chapter five

THE PROCESS OF POLICE INVESTIGATION

INTRODUCTION

The first stage of any criminal case is investigation that is reached when a police officer either by himself [s. 156(1) Cr.P.C.] or under orders of a Magistrate [ss. 156(3), 154, 155(3), 202(1) Cr.P.C.], investigates into a case.

In other words, the registration of FIR is followed by the process of investigation into the alleged crime. This function of the police is manifest in the Preamble of the Indian Police Act of 1861 that reads as under:

> Whereas it is expedient to re-organize the police and to make it a more efficient instrument for the prevention and detection of crime...

The powers of the police officer to investigate a cognizable offence as given u/s. 156 Cr.P.C. are wide and unfettered (in strict compliance of the provisions of Chapter XII of the Code).[1] Even the Courts are not justified in obliterating the track of investigation in such cases. In other words, they have no control over the investigation, or over the action of the police in holding such investigation.[2] But in case a police officer transgresses the circumscribed limits and improperly and illegally exercises his powers in relation to the process of investigation, then the Court has the necessary powers to consider the nature and extent of the breach and pass appropriate orders.[3] The interference by the courts in the investigation of offences is thus permissible only if non-interference would result in miscarriage of justice.[4]

Investigation is not mandatory as the police may investigate at their own discretion. Under the proviso (b) to s. 157(1) of the Code, police can refuse investigation and they cannot be held accountable in law for refusing investigation.[5] But s. 157(2) provides a safeguard against its misuse as it requires the OIC of the *thana* to record in writing the failure to investigate a complaint even it seems a cognizable offence and notify the informant for refusing investigation that could be verified by supervisory officers.

It effectively means, according to the s. 157 Cr.P.C., that the filing of FIR causes the initiation of the process of investigation. Though ordinarily investigation is undertaken by a police officer on information, the receipt of information is not a pre-condition or condition precedent for investigation. It can be initiated either on information or otherwise.[6] The recording of the first information in normal circumstances as prescribed u/s. 154 of the Cr.P.C. or where it is at the instance of the appropriate magistrate in regard to a complaint case u/s. 156(3) or directed by a Magistrate for the purpose of deciding whether there is sufficient ground for proceeding u/s. 202(1) or even in relation to non-cognizable case u/s. 155(3) Cr.P.C. or directed by a Magistrate u/s. 159 in a case which may have been reported by the police as not worth investigating. Thus the commencement of the process of investigation is subject to two conditions:

---

[1] Also see **The Orissa Police Manual, 1940**, Vol. I, Government of Orissa, Cuttack, 1980, Chapter IX.

[2] *Nazir Ahmed*, (1944) 47 Bom LR 245: (1945) 26 Lah 1: 71 IA 203. See **Ratanlal and Dhirajlal's The Code of Criminal Procedure** by Ratanlal Ranchhoddas and Dhirajlal K. Thakore, 15th Edition (Revised by Justice Y.V. Chandrachud, et al), Wadhwa and Company Law Publishers, Nagpur, 2002, pp. 221-28.

[3] *State of Haryana v. Ch. Bhajan Lal*, AIR 1992 SC 604: 1992 Cr LJ 527. See **Ratanlal and Dhirajlal's The Code of Criminal Procedure**, ibid, p. 228.

[4] *Eastern Spinning Mills v. Rajiv Poddar*, AIR 1985 SC 1668. See **Ratanlal and Dhirajlal's The Code of Criminal Procedure**, ibid, p. 222.

[5] David H. Bayley, **The Police and Political Development in India**, Princeton University Press, Princeton, 1969, p. 131.

[6] *Bhagwant Kishore*, AIR 1964 SC 221. See **Ratanlal and Dhirajlal's The Code of Criminal Procedure**, op. cit., p. 227.

1. the police officer should have the reason to suspect the commission of a cognizable offence and
2. it has to satisfy itself, subjectively, as to the existence of sufficient grounds for embarking on investigation.[7]

The officer-in-charge of the *thana* u/s. 157(1) is required to immediately intimate of every such complaint or information preferred to it of the commission of a cognizable offence to the Magistrate having jurisdiction. The officer-in-charge shall then proceed in person or depute a subordinate officer in the task of investigation.[8]

The definition of the term "investigation" is not exhaustive. Investigation includes all proceedings under the Code for the collection of evidence conducted by a police officer (or by any person other than a Magistrate, who is authorized by the Magistrate in this behalf)[9] known as the investigating officer (IO) of a particular case. An "investigation" means search for material and facts in order to find out whether or not an offence has been committed.[10] According to the observations of the judiciary in India, investigation primarily consists in the ascertainment of fact and circumstances of the case. The duty of the IO is not merely to bolster up a prosecution case with such evidence as may enable the Court to record a conviction but to bring out the real unvarnished truth. Thus the object of investigation is never to secure the conviction by any means but to find out if the IO can secure the offenders connected with the crime and to bring them to justice.[11] To which effect, investigation is quintessential to the successful prosecution of the case. Investigation under the Code thus constitutes, as interpreted by the apex court in Rishbud's case, of the following processes:[12]

- Proceeding to the spot,
- to investigate and ascertain the facts and circumstances of the case,
- take measures to discover and arrest of the suspected offender,
- collection of evidence (the main purpose of an investigation) relating to the commission of the offence which may consist of
  (a) the examination of various persons (including accused) and the reduction of their statements into writing, if officer thinks fit, and
  (b) the search of places or seizure of things considered necessary for the investigation and to be produced at the trial, and
- formation of the opinion as to whether on the materials collected there is a case to place the accused before a Magistrate for trial, and if so, taking the necessary steps for the same by filing a chargesheet u/s. 173 Cr.P.C.

The discussions that follow will deal on the processes of police investigation work, as provided by law and that as it takes place in actual practice. It is done on the basis of claims by former and in-service police practitioners that the powers the police derive from the procedures laid down for investigations are itself impedance to their functioning.

---

[7] *State of Haryana v. Ch. Bhajan Lal*, AIR 1992 SC 604: 1992 Cr LJ 527. See **Ratanlal and Dhirajlal's The Code of Criminal Procedure**, ibid, pp. 224, 227.

[8] As prescribed by the "State Government," an investigating officer at the *thana* level could only be of the officer-class, i.e. Asst. Sub-Inspector, Sub-Inspector and Inspector. See Rule 158, OPM.

[9] Section 2(h), Cr.P.C. *U.P. v. Sant Prakash*, 1976 Cr LJ 274, 283 (All.) (FB).

[10] The investigation can also be into the matter of an offence committed under a law other than the IPC.

[11] *State of West Bengal v. Manindra Nath Das*, AIR 1960 Cal 183: 1960 Cr LJ 338; *Jamuna Chaudhary v. State of Bihar*, AIR 1974 SC 1822, 1826: 1974 Cr LJ 896; *Khalaksingh v. State of M.P.*, 1992 Cr LJ 1150 (MP); *Saraj Aslam v. State of U.P.*, 1992 Cr LJ 2244 (All.). See **Ratanlal and Dhirajlal's The Code of Criminal Procedure**, ibid, p. 224.

[12] *H.N. Rishud v. State of Delhi*, AIR 1955 SC 196: 1955 Cr LJ 526. See R. Deb, **Police and Law Enforcement**, S.C. Sarkar & Sons Pvt. Ltd., Calcutta, 1982, p. 62; Syed M. Afzal Qadri, **Police and Law: A Socio-Legal Analysis**, Gulshan Publishers, Srinagar, 1989, pp. 54-55, 59, 128-29; David H. Bayley, op. cit., p. 151.

The following observations of the National Police Commission (NPC) of India were critical to that extent:

> Compliance of certain provisions in law proved unrealistic and difficult in actual investigations and, therefore, led to the adoption of certain improper methods and practices by investigating officers to meet requirements of case law as it developed over several years."[13]

The five-member study group of the NPC per se had earlier noted that

> the obligation cast by the Cr.P.C. are at times impractical for police to follow,... Therefore, the obligation of the police to give a good account of themselves in the face of legal disabilities encourage a whole body of malpractices like fudging of case diaries, padding evidence, third degree methods...[14]

The Fraser Commission of 1902-03 that went into the functioning of the police in India had found that the police was generally regarded as corrupt and oppressive. Every stage of the work of the police-station amounted to harm and harassment of the 'publics'.[15] This chapter deals with the nature of historical continuities in the conditions and standards of contemporary policework and the causal factors. As for instance, Dhillon explains that the Codes that were modelled on the Western concepts of jurisprudence to guide police practice turned out to be complex and beyond the comprehension and capacity of the operatives of 'law' to ensure its implementation and thus malpractices and manipulations continued that in fact had failed similar attempts at reforms undertaken by Kautilya several millennia earlier.[16] Thus the analysis of the policework in actual practice would not only be in the context of the existing legal framework and opinions about it but also take into consideration the considerable scope of discretion delegated to it in matters of daily operations.[17]

THE PROCESS OF INVESTIGATION

Case Diaries:

The investigating officer is required by law[18] to keep a record of the proceedings of the investigation in a diary in narrative form that should be made with promptness in sufficient details mentioning all significant facts on careful chronological order and with complete objectivity which may have a bearing on the result of the case. Haphazard maintenance of a case diary not only does no credit to those responsible for maintaining it but defeats the very purpose for which it is required to be maintained.[19] A copy of the diary relating to each day's investigation (along with copy of any statement that may have been recorded u/s. 161 Cr.P.C.) shall be despatched to the circle inspector the following day. In special report cases, another copy shall be sent to the Superintendent of Police.[20] In actual practice, no *thana* was found to have been following the rules as given. The copies of the case diaries were found to be sent only on two occasions. They are done only when a bail hearing takes place where the IO of the respective *thana* is required to send the necessary updated

---

[13] **National Police Commission**, Fourth Report, MHA, GOI, June 1980, Chapter XXVII, para 27.2, p. 1.

[14] **Report of the Committee of the National Police Commission on Police Structure and Performance**, adopted and signed at Madras on the 21st December, 1979 (Unpublished), Chapter 2: The Present Policing System, para 2.4, pp. 4-5. All the five constitutive members of the committee were members of the police organisation.

[15] K.S. Dhillon, **Defenders of the Establishment: Ruler-Supportive Police Forces of South Asia**, Indian Institute of Advanced Study, Shimla, 1998, pp. 144, 150-51.

[16] Ibid, pp. 117-119.

[17] See Arvind Verma, *Maintaining Law and Order in India: An Exercise in Police Discretion*, **International Criminal Justice Review**, Vol. 7, 1997, pp. 67-68.

[18] Section 172 Cr.P.C. Clause 1: "...shall day by day enter his proceedings in the investigation in a diary, setting forth the time at which the information reached him, the time at which he began and closed his investigation, the place or places visited by him, and a statement of the circumstances ascertained through his investigation." Rule 164 of the Orissa Police Manual provides the detail procedural requirements of maintaining a Case Diary.

[19] *Bhagwant Singh v. Commissioner of Police*, AIR 1983 SC 826: 1983 Cr LJ 1081. See **Ratanlal and Dhirajlal's The Code of Criminal Procedure**, op. cit., p. 267; Syed M. Afzal Qadri, op. cit., pp. 106-07.

[20] Rule 164(f), OPM.

case diaries that the court needs for considering on the bail application of the arrestee. Even when a *thana* sends up an arrestee to the court, it sends along with it the forwarding report that also includes the case diaries in which it reports the progress of the investigation and the relation of the arrestee to that case who is forwarded so that if the arrestee applies for bail, it would be of assistance to the court to consider the bail plea. The only other occasion where the case diaries are sent up are at the conclusion of the investigation of a case. The original case diaries docketed to the final form (chargesheet) are submitted to the presiding judge who may be able to appraise police methods and tactics of investigation.[21] The case diary may be used at the trial or inquiry not as an evidence in the case but to aid the Court in such inquiry or trial and in framing a charge though not for founding the charge, that too not depending alone on the case diary.[22]

The police respondents expressed their concerns over the difficulties in following the rules regarding the maintenance of the case diary.[23] The problem is the myriad form of work they are required to perform including investigation and within a context that impels the police to make various considerations that hinder the strict observance of the prescribed hour to hour recording of the progress of investigation in a particular structural fashion. The difficulties recounted by the police officers in maintaining case diaries were with regard to documenting all the steps taken during the course of the investigation of the case including those that did not bear any or partial results. In fact the problem seems to be mitigated to an extent by the process as suggested in rule 164(b) of the OPM:

> It is however permissible to keep, in a note book to be maintained by every investigating officer, a brief note of the proceedings of the investigation as it progresses and with the help thereof to compile the case diaries subsequently, in the evening of the day in which the investigation is made or in the following morning if the investigation continues late into the night.

While all the respondents strongly agreed that failure to maintain the case diary as per the prescribed norm is primarily due to the heavy workload, a very modest proportion of nearly 22 percent merely agreed to the possibility that the delay in upkeeping the case diaries leaves space for manipulation.[24] According to a Sub-Inspector of Yeshodabad *thana*, the very process laid down for the maintenance of the case diary itself enhances the chance of creeping manipulations. Thus the procedures as 'inhibitory rules' appear to be quite confounding thence inadequate to restrain deviations. For instance, while rule 164(b), OPM provides that for the diary to be written up as the enquiry progresses and as soon as practicable after each step in the investigation, "the hour of each entry" shall be noted in the case diary, but at the same time it also allows the IO to compile the case diaries at the end of the day's investigation from the notings it would have made of the proceedings of the investigation as it progressed in a separate notebook. This gives the IO enough discretionary space for the existing practice of preparing case diaries from notings as late as when, as mentioned, an arrestee is forwarded to the court in relation to a case under investigation and subsequently only when the final form (final report/chargesheet) is prepared.

The Supreme Court, in contrary to the existing rules in the police manual, observed in *OmPrakash v. State* that "the case diary must be written at the place of investigation and not at the

---

[21] *Peary Mohan Das v. D. Weston*, (1911) 16 CWN 145. See **Ratanlal and Dhirajlal's The Code of Criminal Procedure**, op. cit.

[22] *Dal Singh*, (1917) 19 Bom LR 510: 44 Cal 876: 44 IRA 137; *A.N. Mogan Thaka*, AIR 1967 Manipur 11; *Ahmed Miya*, (1944) 1 Cal 133; *Joti Jiban Ghosh*, AIR 1964 Cal 59; *A.K. Roy*, AIR 1962 Cal 135 FB; *Habeeb Mohammad*, (1954) SCR 475: AIR 1954 SC 51: 1954 Cr LJ 338; *State of Kerala v. Ammini*, 1988 Cr LJ 107 (Ker.). See **Ratanlal and Dhirajlal's The Code of Criminal Procedure**, ibid, pp. 267-68.

[23] Item nos. 30, 31 & 112, Police Opinion Schedule.

[24] Item nos. 112 & 113.

end of the day."[25] But this may result in the haphazard maintenance of the case diaries because of the given difficult working conditions on the field for ensuring proper, chronological and orderly statement of facts and circumstances of the investigation as the very flow of information can never be in such a corresponding fashion. Thus not only that the non-compliance of the salutary principle of s. 172 Cr.P.C. is often the case in regard to daily recordings of case diaries but it also affects the provision of prompt despatch of a copy of it to respective authorities. The researcher noticed on various occasions police officers making a fair recording of the proceedings of investigation in their personal diaries or from it, compiling the case diaries.

Spot Visit:

Section 157 (1) Cr.P.C. and rules 158 and 161 of the OPM directs the police "to proceed to the spot..." for conducting investigation into the case, on the receipt of information to that effect. The researcher observed that contrary to the said provision, and as also discussed in the earlier chapter on the general police action on the receipt of information, preliminary enquiry is generally a prelude to the process of dealing with a complaint. Thus 'spot visit' takes place irrespective of the necessity for investigation in the formal sense of policework *vide* ss. 156 or 157 Cr.P.C.

The accessibility of the police to the spot in either case is dependent on a host of factors. The researcher's experience in reaching out to the 'publics' during the enquiry into the case studies correspond with some of that experienced by the officers. The existing physical conditions, predominantly in the rural areas where the distance as also the nature of the roads to the spot from the *thana*, not only determine the mode of conveyance to be adopted by the police but at times also deters the police from taking prompt action. Access to some of the areas of investigation is hindered by the seasonal topography of that place, for e.g. during the monsoons the bare links also get severed or when the crops are ready for harvest. But it does not necessarily mean that in cities and towns, the time taken to reach the spot will be any better as evident from the response of the residents of Sewaknagar. While prompt action as a regular feature of the police was nowhere seen, it was noticed only at times and largely only under some influence. In all respects, the urban *thana* scored either less than all or the combined average of its rural counterparts.[26] Though all police respondents expressed satisfaction over the response time to distress calls as also their visit to the spot for investigation, it was in consideration of the existing conditions and availability of resources.[27] According to the 'publics' of the cases of complaints, either registered at the *thanas* or in respect of which entries made in the SDs, that were selected as part of this study, the visit by the police to the spot for investigation has not been very consistent. The prompt visit of the police 'to the spot' were found only in cases that were considered as 'serious' such as where there has been the occurrence of death or fatal injuries or a serious threat of breach of peace, etc. or else, as found overwhelmingly from the public opinion survey that when the case involves the interference or involvement of the 'influentials' – the prominent citizenry.

The allegation of the complainant of a FIR on kidnapping registered at the Sewaknagar *thana* against the police was of absolute inaction; since the report of the occurrence of the incident till the visit of the researcher was a period of more than six months and the police had never made a 'spot visit'. But the usual nature of the entries in the station diaries found at all the *thanas* only in

---

[25] 1980 Cr LJ N.O.C. 67 (Del.); *Jagannath v. State of Himachal Pradesh*, 1982, Cr LJ 2289 (H.P.) in Syed M. Afzal Qadri, op. cit., pp. 105-07.

[26] Item no. 3(lxviii), Public Opinion Poll.

[27] Item no. 130.

case of registration of FIR was the entry about its registration that was followed by another entry that stated 'the investigating officer leaving the *thana* for investigation of the case'. In cases that were considered to be 'petty', there was no immediate spot visit by the police. An entry in the SD of Sewaknagar *thana* that stated the registration of a FIR under sections of vehicular accident did not have the usual follow-up entry about the IO proceeding to the spot that was found to have taken place more than a day after the registration of the report. In case of a FIR registered at the Lekhpur *thana* at the direction of the Judicial Magistrate, the petitioner stated the reason for approaching the court for redressal was police inaction. Investigation into the case by the researcher revealed that the complainant had first filed a report at the *thana* and when it received no response, it filed an application to that regard with the office of the SP (rural) but on both occasions no FIR was registered by the police. Left with no option, the complainant moved the court for redressal and the police had to register the FIR in accordance with the court's directives, but it made no difference as the first visit to the spot for investigation was made more than three months later.[28]

The police were quite inconsistent in their consideration about the need for the prompt visit to the spot. It was difficult for the researcher to obtain testimonies to establish the priority accorded to the police in making spot visits. An appropriate case to demonstrate such incertitude regarding spot visits was in relation to an incident of house-breaking and theft at a former senior police officer's residence that was lodged at the Sewaknagar *thana*. The first visit of the IO to the place of occurrence of the offence took place after three days and that was after much prodding from the superior officers.

The above discussion shows no specific considerations in the exercise of just one procedural requirement of proceeding to the spot for investigation. Delay in the police arrival at the spot of occurrence of the offence makes it difficult to keep the scene of crime undisturbed as curious friends and relatives cannot be kept away for any length of time.[29] In a case of unnatural death reported to the Sewaknagar police, it was found that by the time the police accompanied by the researcher reached the spot, the body, wherein death was due to suicidal hanging, had been brought down.

It is not necessary for the police to always proceed to the spot for investigation of any case as according to s. 157(1) Cr.P.C. Rule 161 of the OPM elaborates it to show the discretion of the police in the investigation in following cases:

> Where the complaint is not of a serious nature, and is made against a known person, clause (a) of section 157, Cr.P.C., does away with the legal necessity for a local investigation, but advantage should seldom be taken of this. In rural areas, it is permissible only when a case of a simple nature is brought to the police complete, the complainant and witnesses being present. In towns, the investigation may be conducted at the police-station if it is close to the scene of crime.

In reality, seldom do the police use this provision sparingly. Sometimes, the police realising the difficulties to reach out to the far-flung areas and the possibility of finding the concerned persons related to the case during the visits to such places for investigation being unknown, they summon them to the *thana* for the said purpose. The researcher while on the field at Birjodi heard complaints of total inaction of the police in a case of the death of a newly-married woman under mysterious condition that had taken place recently then. The hapless mother of the victim complained that after 12 days of the occurrence of the incident, a constable appeared with a message for the victim's father to send the witnesses and the *bhadralok* of the village to the *thana* for enquiry. The prolonged camping by the police for days together at the scene of crime in the remotest areas far away from the

[28] The complainant and his family complained of the economic status and the political influence of the accused that affected the police method of operation.

[29] David H. Bayley, 1969, op. cit., pp. 130-31.

thana to secure reliable testimonies which formed a part of the investigation technique of the pre-independent Indian police, as observed by the Fraser Commission of 1902-03, is no longer in practice in contemporary policework.[30]

More so, it commits gross irregularities because of the deviations encouraged by the said provisions, like summoning even those that the law prohibits, *vide* s. 160(1) Cr.P.C. The researcher, while at the Sewaknagar *thana* one evening, noticed a Sub-Inspector after hearing the complaint direct the complainant to bring all concerned with the case to the *thana*, amongst them were also women. The police often find it convenient to use its discretion to summon those as it requires for investigation and even at times without their presence it takes the advantage of the said proviso of completing the formalities of investigation sitting at the *thana*.

Collection of Evidence:

The collection of evidence involves various steps that comprise the crucial task of investigation work. The object is to collect all available forms of evidence, *physical*, *documentary* and *circumstantial*, that are necessary for a comprehensive presentation of the same with regard to successful and effective prosecution of the case.

Evidence includes recording of statements, collection of every material or substance used or taken away, that is associated with the commission of the offence. Physical evidence also comprises of finger prints, blood, semen, etc., besides those like the instrument used in a case of homicide or suicide. Documentary evidence includes testimonials as statements of all concerned in a case as also records that exist in paper or in other forms, like electronic-based.[31] Circumstantial evidence is that when all the facts that are collected in the course of the investigation can be so chronicled in an orderly fashion as to determine the circumstances under which the offence was committed or the incident took place.

The rules of the police manual provide for medico-legal examination of persons wounded,[32] medico- and chemico-legal examination of all that is related to obtaining evidence in case of suspicious or unnatural deaths[33] and also of such articles that may serve as exhibits in any medico-legal case.[34]

The collection of physical evidence is impeded by the lack of equipment with the *thanas* who always need to fall back on the expertise of the centrally located units in the district to gather the necessary suspect materials from the spot for medico- and chemico-legal analysis that could be adduced as crucial evidence. It primarily serve as catalytic to the further investigation process and necessary action that could be taken thereof by the local *thana* in the particular case. Most of the State Police Commissions of the late fifties and early sixties that had delved on issues concerning policework had pointed out these shortcomings as the major handicap of the police. All the four sample *thanas* did not have the requisite instruments, for e.g. to collect fingerprints from or to take photos of a scene of crime. It is required of the police at least to be on the alert for objects which

[30] K.S. Dhillon, op. cit., pp. 151-152; David H. Bayley, ibid, pp. 154-55.

[31] The veracity of these evidence also can always be contested and decided by the court.

[32] Rules 212 to 215, OPM. Those who would have incurred physical injury related to a reported case of cognizable offence need to be medically examined for which the police issues injury report and on the basis of which the medical officer shall furnish the statement of the medical report to the OIC of the *thana*. This is not a legal evidence. No person shall be subjected to medical examination without his or her consent. In a case investigated by the Yeshodabad police, it was found that the police had issued legal notices to the victim and its brother and father for the victim to undergo the necessary medical examination.

[33] Rule 205, OPM and Section 174, Cr.P.C.

[34] Rules 216 to 220, OPM.

may be or have physical clues, preserve and pack them, and have them sent to a forensic laboratory. No *thana* has the requisite expertise. The most the local police could do is try preserve the scene of crime till the forensic experts reach the place. The researcher present at one of the spot enquiry of an unnatural death case under Sewaknagar *thana* found that the IO took no proper care of the materials (e.g. the rope suspected to be used for the suicide hanging) seized from the spot and sent them without packing them along with the body on an open trolley followed by a constable to the hospital for medical examination. Yet in another incident of bombing in an attempt to rob a bank under the jurisdiction of the same *thana*, the police awaited for the special branch to collect evidence while curious onlookers walked all over site of crime. The OIC of Yeshodabad during an interactional session with the researcher exhibited the inculpatory objects seized from suspected criminals that were not handled properly as should have been before forensic examination. At Birjodi, the father of a rape victim revealed that the physical samples taken from the victim were allowed to be carried by them for and also after its medical examination, to be deposited at the *thana*. This shows the careless attitude of the police while handling the objects that are meant to serve as vital pieces of evidence in prosecution. A senior police officer at the Sewaknagar *thana* indulged in court-bashing for the acquittal of an accused as he revealed that the court on finding the earlier forensic report on the seized contraband not convincing had ordered for a re-examination of the same, but the police failed to produce it for the second time because the seizure substance had decomposed as it was not properly preserved.

Things have not improved much since the reports by the state police commissions. Bayley had also long back spoken of the delays in examination of the physical clues because they had to be sent a far distant place to a laboratory. And moreover, these laboratories and bureaus are inundated with work; it often takes long to obtain the results of an inquiry. In cases of unnatural deaths the bodies need to be sent to the central medical centre located at the district headquarters for removing the viscera, and for the different kinds of examination of the same and other substances related to the case, it may also be sent to some other specialised centre located at some other place.[35] The situation is not much better now and rural *thanas* find these as major impediments to initiate any prompt legal action. The police often too takes this as a pretext to delay due actions.

In an incident where the father of a newly married pregnant woman had lodged a missing report of her on the basis of the news from her in-laws, but soon after when her body was found, another report was filed that alleged of homicide. The parents of the victim were much distressed at the police inaction and apathy despite their claim that circumstantial evidence was heavily loaded against the in-laws.[36] The police explanation for not taking action against the accused was that it waited for the post-mortem report to determine the future course of action on the case. The place of occurrence of this incident was located in one of the remotest villages of Birjodi, to which there were no proper roads besides a narrow muddy trail that goes alongside the canal. The local *thana* was not equipped to collect necessary materials for medical examination. It had to depend on the experts that were based far away at the district headquarters. And by the time the results of the medical examination reached the police, the police and the accused had the chances to manipulate the future course of action. The accused had seemingly absconded when the police came to arrest them. The

[35] David H. Bayley, op. cit., pp. 152-53.

[36] They claimed that the body was found close to the homestead of the victim's in-laws and the body bore serious injuries. Moreover, the distinct fact was that she was newly married and the parents had alleged of instances of harassment to her by her in-laws. Thus *prima facie*, it warranted immediate action against the accused.

victim's parents alleged of intransigence on part of the police to depend on forensic results as a ploy to refrain from prompt action.

In a similar case in the city *thana* of Sewaknagar, it took the police less than two days to avail of all the necessary medical and forensic results besides other evidence like statements of the concerned to take necessary action on the reported case of unnatural death of a newly-married woman. This was possible as the infrastructure for conducting the tests were located in the same city. Thus, though the shortcoming of the police in regard to the availability of forensic facilities is a serious handicap for necessary action in cases as that of Birjodi, it is not a reason sufficient enough to prevent any action on part of the police.

The same Birjodi police about a year back had brushed aside a complaint that alleged the killing of a youth, lodged by his father and rather preferred to consider the report of the youth's in-laws to register a UD case. It is pertinent to note that during the colonial rule, there was no requirement of further investigation if the local enquiry revealed the cause of death as unnatural and none responsible for it. Arvind Verma could see from the figures and frequency of such deaths from 1868 to 1883 that some cases were definitely suspicious in nature. He cites the case of death of an indigo factory servant alleged by his wife as being beaten to death by the guard was remained classified as unnatural "...for the local police inquiry suggested there was no basis for the allegation."[37] As during those days, the inquiry officer had the discretion of ruling the death as 'unnatural' that then did not require a postmortem. Verma, a former IPS officer, believes that for pecuniary gains many homicides would have been suppressed by recording it as unnatural death, a practice common in the Indian police even today. He also found that none of such cases were ever inquired by the supervisory officers; the mere registration was considered sufficient for administrative purposes. More so, an officer could change a homicide into a case of 'unnatural' death for which there was not even an inquiry.[38] The researcher discovered that in the Birjodi UD case, it was because of the public outcry against such police malpractices that impelled the police to register a FIR that was followed by the arrest of the accused, otherwise it was to be disposed off as unnatural death. Similarly in case of missing persons, it is a general practice all over Orissa without any exception where the police was found to merely carry out an administrative formality of entering the report of missing person into the register maintained for it at the *thana* and make no other effort to search and locate the concerned person other than relaying a message over the VHF to that effect. In the previous chapter, it was discussed how cases of kidnapping were minimised to MMR in order to burke cases.

It is again in contrary to rule 210 of the Police Manual[39] that the relatives of the dead are asked to make necessary arrangements for the transportation of the body to the hospital for autopsy as was observed in case of a suicidal hanging case at Sewaknagar (reference already made above), or else, the police unofficially does it at its own expense or manage it by mobilising local resources. In almost all the cases that were selected for this study, the injured victims had, on the direction of the police, arranged their own conveyance to the hospital for their medical examination, and at times also for being produced before the court as in case of the rape victim at Birjodi. According to the

---

[37] Cited by Arvind Verma from the *Inspection Register*, Vol. I, 12 June 1876, Motihari Police Station in Bihar (where Mahatma Gandhi first began his non-violent movement in 1919). See Arvind Verma, *Consolidation of the Raj: Notes from a Police Station in British India, 1865-1928*, **Criminal Justice History**, 2001.

[38] Ibid.

[39] Rule 210, OPM states that "Expenses incurred in transmitting bodies or wounded persons to medical officers, for examination or treatment shall be met by magistrates and not from the police budget."

police, the rules don't facilitate in the availability of the necessary expenses when required and for reimbursement it is again a tedious process hence it is expedient to follow the present practice.

The Malimath Committee of 2003 makes certain recommendations with regard to mitigating the present handicaps of the investigating units, the *thanas*. It attempts to make them more self-reliant and to turn them over to more comprehensive units of investigation, as its impact would also amend the prevalent police practice that has evolved without them. While favouring the use of modern and forensic technologies right from the commencement of the investigation, the Committee recommends:

i. for the creation of "a cadre of Scene of Crime Officers" for the preservation of scene of crime and collection of physical evidence there-from.[40]

ii. to provide optimal forensic cover to the investigating officers, the network of CFSL's and FSL's in the country need to be strengthened, mini-FSL's and Mobile Forensic Units should also be set up at the district/range level and these including the finger print bureaux need to be equipped with well-trained and adequate manpower and financial resources.[41] Forensic Medico legal Services should also be strengthened at the district and the state/central level, with adequate training facilities at the state/central level for the experts doing medico legal work.[42]

iii. The State Governments must prescribe time frame for submission of medico legal reports.[43]

The Padmanabhaiah Committee on Police Reforms has recommended that every police station should be equipped with 'investigation kids' and every sub-division should have a mobile forensic science laboratory.[44] In the present context, where there is a lack of equipment for collecting physical evidence, as well as the lack of training in its use, and the failure to be alert to physical clues, the IOs rely more on oral testimonies. They are, therefore, more oriented to persons and not to things.[45]

Oral Testimonies or Examination of Witnesses and Their Role in Investigation

The examination of witnesses is only one part of the collection of evidence, included within the meaning of the word "investigation". The role of a witness is paramount in the criminal justice system. In this context Bentham observed that witnesses are the eyes and ears of justice. Wadha J. Said, "A criminal case is built on the edifice of evidence, evidence that is inadmissible in law. Fir that, witnesses are required whether it is direct evidence or circumstantial evidence."[46] In order to secure convictions, as already stated, the police rely almost exclusively upon oral testimony. The examination of witnesses are that provided by the complainant both in its information report or during the course of its examination and that discovered by the police during the course of the process of investigation. Besides these, people in and around the place of occurrence of the offence are also examined though one cannot be forced to serve as a witness. It was learnt from the officers of the *thanas* under study that examination of witnesses is conducted against a background of suspicion

[40] **Committee on Reforms of Criminal Justice System** (Chairman Dr. Justice V.S. Malimath), Ministry of Home Affairs, Government of India, Bangalore, India, March 2003, Recommendation No. 22(a), p. 242.
[41] Ibid, Recommendation No. 22(b).
[42] Ibid, Recommendation No. 23.
[43] Ibid.
[44] http://www.humanrightsinitiative.org/programs/aj/police/india/initiatives/summary_padmanabhaiah.pdf>
[45] David H. Bayley, op. cit., p. 153.
[46] *Swaran Singh v. State of Punjab*, (2000)5 SCC 68 at 678.

that leads and grows from examining one to the other. As part of such investigation it also holds confidential enquiry regarding the truthfulness of the case.[47]

The procedure for examination of witnesses by the police is provided in ss. 161 and 162 Cr.P.C. It provides for the recording of statements of all those persons who are acquainted with the facts and circumstances of the case, directly or indirectly, and the use to which they may subsequently be put in the trial.[48]

Under s. 161, a police officer making an investigation can examine the person acquainted with the facts of the case, and reduce the statement made by such person into writing. No oath or affirmation is required in an examination under this section. Persons to be examined include whosoever may subsequently be accused of the offence in respect of which the investigation is made by the police officer.[49] It is obligatory on a person examined in the course of a police investigation to answer all questions put to it "other than questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture."[50] The person questioned is legally bound to state the truth.[51]

The Criminal Procedure Code as well as the Police Manual lays down the manner in which the statements are required to be recorded. Sub-section 3 of s. 161 Cr.P.C. prohibits the making of précis of a statement of a witness or merely recording that one witness corroborates another. The statement, if recorded, must be recorded as made[52] and should not be in indirect form of speech. The writing should be a record in the first person.[53] The Police Manual of Orissa requires that the statement of a witness, if recorded, shall not be recorded in the case diary but on a separate sheet which shall be attached to the diary and reference to it shall be made therein. The recordings shall be recorded in vernacular and signed and dated by the officer recording it.[54] The researcher during visits along with the police officers to the spot for enquiry found that the officer take rough notes of the statements made by the witnesses and the complainant in its private diary which are later transcribed

---

[47] An officer at Lekhpur claimed that such confidential enquiry cannot be challenged nor the source of such information be questioned but it is entirely the prerogative of the court to decide upon the consideration of the same.

[48] Syed M. Afzal Qadri, op. cit., pp. 62-63; Ved Marwah, *Reforming Police Investigation* in **Seminar** (430), Justice For All: A symposium on some aspects of the law and our judicial system, June 1995, pp. 30-31.

[49] The word "any person" in regard to its examination as part of the investigation in s. 161 Cr.P.C. must be read in conjunction with s. 162 Cr.P.C.; *Pakala Narayana Swami*, (1939) 66 IA 66: 41 Bom LR 428: 18 Pat 234; *Velu Viswanathan*, 1971 Cr LJ 725. See **Ratanlal and Dhirajlal's The Code of Criminal Procedure**, op. cit., p. 231.

[50] s. 161(2) Cr.P.C. Consonant to this procedural law is the provision laid down in the constitution, Article 20(3) that protects one from being made witness against itself.

[51] It is indicated by the word "truly" used after the word "answer" in clause 2 of s. 161. A person who gives false information in answer to such questions can be prosecuted under the provisions of ss. 202 and 203 of the Indian Penal Code. *Sankaralinga Kone*, (1990) 23 Mad. See **Ratanlal and Dhirajlal's The Code of Criminal Procedure**, op. cit.

[52] *Sudhir Kumar Mandal*, (1950) 2 Cal 343. Where investigating officers not recording statement of witness u/s. 162 Cr.P.C. in extenso but making a note that he corroborated the FIR, its held by the court that this is not a statement but the officer's opinion. 1962 Cuttack Law Times (2) 6282/685.

[53] *Bommabayina Ramaiah v. State of A.P.*, AIR 1960 AP 160: 1960 Cr LJ 311. It is essential to note that each statement recorded could be read by itself without necessarily looking into the others. This is made to minimise the chances of contradiction and also avoid any allegation against the IO for having even inadvertently distorted the statement during the process of translating the statement made in a language other than in which it is recorded. If the statement is first recorded in a vernacular language and then translated into English, mere supply of a copy of the English version would not meet the requirements of law. In such a case, the statement in the vernacular being the original statement, copy of it should also be furnished to the accused. *Muniswamy v. State*, 1954 Cr LJ 905 Mysore; *In re Rangaswami*, 1957 Cr LJ 866 Mad.; *Public Prosecutor v. Parasurama Prabhu*, 958 Cr LJ 392 Mad. See R. Deb, op. cit., p. 70; Syed M. Afzal Qadri, op. cit., p. 63.

[54] Rule 170(a) [Statement of witnesses, 2nd para], OPM.

afresh in separate sheets of paper as provided in rule 170(a) of OPM.[55] Despite the claims by nearly 62 percent of the police respondents that the statements are recorded verbatim, the universal practice of taking notes and reproducing them in detail later that usually do not follow immediately points to the obvious, also stated by very few of the respondents, that verbatim record of (u/s.) 161 statements never take place in police practice (item no. 103).

According to these very few police respondents, the statements are never recorded as made. It is so because recordings of all what a person states and as it states would finally result in a declaration wherein statements would not appear in a cogent and systematic manner. There would also be the possibility that a statement of a witness be recorded more than once, that is, as many times made during investigation but it is generally found to be made into one.[56] There is also the possibility that such kind of recording would result in inclusion of such matters that may not only rob the substance of the statement but that certain statements may also turn out to be at variance with each other that may eventually render the statement in its entirety as unreliable.[57] Hence the suggestion by Ved Marwah that to avoid irrelevant facts creeping into the recordings leading to long and confusing statements, the alternative should be that the IO be authorised to record only relevant facts.[58] In other words, it is desirable that the IO records only the substance of the statements of the witnesses.

But empirical findings showed that the IO make willful distortions in to the original statements as a part of favour either to one party or at times to both the disputants in a situation 'where a compromise has taken place and both parties do not want to continue with the legal processing of the matter that concoction of evidence takes place'. There are various other reasons that impel the police officer to manipulate statements, one of them as revealed by one of the most senior most officer of Sewaknagar *thana* which was later confirmed from many of the other functionaries of the four *thanas* is the lack of support and cooperation from the public.[59]

The investigating officer is not bound to reduce into writing the statements of witnesses examined by it. Section 161(3) Cr.P.C. gives the investigating officer the discretion to record or not

---

[55] It is important that the IO preserve those rough notes both for inspection of the court as well as for the purpose of giving copies thereof to the accused as they constitute the original statements of the witnesses and the accused has a right to test the veracity of the testimony of the witnesses in reference to them u/s. 162 Cr.P.C. Merely supplying copies of the subsequent fair statements will not do. *Bejoy Patra v. State*, 1951 Cr LJ 1307 (Cal.); *In re Appalaswamy*, 1957 Cr LJ 1227 (A.P.); *Noor Khan v. State of Rajasthan*, AIR 1964 SC 286: 1964(1) Cr LJ 167. The right guaranteed to an accused u/s. 162 Cr.P.C. is total and absolute. No exception can be taken to it by the prosecution. The accused has the right to all the copies of the statements recorded by the investigating agency. *Dalla v. State of Rajasthan*, 1988 Cr LJ 42 (Raj.). See R. Deb, op. cit., pp. 71-72; **Ratanlal and Dhirajlal's The Code of Criminal Procedure**, op. cit., p. 234. In actual police practice, neither the rough notes of the statements preserved nor copies of them are ever supplied to the accused, according to the response to item no. 28 by the near total police sample of the *thanas* of Sewaknagar, Lekhpur and Yeshodabad.

[56] But it is very unlikely that copies of all the statements are supplied to the accused as u/s. 162 Cr.P.C.

[57] It is natural that the witness may not only speak what is considered in legal understanding as substantial. The very procedural details as prescribed in the rule 162(a) of the Orissa Police Manual explain the obvious that there exists the probability of the witness "lying or withholding facts" or that the witness may have "the best intention to speak the truth," but "he may make inaccurate statements on account of bad observation, defective comprehension or weak memory." Hence under such conditions the advise to the investigating officer, as provided in the Police Manual, is to make necessary effort "so that he may eventually speak the truth." All these assures the prevalence of all kinds of statements from one single source and the recording of them all from this particular witness would by no means constitute a reliable piece of evidence because going by the law of reducing into writing any statement made to the IO in the course of an examination u/s. 161(3) Cr.P.C., the eventual piece of the recording would contain self-contradictory statements. See Rule 162(a), OPM.

[58] Ved Marwah, op. cit., p. 31.

[59] Such problems are discussed in detail later in this very section of the chapter.

to record the statements of a person examined by it,[60] as it is only they who can appreciate whether the statement of the witness is material enough to be recorded.[61] But the discretion should not be exercised in such a manner as to handicap the accused in their defence or to deprive the Court of valuable material for ascertaining the truth.[62] While the failure to comply with the requirements of s. 161 might affect the weight to be attached or impair the value of the evidence of the witnesses, it would not render it inadmissible.[63] Thus even though it is the IO to decide who should be examined as witness in a case, it is obligatory on its part to record the statement when the witness is a material witness for unfolding the prosecution story.[64]

The principle embodied in s. 162 Cr.P.C. ensures that no statement made to the police which is reduced to writing be signed by the person who makes it[65] and that no such statement or record of such a statement shall be used for any purpose other than those stated in the section.[66] The responses to item no. 28 showed that the statements are recorded in the vernacular language as also in English where the witness is conversant with the language. An officer of Yeshodabad revealed that after the recording of the statements u/s. 161 Cr.P.C., the IO does inscribe a statement of self-attestation at the end that reads as follows: "whatever is stated, the same is recorded and read over and found to be true." And as regards the signature of the maker of the statement made u/s. 162 of the Code, they insisted that signatures make no difference to the reliability of the statement as they are in itself never given much weight in evidence by the court.

The NPC in its recommendation for doing away with the existing practice of recording in detail the statement by witness(es) during investigation, suggested for an arrangement in which the IO can record the fact as ascertained by him on examination of a witness. This statement of facts can be in third person in the language of the IO himself and a copy of the statement should be handed

---

[60] Even in the selection of witnesses the police exercise discretion. The Law Commission in its Forty-First report expressed its support for the existing law that grants the discretion to the police with regard to examining witnesses and recording of statements. It was not in favour of imposing limitations on this discretionary power of the investigating police officer. See Law Commission of India, **Forty-First Report**, Ministry of Law, Government of India, 1969, Vol. II, para 14.9, pp. 69-70.

[61] It is expected that if the IO does record the statements or their substance, it may do so either in the case diary maintained u/s. 172, or on separate pieces of paper, whether loose or stitched into a notebook, or in both, but it must record the statement of each witness or its substance separately and truly as laid down in sub-s. (3) of 161.

[62] *In re Mettu Pentayya*, AIR 1960 AP 545. See **Ratanlal and Dhirajlal's The Code of Criminal Procedure**, op. cit., p. 231.

[63] *Noor Khan v. State of Rajasthan*, AIR 1964 SC 286: 1964 (1) Cr LJ 167; *Purshottam v. State of Kutch*, 1954 Cr LJ 1751 (SC); *Tikeshwar Singh v. State of Bihar*, AIR 1956 SC 238: 1956 Cr LJ 441. See **Ratanlal and Dhirajlal's The Code of Criminal Procedure**, ibid, pp. 231, 234.

[64] *Gopalkrishna v. State*, 1964 (2) Cr LJ 497 (All.); *Bommabayina Ramaiah v. State of A.P.*, AIR 1960 AP 160: 1960 Cr LJ 311. See **Ratanlal and Dhirajlal's The Code of Criminal Procedure**, ibid, p. 231.

[65] If an investigating officer obtains the signature of a witness on his recorded statement, the evidence of the witness is not thereby rendered inadmissible. It merely puts the court on caution and may necessitate an in-depth scrutiny of such an evidence. *State of U.P. v. M.K. Anthony*, AIR 1985 SC 48; *Tellu v. State*, 1988 Cr LJ 1063 (Del.); *Zahiruddin v. Emp.*, 48 Cr LJ 679 (P.C.); *State of Kerala v. Samuel*, 1961(1) Cr LJ 505 (Kerala-F.B.). See R. Deb, op. cit., p. 72; **Ratanlal and Dhirajlal's The Code of Criminal Procedure**, ibid, pp. 232-33.

[66] That is, u/s. 162, a statement recorded under 161 Cr.P.C. can only be used for contradicting the particular prosecution witness by the accused as of right and also by the prosecution to contradict such witness in the manner provided by s. 145 of the Indian Evidence Act, 1872. [*Hazari Lal v. State* (Delhi Administration), AIR 1980 SC 873: 1980 Cr LJ 564; *M.S. Reddy v. State Inspector of Police*, 1923 Cr LJ 558 (AP); *Mohd. Islam v. State of U.P.*, 1993 Cr LJ 1736 (All.); *Hamidulla v. State of Gujarat*, 1988 Cr LJ 98 (Guj.); *Fateh Singh v. State*, 1995 Cr LJ 96. The statement cannot be used for the purpose of contradicting a defence witness or a court witness. *Ganga*, (1929) 4 Luck 726; *Tahsildar Singh*, AIR 959 SC 02: 1959 Cr LJ 1231; *Shakila Khader v. Nausher Gama*, AIR 975 SC 1324.] They cannot be used either as a substantive or corroborative piece of evidence on behalf of the prosecution. [*Sat Paul v. Delhi Administration*, AIR 1976 SC 294: 1976 Cr LJ 295; *Rameshwar Singh v. State of J&K*, AIR 1972 SC 102: 1972 Cr LJ 15; *Prakash Sen v. State*, 1988 Cr LJ 1275; *Jadumanikhanda v. State of Orissa*, 1993 Cr LJ 2701 (Ori.); *Jahri Gope*, (1928) 8 Pat 279; *Sahdeo Gosain*, (1944) FCR 223.] They can only be used for raising suspicion against credibility of the witness. [*Chinamma v. State of Kerala*, 1995 Cr LJ 171 (Ker.).] The limited use of such a statement is to contradict the maker of it. [*Jodha Khoda Rabari v. State of Gujarat*, 992 Cr LJ 3298 (Guj.).] See R. Deb, ibid; **Ratanlal and Dhirajlal's The Code of Criminal Procedure**, ibid, pp. 231-237.

over to the witness under acknowledgement. It is believed that this arrangement would act as a safeguard against the malpractice of padding of statements which the IOs are often accused of doing that has eroded their credibility in the eyes of the judiciary.[67]

According to sub-s. 2, s. 162 does not affect the provisions of s. 27 of the Indian Evidence Act (IEA) and therefore information leading to the discovery of a fact made to the police and admissible under s. 27 of the IEA, is not rendered inadmissible under this section. As also s. 162 does not affect a dying declaration recorded during investigation u/s. 32 of the IEA and thus is admissible in evidence.[68] The practice of the IO itself recording a dying declaration ought not to be encouraged. However, such a dying declaration is not altogether excluded but may be used depending upon its veracity.[69] The police have to arrange for recording the dying declaration whenever it is necessary.[70] Evidence in form of statement from a person, if required, who is in imminent danger of death, be recorded by a magistrate whenever possible. If such arrangements are unlikely to be possible, then such statement should be taken in the presence of the accused and of attesting witnesses. The rule of the Police Manual prescribes that "a dying declaration made to a police officer shall be signed by the person making it."

The shortcomings in the police to collect physical evidence, as stated earlier, make them rely largely on oral evidence. The police instead of expecting the procedural criteria to provide them with the true statements on the facts of the case from the witnesses or the accused, it tends to be guided by the administrative presumption of regularity whereby on the basis of its own expertise and specialised abilities it can estimate the guilt or innocence of a person.[71] The police thus feels that it ought to be free to employ the techniques of its trade and which it does to extract the "truth" from the witness(es), in contravention with the procedural requirements based upon the rule of law that seems to it as irrational and frustrating its efficient functioning. But even the discovery of a fact within the meaning of s. 27 of the IEA will not go in favour of the prosecution if the statement is extracted forcibly because that would constitute a violation of the guarantee against testimonial compulsion as contained in Article 20(3) of the Constitution of India.

Provisions of ss. 161 and 163 Cr.P.C. emphasize the fact that a police-officer is prohibited from offering or making any inducement, threat, or promise as is mentioned in s. 24 of the IEA with a view to procure any to make a statement.[72] But a police officer or other person shall not prevent by any caution any person from making any statement which he may be disposed to make of his own free will.[73]

There should not be undue delay on the part of the investigating authorities in recording statements, for unjustified and unexplained[74] long delay in the examination on part of the IO will render the evidence of such witnesses suspect and will throw doubt on the veracity of the

---

[67] **National Police Commission**, Fourth Report, June 1980, Chapter XXVII.

[68] Rule 170 (b) of the Orissa Police Manual provides that the "a dying declaration shall always be recorded and is admissible in evidence." *Najjam Faroqui v. State*, 1992 Cr LJ 2574 (Cal.). See R. Deb, op. cit. *Satish Chandra Seal*, (1944) 2 Cal 76; *Safi Mohd. Hussain v. U.P.*, 1992 Cr LJ 755 (All.); *Public Prosecutor v. P.N. Rao*, 1993 Cr LJ 2789 (AP). See **Ratanlal and Dhirajlal's The Code of Criminal Procedure**, op. cit., pp. 233, 235-37.

[69] *Harej Ali v. Assam*, 1980 Cr LJ 745 (Gau.); *Jamiruddin Molla v. The State*, 1991 Cr LJ 356 (Cal.). See **Ratanlal and Dhirajlal's The Code of Criminal Procedure**, ibid, p. 233.

[70] Rule 169, OPM; Syed M. Afzal Qadri, op. cit., p. 61.

[71] The police attitudes toward criminal law in its daily operations is conceptually dealt in Chapter 3.

[72] *Atma Ram*, AIR 1966 SC 1736; *Venu Gopal*, AIR 1964 SC 33; *State of Bombay v. Kathi Kalu*, 1961(2) Cr LJ 856 (SC). See **Ratanlal and Dhirajlal's The Code of Criminal Procedure**, op. cit., pp. 238-39; R. Deb, op. cit.

[73] Section 163(2) Cr.P.C. Rule 162(a) of the Orissa Police Manual spells out the procedural requirements of the conduct of the investigating officer during the examination of witnesses. See Chapter IX of the Orissa Police Manual.

[74] *Ranbir*, AIR 1973 SC 1409: 1973 Cr LJ 1120; *Bhagwan and others v. State of M.P.*, AIR 1980 SC 1750. See **Ratanlal and Dhirajlal's The Code of Criminal Procedure**, op. cit., p. 230.

prosecution story.[75] The Police Manual also suggests that recording of evidence be done while it is fresh and before opportunity occurs for tampering with it.[76] Delay in investigation, i.e. in the examination of witnesses, would amount to defective investigation as it raises doubt over police action and on the motive of the IO. The prosecution case is fully established by direct testimony of eye-witnesses that would be corroborated by medical evidence. Thus any failure in omission of IO cannot render prosecution case doubtful or unworthy of belief, but where statements were at variance with medical evidence or in the absence of medical evidence, where there is greater dependence on statements of eye-witnesses and there was variation between the statements u/s. 161 Cr.P.C. and those made in the Court, it was held that evidence was not reliable.[77]

For obtaining oral testimonies, the IO has the power u/s. 160(1) Cr. P.C. to require the attendance before itself of any person (within certain limits) who appears to be acquainted with the facts and circumstances of the case, but no male under the age of fifteen years or woman shall be required to attend at any place other than the place in which such male or woman resides. Such orders requiring the attendance must be in writing and a person who fails to comply with the order of the police may be prosecuted for disobedience u/s. 174 of the IPC.[78] The statutory provision [sub-s. (2) of s. 160] for the payment of reasonable expenses of every person's attendance for the purpose as stated in sub-s. (1) at any place other than its residence is not observed in actual police practice and the public is also unaware of it. It can be said that if this rule is diligently followed, it may minimize the inhibition for willing testimony.[79]

The researcher observed that these inhibitory provisions were not given due regard in routine policing activities. The general procedure followed in requiring attendance of such persons associated with a case is through an oral message carried either by a constable or the *gram rakhi.* Only nearly 38 percent agreed that the notices u/s. 160 Cr.P.C. are rarely served for summoning witnesses for examination. While at the Sewaknagar *thana*, a woman complainant was asked by the dealing officer to come along with the others involved in the case that she had come to report of in the evening. The enquiry into a FIR filed at the Lekhpur *thana* by a woman complainant revealed that the IO of the case had summoned her and the accused to the *thana* for investigation without any written orders. The IO enquired both the informant and the accused about the facts of the case in the presence of each other which too is against the norms of enquiry as prescribed in rule 162(a) of the Orissa Police Manual.[80] It is provided for the benefit of the IO and good for the case as the rule presumes that "the more an officer succeeds, in keeping an investigation screened from the view

---

[75] *Ramsingh v. State of M.P.*, 1989 Cr LJ NOC 206 (MP); *Brij Nandan Rai v. State of Bihar*, 1922 Cr LJ 942 (Pat.); *Balakrishna v. State of Orissa*, AIR 1971 SC 804: 1971 Cr LJ 670; *Krishan Lal v. State*, 1971 Cr LJ 1610 (Del.); *G.B. Patel v. State of Maharashtra*, 1979 Cr LJ 51 (SC); *Banwari v. State of Rajasthan*, 1979 Cr LJ 161 (Raj.). See R. Deb, op. cit., p. 71.

When the delay is properly explained, it may not have any adverse impact upon the probative value of a particular eye-witness. Reasonable delay in itself in recording statements of the informant does not amount to serious infirmity, unless there is material to suggest that investigating agency had deliberately delayed in order to afford an opportunity to the maker to set up a case of his own choice. *Washeshwer Nath Chaddha v. State*, 1993 Cr LJ 3214 (Del.); *Raj Mangal Thakur v. State of Bihar*, 1993 Cr LJ 1090 (Pat.); *Paresh Kalyan Das Bhavsar v. Sadiq Yakub bhai*, AIR 1993 SC 1544: 1993 Cr LJ 1857. See **Ratanlal and Dhirajlal's The Code of Criminal Procedure**, ibid.

[76] Rule 170(c), OPM.

[77] *Chunni v. State*, 1996 Cr LJ 489 (All.); (2003 AIR SCW 717) 2003 AIR (Vol. 90, Part 1072) 126, in **The SC Monthly Digest**, March 2003. The most illuminating illustration of the nature of police investigation, the prosecution story on the case, the deposition of eye-witnesses before the court and the subsequent observation of the Court on the case can be seen and understood in the famous *Best Bakery* Case of (Gujarat riots) 2002.

[78] *Jogendra Nath Mukerjee*, (1897) 24 Cal 320. See **Ratanlal and Dhirajlal's The Code of Criminal Procedure**, op. cit., p. 229.

[79] Also see rule 178(a), OPM.

[80] "Witnesses should be examined separately, and not in the hearing of each other or of any individual whatsoever."

of others, the better he will be able to secure the confidence of those who are acquainted with the facts of the case or are in a position to give valuable information."

The Supreme Court has laid down the correct position on the question of examination of witnesses by the police in the case of Nandini Satpathy. Noting with anguish the police practice of calling female witnesses to the *thana*, it made the following observation:

> We wish to note our regret, in this case, that a higher level police officer, ignorantly insisting on a woman appearing at the police station, in flagrant contravention of the wholesome provision to Section 160(1) of the Cr.P.C. Such deviance must be visited with prompt punishment since policemen may not be law unto themselves expecting others to obey the law. The wages of indifference is reprimand, of intransigence disciplinary action. There is public policy, not complimentary to the police personnel, behind this legislative prescription which keeps juveniles and females from police company except at the former's safe residence.[81]

There are also specific departmental regulations or policies in place to this regard but as noted in the above case such violations are encouraged not because of the absence of proper supervision but by the officers themselves in such positions. The Court's directives are also willfully ignored by the functionaries as they find them unreasonable and responsible for creating harsh working conditions. While the operational norms of policework are characterised by commitment to high-rate of apprehension and conviction and the insistence of their superiors (departmental and political) for evidence of producing results, the injunctions of the judiciary are seen as interference that impede their capacity to produce.

In fact, the core aspect of every investigation and upon which the investigating officers rely the most is the obtainment of oral testimony. The reliable testimony of witnesses is the keystone of most police cases but according to those who are engaged in this process of obtaining such testimonies, it is not easy to come by. The systemic bearings like "the delays of the courts and their petty, stultifying legalisms" are one of the causes for creating the reluctance in the people to cooperate with policework. Moreover, according to the contemporary Indian police, in the words of the Police Commission of 1902-03, the people "are not generally actively on the side of law and order; unless they are sufferers from the offense, their attitude is at the very best one of silent neutrality; they are not inclined actively to assist the officers of the law."[82] The attitude of the public is not only uncooperative, apathetic and unresponsive but also as Bayley had noted, they are partisan, maliciously interested, and hostile.[83] But what was most revealing and equally annoying for an observer was that though the police are aware of the fact that the public expects that the police seek their support and cooperation, it still eludes them as apparently nothing has been done to secure it.[84] This is the most vital component and itself is as the entire sample of police respondents emphatically approve The police recognises that the 'public has a role in policing', mostly sought in the field of investigation, a function crucial to successful prosecution work, that influence the very progress of the criminal justice process.[85]

Public opinion on whether one should willingly help the police in serving as a witness in a police case, was not very encouraging.[86] The rural respondents were certainly found to be more willing than its urban counterparts. An average of half of the total rural respondents thought that the public should be a willing witness in a police case whereas the corresponding urban response was a mere three out of every ten respondents. Looking at the responses of the cross-section of the society,

---

[81] Syed M. Afzal Qadri, op. cit., pp. 82-83, 104.
[82] David H. Bayley, op. cit., pp. 154-55.
[83] The views of the police participants about the public in this research will be taken up in detail in the chapter on Police-Community Relations.
[84] Item no. 67, Police Opinion Schedule.
[85] Item no. 64. See David H. Bayley, op. cit., p. 157.
[86] Item no. 3(xix).

it showed that people were largely hesitant to serve as witnesses. Thus the popular opinion about a common man's voluntariness is such that if a witness appears in court voluntarily, it will not be appreciated as akin to the values of citizenship rather its motive will be questioned.[87]

The problems of securing witness are varied for the police. In cases of accidents where it involved insurance claims for monetary to the effect of losses incurred in the incident, the police not only get abounding number of witnesses ostensibly arranged by the beneficiary. At the same time, witnesses are hardly to come by in case of traffic accidents with casualties and also where it involved the commission of grave offences in public domain. The usual scenario is that huge crowds gather at such sites for a glimpse but when the police start to look for a witness, as Bayley has also accounted, "the crowd melts away."[88] A functionary of the Sewaknagar *thana* narrated to the researcher of an instance where lack of witness in the murder of a bad character in broad daylight in its jurisdiction seriously impeded the investigation work of the police. The police also had experiences of such situations where incidents as they occurred attracted immediate sympathy for the victims from the neighbourhood that resulted in the police getting overwhelmed by excited witnesses. But what the police actually require is disinterested testimony. At times, the same witnesses turn indifferent or hostile during the legal processing of the case; the reasons are various. The researcher as a participant-observer with the police of the Sewaknagar *thana* that was attending to a reported occurrence of an unnatural death case noted that the dealing police officer could find no one from among the neighbourhood that crowded the site of occurrence to be a willing witness for drawing up a report of the apparent cause of death.. According to s. 174 Cr.P.C. and rule 199(b) of the OPM, the presence of two or more respectable inhabitants of the neighbourhood are required for the police to draw up the necessary report. But the requirement of "respectables" only as witness is a difficult ask as in this case, where there was no such person available in and around the place or if there were any, none volunteered to be a witness despite much persuasion by the police as well as the participant-observer. None willing to be witness, the police had to prepare the inquest report and dead body challan without the presence of any witness. But to give the process an impression of having fulfilled the legalities, the police had to make do with the signatures of two local vagrants who readily obliged most probably to earn the goodwill of the police, whom they might expect to encounter in the future. These elements go on to form 'stock witnesses' for the police.

The survey had a few items on the subject of public willingness to serve as witness. Though 45 percent of the respondents thought that people should be willing to serve as witness, they had reservations on actually exercising it. To a question on what their response would be in a situation where the police comes around seeking information on something about which they can assist the police [item no. 3(xxi)], 31 percent of the total respondents thought of avoiding the police, as an equal measure of respondents were uncertain whether they would or not. Again the rural people showed much greater eagerness to cooperate with the police than their urban counterparts. While an average of half of the total rural sample showed the willingness to share information with the police on something they knew, a meagre 14 percent of the urban respondents felt the same. Contrary to the general perception, the better educated that constituted 29 percent of the total sample were more reluctant to help in policework. The majority of the largest proportion of the respondents (46

[87] There has been no change in the situation that existed four decades back whence the Law Commission of India in its Fourteenth Report on *Reform of Judicial Administration* had made a mention that summons was considered essential for the witness to give their evidence, primarily to ward off any chance of being labelled as biased as it was so considered if the witness appeared voluntarily. See David H. Bayley, op. cit., p. 155.

[88] David H. Bayley, ibid.

percent) that thought that they would assist the police in providing information (if sought) about which they would have any knowledge comprises of the illiterate and the least educated. The police should be in the know that the source from where it can obtain a true picture of the public opinion regarding 'willingness to assist in policework' is from their own family members and relatives as such respondents turned out to be the most unhelpful of all.[89]

Thus the police complain of 'little respect by the people for their profession' as being one of their most significant problems in daily operations,[90] is not unreasonable as the public opinion survey showed that there was not a single respondent all across the jurisdictional areas of the four *thanas* that would think that the public is friendly to the police [item no. 3(lxiv)]. Only a negligible seven percent of the entire public sample thought that the people in their respective areas are cooperative. Thus as Bayley supposed, people are more willing to find an absence of cooperativeness in their neighbours' predispositions than in their own.[91]

Despite the indifference, it is difficult to conclusively characterise the public attitude toward the police as the opinion expressed by the public to two items in the survey reflected the sensitivity that was widely prevalent among the public about its role in policing affairs. While eight out of every ten respondents felt that 'policing is not solely the obligation of the formal state agency' and that it does have its share of responsibility in it [item no. 3(lxi)], more number of people, that is, nearly 90 percent of the total respondents, could understand that the general commoner has a duty to assist the police in their work to the best of its ability [item no. 3(lxii)]. But this may not be uniformly seen in all processes of policework, as was in case of the people's willingness to serve as witness. Hence, the way to mitigate the difficulty that the police encounter during investigation lies in what the police respondents themselves emphasise, the need for a public-friendly attitude.[92] This assumption has had a bearing on policework is evident from the feeling amongst the police that public support for their work has been growing.[93]

Bayley considers the role of the public in policework as the defining factor of the quality of the relationship between the police and the public. How does the role as a prospective witness in police investigations be regarded as cooperation in policework is a subjective matter. Because it depends on the nature of cooperation, grudging or enthusiastic, or for that matter whether the manner of the oral testimony is to the liking of the IO or not. Cooperation itself is a function of what one party thinks or expects the other is capable of doing.[94] To measure the amount of public cooperation through simplistic methodologies of looking just at the opinions is a fallacy and to ever make an objective evaluation of it is doubtful, therefore, what is more critical is to know the reasons of such impressions.

Thus, why do the Indian policemen face difficulties in eliciting the reliable testimony from someone who is expected to come forward of its own volition to be a witness in a police case need to be accounted for.

The most commonly known factors that dissuade or deter the public from being cooperative with the police in its work processes are the unpleasant encounters with the justice process, particularly, the discourteous and uncivil attitude of the police at every possible contact point with

[89] While six out of every ten such respondents would like to avoid the police, 25 percent of the people who have none from their families in the police would behave likewise.
[90] Item no. 74(b), Police Opinion Schedule.
[91] David H. Bayley, op. cit., p. 156.
[92] Item no. 62, Police Opinion Schedule.
[93] Item no. 76.
[94] David H. Bayley, op. cit., p. 157.

the public and the total disregard by the police and also the courts for the inconvenience to which those persons are put to merely because they serve as witnesses. Hence the resultant prevalent situation where the police are unable to get the witnesses they need for in any investigation. The survey had questions to elicit opinion on the behaviour of the police during its dealings with the public. To a question on how do the police behave when they come around the scene of an offence looking for information, seven out of every ten respondents said that the police was rude and authoritative, while amongst the rest those who saw the police as fair and courteous and those who were unable to say anything were in equal proportion. Though the general response among the different categories of respondents to the option of police being fair and courteous was largely marginal to negligible (i.e. 22.9 to 2.7 percent), no respondent from either the minorities in all the four *thana* areas, or in the city, or those with a residency of less than fifteen years had ever seen the police to be fair and courteous in their approach [item no. 3(xiv)].

About personal experiences regarding the encounters with the police, of the 69 percent of the total respondents who had ever been subject to questioning by the police [item no. 3(xv)], 35 percent stated that the police treatment during that process was rude while nearly 37 percent considered the police as though not rude but were not courteous even. Thus, seven out of every ten respondents never received a courteous deal from the police. Here too, the least favourable about the police were the urban respondents as a minuscule proportion of them ever found the police as courteous [item no. 3(xvi)]. Besides first-hand experience, nearly 80 percent of the total respondents knew of someone who have had been questioned by the police [item no. 3(xviii)]. As was the response to item no. 3(lxiv), here too it seems that the people know more about their neighbours' experiences with the police that had largely been unpalatable. The police manner of conducting investigations has, therefore, evidently been rude, officious, imperious and unsympathetic.

The survey had certain questions that would give an idea of the reasons for which the public desist from serving as a witness or for that matter assisting the police in investigation work. Of the 48 percent of the total respondents from whom assistance had ever been solicited by the police in its investigation work, the proportion that really extended its cooperation turned out to be less significant considering the reasons for doing so as also for not doing so (item no. 3(xvii)]. Taking these general responses along with those elicited from specific queries on why one should or should not willingly help the police in serving as a witness [item no. 3(xix)] and that of those who have had the experience of actually being a witness [item no. 3(xx)] point out the following:

The respondents who had participated in the investigation work of the police had done so not out of the realisation of assisting the police in its work but primarily as it involved their own personal interests.[95] But where it had been for the 'other', it involved minor issues and where the interest was collective, the reference more often was to concerns like peace or law and order in the neighbourhood. There were many respondents who cited the cause of justice, but not from the ethico-philosophical sense. The orientation of their impersonal involvement in the work processes of the 'objective third party' was to protect and promote its own interests.

The predominant cause for the refrain amongst all rural respondents and 86 percent of the urban respondents to be a willing witness in any police case was 'not to get involved'. A labyrinth of processes involved in a criminal case appears intimidating for one to involve itself by volunteering to

[95] Those interests are considered personal that are related to one's family or relatives, including certain other relationships that in community life are considered sacrosanct. For a political leader or for an elected representative, the notion of personal is an embodiment of interests often related to that of others.

be a witness. That is, the insufficient regard by police and courts for the inconvenience to which witnesses are put scares the public from cooperating with the police.

The intimacy of community life is also a discernible factor in influencing the minds of the people to stand as witness against a fellow-villager. The dynamics of social relations that usher in an interpretation of things and events may not correspond with the legal perspective of the same. Bayley aptly presents this ethical dilemma that sprouts from the existing inter-personal relations between the villagers:

> It is one thing for a man to accuse a stranger of a crime, it is quite another to say it was the neighbour down the street, or the woman who draws water at the well each morning, or the son of a respected elder. Crimes are quickly transposed into personal terms. The law would have the description in terms of victim, accused, witnesses; the community translates it into Ram Singh, Mohan Rao, and the families and friends of one or the other. Giving evidence is choosing sides, and the consequences in terms of personal life in a village may be unsettling and unpleasant. By the same token villagers automatically consider the justice of the event. One man's assault on another may be justified, many villagers reason, because of the victim's ugly behaviour previously. The attack is not an isolated event, but part of a skein of happenings extending back in time for months or years. If justice has now been done, intervention by the law may also unbalance the scale of natural justice all over again.[96]

In rural areas, the village communities were quite conscious and protective of their respective identities and that galvanised all its inhabitants, the spirit of which assumed a formidable force to take on any contingency that involved the honour of the village. They would thus not allow any outside intervention on the grounds that it would result in causing damage to the social fabric of the village.

But, as mentioned in the earlier chapter, the introduction of village government has brought about competitive politics resulting in factions within the village community that has had a consequential impact on the social relations, characterised by intense acrimony and animus. In this context, any dispute is likely to be politicised and the act of standing as witness would acquire political overtones as also it becomes a test of loyalties for the person willing to provide testimony. The person with a sense of objectivity will be caught invidiously between opposing forces. The IO often finds itself entangled in the row between various forces contesting for favours from the police. The police for its functions have traditionally relied on collaborations and alliances within the neighbourhood that it exploits according to the situation to its advantage. It refrains to intervene in their ways of dealing with disputes as, according to Bayley, it has a vested interest in stability and good relations with the village and it also sees that more is involved than an isolated investigation. Thus in such an atmosphere, not only that the significance of addressing the crime is lost but the greatest casualty is truth.[97]

Amongst the major impediments that hinder willing testimony is the fear of reprisal from those against whom one stands to speak, hence the noncooperation shown by the public. Agreeing to serve as a witness beckons the risk of putting the life of its own and family in danger. Thus, the source of evidence is threatened and scuttled by those who cause the woe to betide the very person who may choose to speak against them.[98]

The fear of police harassment is another critical factor that thwarts the flow of willing testimony. Nearly 63 percent of the total respondents were apprehensive of falling targets to police harassment in case they serve as witness. A respondent in Yeshodabad related the harrowing experience of having volunteered to give testimony for the first time.

---

[96] David H. Bayley, op. cit., p. 161.

[97] Ibid, pp. 39, 161-62; Rajnarayan Chandavarkar, **Imperial Power and Popular Politics: Class, Resistance and the State in India, c. 1850-1950**, Cambridge University Press, Cambridge, 1998, pp. 182-83.

[98] Also see David H. Bayley, ibid, p. 162.

> One day, while he was away from home, a constable came to summon him to the *thana* without serving any written orders to that regard. When he returned home and learnt about the summon, it was quite late in the night for him to respond. The police that very night picked him up from home and took him to the *thana* where he was severely beaten up for having willing to give testimony against an influential member of the village. He was also forced to change his statement and a doctored version was recorded accordingly.

Another similar incident was reported by a woman respondent in Birjodi who was allegedly coerced by the police to provide a testimony different from the one made earlier. Such allegations against the police are rife that seriously inhibits the public to serve as a witness. A respondent in Yeshodabad was distressed that the police gave no hearing to the truth and as gained over by the opposite party it indeed was looking for such persons who would agree to toe a particular version of the incident. In another instance, the same police was accused by a unit of the public sample for having forcibly attributed a statement, recorded by the IO, as that of his, which he was also supposed to state the same in the court. [99] This illustrates the manner in which the investigating officer can exercise the discretionary power enjoyed by it u/s. 161(3) Cr.P.C. in matters of recording the statement of witnesses.

The difficulties that the respondents enlisted do not provide a favourable picture, as it could at times be a liability for the willing witness. The predisposition of two business-men respondents was alike to a similar situational encounter although they belonged to different places, Yeshodabad and Lekhpur. Though they were witness to an incident that occurred in the marketplace close to their shop, they instead chose not to serve as witnesses in the related police case because of the fear that attending to the ensuing legal processes would have hampered their business interests. Thus, the overbearing concerns of welfare, security of persons, property and livelihood, on account of serving as a witness is a major impediment for the police to obtain willing testimony.

Humiliation at the hands of the unruly police has also been another associated fear of the public. The subjective experiences of the police about its work elicited as responses to item no. 43 constitute the problems that afflict the availability of easy, willing and trustworthy witnesses. But when it comes to issues that arraign their lot for the problems, not all police respondents would agree. The general view is that noncooperation of the public is predominantly due to the fear of police brutality.[100] But the police argue that it is impossible in the present day context as people are more aware of their rights, with social agencies espousing the cause of human rights that are ever vigilant toward police excesses, and more so, with their identity as the ruler-supportive force, the opposition political parties are always on the look out to catch the police for their mistakes so as to embarrass the government. One of the officers of the Sewaknagar *thana* wanted to communicate the same that it was not easy to intimidate the people in to serve as witnesses as he pointed out to a then recently filed FIR at the instance of the Superintendent of the Police against two of his colleagues on allegations of atrocity.

At the same time, police officers acknowledged that they were clothed with a reputation for rudeness and lack of sympathy. Though they also realised the problems of the people, the police showed their inability to provide protection to the witnesses or create conducive conditions to facilitate or ensure willing testimony.

---

[99] The National Police Commission had taken note of this improper practice of recording statements according to the whims and fancies of the investigating officer and not what the witness has stated. See **National Police Commission**, Third Report, MHA, GOI, January 1980, paras 27.18, pp. 26-27.

[100] The tendency of the public to keep off policework, especially in case of serving as a witness, is based on the stories that stirs up this sense of repugnance in the minds of the people. Hence, the overwhelming refrain among all the rural respondents and 86 percent of their urban counterparts for not to get involved.

The difficulties of the police to obtain such witnesses are comprehensible, more so, when the police itself indulge in such activities as stated below:

- A woman resident of Sewaknagar complained that bootlegging took place in their locality in connivance with the local police. This creates a feeling of insecurity as there can hardly be any intrepid witness to stand up against this dangerous alliance.
- The complainant of a FIR filed at the same *thana* revealed that the police employed subtle intimidatory tactics to dissuade the witnesses like warning them of the risks involved in giving testimony against the accused.

It is pertinent here to document that where the police finds no witnesses, the IO in such cases compelled by circumstances dictated by procedural requirements of investigation 'creates' the same. The usual modus operandi is that the IO to fulfill the obligatory processual norms of investigation concoct the testimony and also sometimes in the name of such persons as witnesses that either no person exist by such names, or that the concerned person would not be in the know of being named as a witness in police case.[101]

> An unit of the public sample of Lekhpur was surprised to receive a summon from the court to give testimony as a witness in a case about which he had no knowledge.

The National Police Commission observes:

> A police malpractice brought to our notice is the habit of some police officers to be very cursory in their examination of certain witnesses and then proceed to make a detailed record of the witness' statement, assuming it to be what they would like it to be in the context of statements of other witnesses already recorded.[102]

The police resort to such practice either when it feels that it is necessary to seek the conviction of the accused, as was observed by the Apex Court in *Prem Chand v. Union of India*,[103] or that to favour a particular party in the case. It is argued that under the given circumstances, where people are not willing to come forward or are discouraged to give evidence, the police have to make do with whatever is available. It has given rise to the practice of making use of the services of "stock witnesses". In sum, the police still lack the detective ability or due to indolence, as did their colonial predecessors who directed their efforts to procure confessions by improper inducements, by threats and by moral pressure.[104]

The police opinion survey had a total of seven questions to elicit information on the collection of evidence. Very few officers agreed that concoction or manipulation of evidence has become a part of the investigation work of the police. It was observed that such undesirable practices take place in circumstances where there is the existence of pressures or interference in policework, or in instances of *factual* guilt not meeting legal criteria, that is, when the IO presumes the guilt of the accused but against whom there is not sufficient evidence or where there is no eye-witness available.[105] From amongst those respondents who strongly disagreed that concoction or manipulation of evidence are necessary to ensure conviction and that witnesses are ever planted,[106]

---

[101] This revelation comes from two police officers of different generations, one a senior officer at Lekhpur and the other a probationer yet to be posted. It reflects the universality of such a practice but what was startling was the perceptible socialisation of the latter into the world of real policing. That is, the young trainee acquires an understanding of the informal norms and values of the police subculture to transform itself into, what Chatterton called as, 'practical copper'. See Mike Brogden, et al, **Introducing Policework**, Unwin Hyman, London, 1988, pp. 32-33. How occupational commonsense is absorbed by the police officers that guides them how to get the job done in times of hardship and in ways that gives the appearance of legality, see Chapter 3.

[102] **National Police Commission**, Fourth Report, June 1980, Chapter XXVII, para 27.18, p. 5.

[103] (1981) Cr LJ 5 (SC). In this case a person challenged the court's order of externment against him as being malafide on the ground that such order is being issued as he had on earlier occasions appeared as a "stock witness" of the police but that he has refused to give any such testimonies. See Syed M. Afzal Qadri, op. cit., p. 132.

[104] K.S. Dhillon, op. cit., p. 152.

[105] Item nos. 48 & 97, Police Opinion Schedule. The police officer tends to emphasize its expertise and specialized abilities to make judgements about the required measures to be applied to apprehend "criminals," as it can estimate accurately the guilt or innocence of suspects.

[106] Item nos. 100 & 107, Police Opinion Schedule.

most of them on the contrary concurred with the occupational view that 'true recording of the statements is not possible as it has greater chance of weakening the police case'.[107]

According to the public opinion survey, another major factor that discourages willing testimony is the work processes of yet another component of the criminal justice system, that is, the judiciary. The willing testimony entails to a witness no material benefits, rather inconvenience, harassment and losses [item no. 3(xix)]. Bayley presents it, as observed by the Law Commission (1961-62) in its 14th Report, most eloquently that this study could gather about the plight of a willing witness during the legal processing of a case:

> Appearing as a witness in court does cost the citizen time. Then, if there are many delays, he may be called back again and again. ...in an underdeveloped country where incomes are very low the loss of several days' wages produces substantial suffering. Even if people are not fully employed every day, as many are not, courts are often a considerable distance away. Government is supposed to reimburse witnesses for travel and maintenance, but the rates are absurdly inadequate and frequently never paid. Police officers complain too, of the numbers of adjournments obtained by defense counsel. It is generally recognized that counsel, realizing the hardship witnesses of attending court, sometimes deliberately aggravate the hardship by applying for postponements. Courts simply do not seem to consider that witnesses, after waiting several hours to testify, may have to travel distances of thirty and forty miles to get home. In the end memories fade or witnesses change their stories so as to avoid testifying. And the word circulates that to get embroiled as a witness is like being played as a fish on a long line. Very little regard is had for convenience of witnesses while waiting whether at police stations or in courts. They squat on verandahs or in the shade of trees in courtyards. Finally, people may be unwilling to fall into the hands of badgering attorneys. The manner of their cross-examination by the opposite counsel very often borders on the insulting and offensive.[108]

Justice Wadhwa in *Swaran Singh v. State of Punjab* had also made similar observations about the conditions of witnesses in the following words:

> A witness in a criminal trial may come from a far-off place to find the case adjourned. He has to come to the Court many times and at what cost to his own-self and his family is not difficult to fathom. It has become more or less a fashion to have a criminal case adjourned again and again till the witness tires and gives up. It is the game of unscrupulous lawyers to get adjournments for one excuse or the other till a witness is won over or is tired. Not only that a witness is threatened; he is abducted; he is maimed; he is done away with; or even bribed. There is no protection for him. In adjourning the matter without any valid cause a Court unwittingly becomes party to miscarriage of justice. A witness is then not treated with respect in the Court. He is pushed out from the crowded courtroom by the peon. He waits for the whole day and then he finds that the matter adjourned. He has no place to sit and no place even to have a glass of water. And when he does appear in Court, he is subjected to unchecked and prolonged examination and cross-examination and finds himself in a hapless situation. For all these reasons and others a person abhors becoming a witness. It is the administration of justice that suffers.[109]

More so, the allowance due for the witnesses for attendance in the court is a far cry.[110] The Law Commission observed that the unfavourable condition "naturally leads to a disinclination on the part of the witnesses to appear in court."[111] This explains the attitudinal indices of the public. While on one hand, the respondents absolutely agreed about the responsibility of the community toward policing [item no. 3(lxi) & (lxii)], there were only seven percent of the total respondents that characterised the attitude of the people as cooperative towards the police [item no. 3(lxiv)] and about

---

[107] Item no. 36.

[108] David H. Bayley, op. cit., pp. 159-60. Also see Law Commission, op. cit., Vol. II, pp. 743-44, 777-78.

[109] (2000)5 SCC 68 at 678. The instrument of adjournment as a vice in criminal cases was brilliantly portrayed in the Hindi film '*Damini*' wherein the protagonist, the lawyer of the complainant, makes an absorbing protestation before the Judge against the repeated adjournments granted by the Court.

[110] Section 312 of Cr.P.C. provides the discretion to the Magistrate to order payment of the reasonable expenses of any complainant or witness attending for the purpose of any inquiry, trial or other proceeding... either by the party concerned or by the State subject to the rules made by the State Government. Rule 180(b) of the Orissa Police Manual provides the procedure prescribed by the State Government for observance by all magistrates in police cases to ensure that witnesses receive payment for their travelling expenses with a minimum of inconvenience as rule 180(a) reiterates the provision of and the rules as framed u/s. 312 Cr.P.C. as provided in appendix 10 of the OPM.

The NPC in its fourth report suggests that the allowances payable to the witnesses for their attendance in court should be fixed on a realistic basis and their payment should be effected through a simple procedure, which should avoid delay and inconvenience.

[111] Law Commission, op. cit., Vol. II, p. 744.

their ownselves, nearly 40 percent of the respondents thought that they might assist the police about something that they know when the police comes around looking for information [item no. 3(xxi)] as only one in every ten respondents elected 'to go and inform the police about the commission of any offence in their area' [item no. 3(lxv)]. This figure would also in all probability wane if it involves any risk in that assistance to the police. The general public disposition arrogates a pattern, that is, *we-know-what-we-should-do, but-either-we-can-not-or-do-not!*

Search and Seizure

Searches are also proceedings for the collection of evidence and therefore part of investigation u/s. 2(h).[112] In order to recover physical evidence police must search the premises and seize inculpatory articles from persons and places. Search also means to find out the accused connected with any offence, who may have concealed itself in certain premises, hence entry into the premises to search for the accused is imperative. During the process of investigation, the investigating police officer has the power to make search and seizure with and without search warrants from a magistrate.[113]

Section 165, Cr.P.C. authorises a general search on the chance that something incriminatory might be found in connection with an offence. The provisions of search are discretionary in nature. Sub-section (1) of s. 165 states that

> whenever an officer in-charge of a police station or a police officer making an investigation has reasonable grounds for believing that anything necessary for the purpose of an investigation into any offence...may be found...and that such thing cannot in his opinion be otherwise obtained without undue delay, such officer may...search, or cause search to be made, for such thing...

The police officer is thus empowered to embark upon any search if it occurs to the officer concerned that there exist necessary reasonable grounds for the purpose. More so, this supposition or believe is further extended to be employed in the consideration of obtaining the requisite search warrant for which if there is an apprehension of any *undue delay*, the officer in regard to the said operation has the discretion to go ahead with the search without it. That is, s. 165 Cr.P.C. is meant to be used in cases where a search warrant would be required in the ordinary course, but lack of time renders it impossible to obtain it.[114] But the officer acting under sub-s. (1) or sub-s. (3) must record in writing the reasons for the making of a search and under sub-ss. (1) and (3) the thing for which the search is made shall be specified as far as possible. Under sub-ss. (2) and (3) the search must be conducted by the officer in person proceeding under sub-s. (1), if not possible, must record the reasons for not doing so.[115]

The procedures of the search are also stated in s. 100 Cr.P.C. as also in rule 165, OPM.[116] Section 100 Cr.P.C. provides for the right to free ingress in case of closed premises on demand and on production of the warrant of search by the police officer and it also seeks to ensure that searches are conducted fairly and squarely and that there is no "planting" of articles by the police.[117] In order to achieve that object, the law makes it obligatory that, first, at least two independent and respectable witnesses of the locality should be present. Only if no such persons are available or willing to be witness to the search, then two such persons of another locality may attend and witness

---

[112] ILR (1978) 2 Punj 305. See **Ratanlal and Dhirajlal's The Code of Criminal Procedure**, op. cit., p. 7.

[113] See sections 165, 95, 97, 99 & 100, Cr.P.C.

[114] *Malakhan v. Emperor*, AIR 1946 P.C. 16.

[115] *State of Rajasthan v. Rehman*, AIR 1960 SC 210: 1960 Cr LJ 286. Rule 165(a) of the Orissa Police Manual reproduces the same provisions for search without warrant as stated in ss. 165 and 166 Cr.P.C. In addition to the above, the rule also states that 'the police is not obliged to give the name of the person upon whose information they act'.

[116] Section 165(4) of the Code provides that any provision of this code relating to search-warrants and the general provisions as to searches contained in s. 100 shall apply to a search made under this section.

[117] Rule 165(e) of the OPM also exhorts that the investigating officer shall conduct searches in such a manner as to leave no room for suspicion that articles have been surreptitiously introduced by them, their subordinate or informers.

the search. The IO may issue an order in writing to them or any of them in that regard. The word "independent and respectable" will equally govern the latter case. The discourse on the requirements of witnesses as per the case law is as follows:

> It was held that the evidence requires greater scrutiny because of the absence of an independent witness;[118] in another case, the absence of an independent witness from the locality to witness the search was considered to be not material as per the circumstances;[119] and in yet another case it was held that the emphasis is more on the respectability of the witness rather than on the question of locality of the witness.[120]

Secondly, the search should be made in their presence, and the list of things seized in the search and of the places in which they were respectively found, familiarly known as the *panchanama*, should be signed by them.[121] Thirdly, the occupant of the place searched or his representative should be permitted to attend during the search, and to have a copy of the list prepared.[122] Above all, the search party should before entering the premises, tender themselves for personal search by the witnesses.[123] Any person in around the place of search who is also subjected to search because of being reasonably suspected of concealing anything inculpatory about his person is also entitled to a copy of the list of things recovered from it.[124]

The officer conducting the search has the discretion to select the witnesses, it is thus required that to ensure fair dealing and a feeling of confidence and security amongst public, the *panches* – witnesses – should be unprejudiced and uninterested, that is, they should in no way be related nor hostile to any of the parties in the concerned case.[125] The rule stipulates that generally searches by night though not illegal should be avoided, if possible could be postponed till day-light without endangering the chance of recovering the concerned articles. When on occasions it becomes unavoidable, then the reasons for conducting the search at night must be carefully recorded in the case diary and extra care needs to be taken to ensure that the exercise is free of all probabilities of allegations regarding unfair practices on the part of the police.[126] Copies of any record made under sub-ss. (1) or (3) that also includes the incorporation of the necessity of the night search, shall be sent to the Magistrate concerned, and the owner or the occupier of the place searched is also entitled to a free copy of the same.[127]

The provisions of s. 165 Cr.P.C. are mandatory and not directory, hence it is always obligatory for the investigating agency to strictly comply with the requirements of the law before it

---

[118] *Premchand v. Punjab*, 1984 Cr LJ 1131 (Punjab); *State of Rajasthan v. Rehman*, AIR 1960 SC 210: 1960 Cr LJ 286; *Beeravoo v. Collector*, 1965(2) Cr LJ 279 (Ker.); *State of U.P. v. Ram Sanchi*, 1969 CR LJ 952 (All.). The common concern was that the evidence obtained by suspicious means will have to be examined by the court with more than ordinary care. It was held in *Prem Lata v. State of H.P.* (1987 Cr LJ 1539 [H.P.]) that where provisions of s. 100(4) of the code are not applied the accused is entitled to the benefit of doubt. See **Ratanlal and Dhirajlal's The Code of Criminal Procedure**, op. cit., p. 94.

[119] *The State of Maharashtra v. Madhukar Keshav Waity*, AIR 1980 SC 1224: 1980 Cr LJ 923. See **Ratanlal and Dhirajlal's The Code of Criminal Procedure**, ibid.

[120] *In re Rajabather*, 1959 Cr LJ 1189 (Madras); *Radhakrishan v. State of U.P.*, AIR 1963 SC 822: (1963) 1 Cr LJ 809; *Gopalpur Tea Co. v. Calcutta Corpn.*, 1966 Cr LJ 135 (Cal.). See R. Deb, op. cit., pp. 73-74; **Ratanlal and Dhirajlal's The Code of Criminal Procedure**, ibid.

[121] Section 100(5), Cr.P.C. After the search, a copy of the list of the recoveries shall be forwarded to the office of the CSI (Court Sub-Inspector) by the first available messenger or post, *vide* 165(d) of the OPM. It also states that where no property is seized, the search list and its copy should be crossed vertically and signed by the witnesses and the officer making the search.

[122] Section 100(6), Cr.P.C.

[123] Rule 165(e), OPM. It would be difficult for the court to accord weight to the evidence of seizure if there is any suspicion on it to that regard, hence it is one of the foremost requirement prior to the conduct of the search. *Cherian Lukose v. State*, 1968 Cr LJ 169; *State of Bihar v. Kapil Singh*, 1969 Cr LJ 278. See R. Deb, op. cit., p. 75.

[124] Section 100(3) & (7), Cr.P.C.

[125] *Raman*, (1897) 21 Mad 83, 89; *Kullan Panicker v. State of Kerala*, (1963) 1 Cr LJ 669; *Kaur Sain*, AIR 1974 SC 329. See David H. Bayley, op. cit., p. 153; **Ratanlal and Dhirajlal's The Code of Criminal Procedure**, op. cit.

[126] Rule 165(b), OPM.

[127] Section 165(5), Cr.P.C. See R. Deb, op. cit.

can validly institute a search of the nature mentioned in this section.[128] It has also been held that where conditions under sub-ss. (1) and (3) of s. 165 have not been strictly complied with, it may be only an irregularity and entry in the premises for making search in discharge of official duty cannot be turned into a criminal trespass only on account of such a defect.[129] When provisions of this section and s. 100 of the Code are contravened the search can be resisted by the person whose premises are sought to be searched.[130] But even if the search be illegal, it does not justify any obstruction or other criminal acts against the person conducting the search, after search and seizure are complete.[131] The courts have held that once it is found that the evidence of the recovery of articles is reliable, "the illegality of the search however does not make the evidence of seizure inadmissible."[132] That is, the illegality of a search will not affect the validity of the articles or in any way vitiate the recovery of the articles and the subsequent trial; furthermore "conviction on basis of discoveries made in such search can be made."[133]

Section 165 Cr.P.C. is imbued with two conceptual variables in terms of its functional feasibility. As the executing agency is provided with the operational autonomy in regard to the necessity of exercising this section effectively in varying circumstances, it also stipulates requirements as procedural safeguards, mandatory for its observation. More so, the Apex Court had observed that the provisions governing the search if ignored, it cannot be said that the search is carried out in accordance with but in contravention of the provisions of the Code. It had also suggested that this section be sparingly used, "only in cases of emergency, otherwise in all normal and routine cases the search warrants should be obtained from court of law."[134]

The mandatory provisions in the section whose rationale ostensibly is to prevent the excesses of the police rather than to protect the constitutional rights of the citizens has been undermined as the courts have overridden the illegality of the search caused due to the non-observance of the said provisions in order to preserve the evidentiary value of the seizures from such illegal searches. This is in sharp contrast to the "exclusionary rule" of evidence in American jurisprudence, a device for enforcing police lawfulness.[135] The exclusionary rule is that upon appropriate motion by the defendant in a criminal prosecution, evidence obtained from the defendant in violation of his

---

[128] *New Swadeshi Mills of Ahmedabad v. S.K. Ratton*, (1967) 9 Guj LR 364. The Orissa High Court in *Radhakrishna Singhari v. State of Orissa*, held the search to be invalid as the IO in a case under the Narcotic Drugs and Psychotropic Substances Act, 1985, had neither mentioned in the case diary or in the seizure list that the accused were given the option to be searched before the Gazetted Officer or the Magistrate as required under the Act. The Court observed that strict compliance of the law on the points and to keep contemporaneous record, while effecting search and seizure, is imperative on part of the IO (1995 Cr LJ 3083 [Ori.]). In *V.S. Kuttar Pillai v. Ramakrishnan* (AIR 1980 SC 185: 1980 Cr LJ 196), it was held that even a Magistrate issuing a search warrant u/s. 93 Cr.P.C. should record reasons therefor. The court in *Hiralal v. Ramdulare* (AIR 1935 Nag. 237), held that the search without complying with the preliminaries laid down in s. 165 of the Code could not be said to have been done in good-faith. See Syed M. Afzal Qadri, op. cit., p. 65; R. Deb, ibid, p, 74; **Ratanlal and Dhirajlal's The Code of Criminal Procedure**, op. cit., p. 249.

[129] *B.S. Thind v. State of H.P.*, 1992 Cr LJ 2935 (HP). See **Ratanlal and Dhirajlal's The Code of Criminal Procedure**, ibid.

[130] *Radha Kishan v. State*, AIR 1963 SC 822: (1963) 1 Cr LJ 809. See R. Deb, op. cit.; **Ratanlal and Dhirajlal's The Code of Criminal Procedure**, ibid, pp. 94, 249.

[131] *Shyam Lal*, AIR 1972 SC 886: 1972 Cr LJ 638. See **Ratanlal and Dhirajlal's The Code of Criminal Procedure**, ibid, p. 249.

[132] AIR 1965 Orissa 136-37. See Arvind Verma, 1997, op. cit., p. 69.

[133] *Asst. Collector of Central Excise v. Wilfred Sebastian*, 1983 Cr LJ NOC 43 (Ker.); AIR 1955 NUC M.B. 3862 DB. See Arvind Verma, ibid; **Ratanlal and Dhirajlal's The Code of Criminal Procedure**, op. cit.

[134] See Syed M. Afzal Qadri, op. cit.

[135] Briefly stated, the exclusionary rule rejects illegally seized evidence. As evolved in *Mapp v. Ohio* (1961), the officer should have sufficient evidence to infer "reasonable or probable cause" for an arrest and, therefore, grounds to search and seize. Hence search is incident to an arrest. Jerome H. Skolnick, **Justice Without Trial: Law Enforcement in Democratic Society**, John Wiley & Sons, Inc., New York, 1966, pp. 211, 214. Also see Arvind Verma, op. cit.

constitutional rights to be free from unreasonable searches and seizures will be suppressed by the order of the court.[136] According to the due process clause of the Fourteenth Amendment, a result of the *Mapp v. Ohio* decision of the Supreme Court of the USA, it is imperative to exclude from all state criminal trials evidence illegally seized.[137]

In the absence of such inhibitory rules, the researcher found stop-and-search activity of the Indian police as relatively exploitative. While on night patrol duty along with the Yeshodabad police, the researcher found the police use its discretion to stop-and-search carriage vehicles randomly and on suspicion. In one such stop-and-search of a truck, its driver on hearing the inspecting officer's direction to one of the constable to seize the truck, immediately tried to force something into the hands of the officer who got agitated at the driver for the act before the researcher and took him away from the sight of the latter. After sometime the truck was let off. One of the constables at the Lekhpur *thana* once ran riot on sharing his impressions about the former OIC's amazing sense of suspicion: "whichever vehicle he would target for search, invariably have turned out to be carrying illegal goods for which then he would levy a heavy sum for its release."[138] As has been mentioned in the previous chapter about the reports on "victimless crimes," it has been usually the police who is the surrogate complainant of such offences and thus seizures that take place during the discovery of such crimes are often without any witnesses as they occur mostly during night patrols. Thus under such circumstances the need of witnesses appear to be unenforceable.

As it is for the Indian police, witnesses are extremely hard to obtain. Sub-section (4) of s. 100 of the Code envisage this difficulty of the police as is implicit in the provision, a measure to mitigate it to an extent possible:

> Before making a search under this Chapter, the officer or other person about to make it shall call upon two or more independent and respectable inhabitants of the locality in which the place to be searched is situate or of any other locality if no such inhabitant of the said locality is available or is willing to be a witness to the search, to attend and witness the search and may issue an order in writing to them or any of them so to do.

In addition, the same section provides for sanctions *vide* sub-s. (8) to ensure availability of witnesses for smooth conduct of search by the police. Thus sub-section states that

> any person who, without reasonable cause, refuses or neglects to attend and witness a search under this section; when called upon to do so by an order in writing delivered or tendered to him, shall be deemed to have committed an offence under section 187 of the Indian Penal Code.

But seldom is this sub-section enforced; the courts have invariably ignored to take cognizance of the role of the public, lawfully required in the process of police investigation, in ensuring fairness in the conduct of the investigating agencies. That is, it does not invalidate evidence obtained by illegal search. As a result, the Indian police is allowed to willfully violate the existing procedural requirements. In other words, they do not feel it necessary to obtain search warrants, for they can always search a place under any current ongoing investigation of a case. More so, the practice of using 'stock witnesses' has been without any inhibitions now.[139]

Another such enabling procedure can be found in regard to the limits of the police authority to conduct search. According to s. 165(1) Cr.P.C., the IO can only conduct search within the limits of its *thana*, but in certain cases a search within the limits of another *thana* is now authorized. Section 166(1) Cr.P.C. extends the power of the IO to have such searches carried outside its

---

[136] Judge Traynor of the California Court in *People v. Cahan*, 1955. See Jerome H. Skolnick, ibid, p. 211.

[137] Jerome H. Skolnick, ibid. The assumption behind the exclusionary rule as a control device is that given the exclusionary rule and a choice between securing evidence by legal rather than illegal means, officers will be impelled to obey the law themselves since not to do so will jeopardize their objectives.

[138] It was learnt that the OIC used a part of such collections in adding to the existing physical infrastructure of the *thana*.

[139] See Arvind Verma, op. cit., pp. 69-70.

jurisdiction by requiring the OIC of that *thana* to cause such search, and in exigencies where in the opinion of the IO if such requirement may occasion delay that may result in evidence being concealed or destroyed then the concerned officer can go ahead with such search[140] and shall inform the OIC of the *thana* under whose limits such search took place. The probable rationale for the law to also provide for conditional measures is to enable the IO to carry out its activities successfully. The significance of section 166 can be read from a successful investigation of a case, filed at Sewaknagar *thana*, within a few hours from the receipt of its information.

> It involved two investigations conducted successively by two independent agencies, one being the Sewaknagar police that acted on the FIR of another agency which was first to act on an information that required immediate conduct of search operations into the jurisdiction of the former and their actions were facilitated by the provisions of s. 166(3) of the Code. The first agency could successfully apprehend the accused and as also seize the illicit article from its possession. It had sent the information of the search to the In-Charge of the Sewaknagar *thana* and later with the seizure, seizure list and the accused handed them over to the Sewaknagar *thana* lodging a FIR to that effect. In response, the In-Charge of Sewaknagar *thana* launched an immediate search of the dwelling of the accused and seized other incriminating materials.[141]

The Indian police have been permitted to exercise considerable personal judgement in conducting searches in the course of their investigations. The provisions for search considered to be obligatory allows expediency in the investigation work.

The police respondents were still complaining about the difficulties in the conduct of search and seizure.[142] Though near-total of the respondents agreed that search warrants are commonly not required in all forms of investigation, one of them of the Yeshodabad *thana* said that wherever it becomes an administrative necessity affecting their operation, they deploy a sentry till orders are obtained. It suggests that deviations do occur in large measure as, moreover, nearly all of the police respondents strongly agreed to the proposition (item no. 106) that "it is not possible to strictly follow the procedural norms in all cases of search and seizure." Considering these responses, the opinion elicited by item no. 105 appears to be specious, as only a few respondents acknowledged that scarcely do the police fail to strictly follow the procedures.

The common procedural difficulties are regarding the necessity of warrants and the required presence of witnesses. The searches mostly take place without the presence of witnesses and the signatures are mostly obtained without the witnesses having any knowledge of them. The requirements to seek the service of witnesses by order in writing is thus not the norm in practice. It also shows that the 'stock witnesses' are used with increasing regularity without any inhibition.[143] The study of all the seizure lists of a particular year at the Lekhpur *thana* showed that generally the witnesses, as determined from their addresses mentioned in the seizure lists, were drawn from the locality where the search was situated. But whether other procedural requirements were observed or not, it could not be ascertained from this source.

---

[140] Section 166(3), Cr.P.C.

[141] The In-Charge of Sewaknagar *thana* had drawn a Plain Paper FIR on the spot of the search investigating into the FIR filed by the police of another agency. In both the FIRs of this case, it was found that the investigating officers had mentioned in detail about the implementation of all formalities of the search. The portions of it reads as follows: The first FIR states: the raiding party "...detained him and being asked he disclosed his identity as above and after disclosing our identity and in presence of witnesses (names of witnesses mentioned) took his personal search. During search found.....being asked he could not account for any authority about its possession and disclosed.." the name of another. "I seized the..., in presence of witnesses who signed in the seizure list. A copy of seizure list was also furnished to him." The P.P. FIR drawn by the OIC of Sewaknagar *thana* states: "...searched house of...and dwelling house of...and... recovered... ...and were seized in presence of witnesses as per seizure list..."

[142] Item no. 29, Police Opinion Schedule.

[143] See David H. Bayley, op. cit., pp. 153-54; Ved Marwah, op. cit., pp. 31-32; Syed M. Afzal Qadri, op. cit., p. 132.

The empirical evidence of the search in actual practice, as gathered from direct observation, interviews of the public sample related to the FIRs and interactions with the IOs, show flagrant violation of the norms, enumerated in rule 165(f) of the Orissa Police Manual which is as follows:

> The power to search houses be exercised in accordance with section 165(1) of the Cr.P.C. While such power is necessary in the interest of investigation of crime, indiscriminate search of houses should be avoided. Houses should not be searched on the mere assertion of the complainant, without any enquiry into the grounds on which the assertion has been made as by such search feelings of persons whose houses are searched may be hurt. A general search of the houses suspicious characters, or conducting searches as reprisals, with the intention of harassing or humiliating a person, is not authorised by law. Police officer should see that in searches unnecessary damage to property is not caused nor any cause given for complaint of incivility, particularly to women.

The enquiry into a case revealed the following about the police search:

> The police of the neighbouring *thana* barged into the house that falls under the jurisdiction of Birjodi *thana*, late in the night purportedly to search for a stolen television. On being enquired by the head of the family about the reasons for the search, he was physically assaulted by the police and in utter darkness as the house was without electricity, the entire house was ransacked as even vessels containing grains were toppled and smallest of trunks were broke open, etc. The women folk were addressed with profanity and manhandled for protesting the ruthless conduct of the search.

The above illustration of the search show that the police had observed no procedural requirements to legally substantiate their search. To mention some, the search team had neither any women police, nor they had the necessary warrant, nor did they obtain any witnesses for the search, nor did they give their personal search, nor was the place of search properly lit, nor did they prepare any list of the search, nor the local *thana* was informed of such a search. Above all, there existed no formal complaint with the police for conducting the search. In sum, the search was illegal.

The researcher encountered an incident where the OIC of Lekhpur *thana* on discovering discrepancies in the seizure-list made in related to a case by the IO, his subordinate, reprimanded him for having made a seizure of things that were totally irrelevant to the substance of the case under investigation.[144]

According to the police respondents as also observed by the researcher as participant-observer in policework, the police face resistance during its search operations. A SI of Yeshodabad *thana* while speaking about the risks involved in search operations, narrated of an instance where on an information of theft of a cycle, the police tried to search a place on reasonable grounds to believe that it would recover the lost article, but they were resisted by the women folk. Having no other options available, they forcibly entered the house and seized the stolen cycle. The consequence of it was that grievous charges of molestation were levelled against the police by the women folk of the family. Besides, hardly does anybody in the locality come forward to assist the police in making the exercise any easier as that would be considered as standing against their fellow-members of the community. The police also complain of court's cavalier attitude toward the evidence obtained by the police. In cases of unenforceable laws, related to victimless crimes, the position of the police is awful as, according to a senior officer in Sewaknagar *thana*, the court let off those apprehended in such offences due to the absence of independent corroboration of police testimony. The police sees its worth as inferior to the accused before the judge who perpetually suspects the legality of the police evidence. The police considers that its efforts are nullified by such an attitude of the court that moreover create obstacles in its work by imposing irrational and unclear procedural requirements, frustrating the efficient administration of criminal justice. Therefore, wherever they find the procedural requirements either as confusing or as an hindrance to the exercise of his primary task, the police handles the situation in the interest justifying a contention of legality, irrespective of the actual circumstances. Aware of the obligation to fulfill the mandatory provisions of search and

[144] Rule 165(c) of the Orissa Police Manual forbids promiscuous seizure of property.

seizure, it embellishes the processes of the operation to give the impression of legitimate evidence. Thus "compliance" with the provisions take the form of *post hoc* manipulation of the facts rather than before-the-fact behaviour.[145] An officer at Yeshodabad *thana* revealed that deviations occur due to unfavourable working conditions; one who becomes rigidly fastened to the procedural law, it can never succeed in seizing the evidence.

Bayley reflects the much relevant thinking among the police officers to do away with the procedural requirement that witnesses be from the neighbourhood; a problem reckoned by the courts and have also allowed the law to be stretched.[146] The empirical findings support the observations of the Bihar Police Commission. The Commission while taking note of the prevalence of frivolous searches that are intended only to harass, had viewed the requirement of the presence of search witnesses as an useful corrective. The task of investigation is not a smooth sailing affair for any state agency in the world. The essence of procedures are to ensure a uniform, fair and systematic conduct of police practice that attributes legitimacy to the outcome of such work and the presence of certain mandatory provisions are to deter any deviations from the processes laid down. The effort of the police should be directed more at correcting their own mode of functioning. Out of the two broad reasons that explain the difficulties that the police encounter in obtaining witnesses, Bayley assumes that more than the "human" reasons, common to all men, the circumstantial ones – a part of the Indian situation – could be more amenable to change. He thus sees in the state's agency a crucial pedagogical role that it is required to play in affecting all of them so as to revolutionise public cooperation. At the same time, he emphasises that such willing assistance in policework cannot merely be brought forth by their own unaided efforts but cautions that this thought should not push them into inertia.[147]

Every *thana* maintains a record of the work processes in relation to the search and seizure. They are: the '*malkhana* register' that shows a comprehensive record of all the seized property (*mal*) that is in the custody of the *thana*, the store where they are housed is called the *malkhana*;[148] a separate file that contains the 'seizure list' or 'recovery memo' of every seizure made by the *thana*; the '*zimanama* file' contains the receipts drawn by the police in the name of those who is granted the

---

[145] See Chapter 3 for a discussion on the challenges that the police face in its operations and how does it grapple with them in regard to the principles of legality.

[146] David H. Bayley, op. cit., pp. 153-54. The Law Commission in its Fourteenth Report had also proposed for widening the range of recruitment for witnesses (Vol. II, pp. 755-56).

The suspicion of the court on the integrity of policework is related to the compliance of the procedural requirements. The court has also been considerate about the nature of policework that can be reflected in the following observations regarding witness: It was held that the evidence of a *panch* witness cannot be discarded merely on the grounds that the witness did not belong to the same locality where the search was situated (*Abdul Sattar v. State of Maharashtra*, 1989 Cr LJ 430 [Bom.]). It has been seen that the court has been more sympathetic to the work processes of the police in victimless crimes. In a search where narcotic substances were recovered, it was held that merely because that the *panch* witnesses were not called from the same locality as required by s. 100(4) of the Code, the search cannot be vitiated unless grave prejudices could be shown thereby (*D.B. Thakur v. State of Gujarat*, 1995 Cr LJ 3751 [Guj.]). In a similar case of recovery of contraband article, where no independent witnesses could be associated with the search, taking into consideration of the circumstances of the raid by the police, it was held that it would amount only to an irregularity but could not vitiate the trial unless the non-joining of witnesses could be proved as an act of prejudice against the accused (*Som Nath v. State of Haryana*, 1995 Cr LJ 3322 [P&H]). In yet another such recovery by the police while on patrol duty, it did not find any independent witness to attest the recovery memo, the court in appreciation of the circumstances held that s. 100(4) Cr.P.C. was not a mandatory provision and statements of the police personnel inspired confidence and their sworn testimony could not be discarded only because they were official witnesses (*Krishan Lal v. State of Haryana*, 1996 Cr LJ 1401 [P&H]). **Ratanlal and Dhirajlal's The Code of Criminal Procedure**, op. cit., pp. 94-95.

[147] David H. Bayley, op. cit., p. 163.

[148] The *Malkhana Register*, i.e. *Property Register*, is maintained as per Rule 119 of the Orissa Police Manual. The kinds or classes of property that are entered in the register and so in the *malkhana* are stated in rule 120. They are stolen property, unclaimed property, suspicious property, intestate property, and exhibits and other property.

custody of any seizure; another file that maintains a record of the magistrate's orders concerning any seizure;[149] and a 'receipt voucher' file that documents the acknowledgment of the seized property that has been disposed of or released to any agency.[150] The upkeep of these documents in relation to the search and seizure are done by the Literate Constable (LC) at the *thana*.

Test Identification Parade

Evidence in regard to test identification parades (TIPs) are held in matters of person as well as property. The basic procedural norms for conducting TIPs in either case are essentially the same. A test identification is necessary

> Where any property recovered in a search, or otherwise, and alleged or suspected to have been stolen, is of a commonplace nature, in regard to the identification of which reasonable doubt could arise, a test identification shall be held...[151]
>
> Whenever it is necessary that a person suspected of any offence should be identified...[152]

The rules for a TIP apply

> only when suspects have to be confronted with witnesses who express themselves able to recognize them by appearance, although not previously acquainted with them.[153]

The method of conducting TIP is enumerated in the Police Manual[154] but the specificities of such processes as well as its significance has evolved out of case laws. The credibility of the evidence of identification depends obviously on the compliance of the procedural requirements, but it is greatly enhanced by certain given circumstances where the accused is unknown or not arrested on the spot. In such cases a TIP provides a very reliable piece of corroborative evidence. Moreover, mere evidence of identification in court in the absence of a prior TIP is of very little consequence.[155]

The test identification should be carried out in the presence of a magistrate, or when no magistrate is available and mostly in ordinary cases, in the presence of at least two or more respectable persons unconnected with the case, who shall be asked to satisfy themselves that the identification has been conducted under conditions precluding the possibility of collusion.[156]

Regarding the presence of a police officer and his duties in a TIP, rule 166(c) of the Police Manual shall be followed as also of the norms set by the courts. The police certainly arranges the parade – would call the persons who would be mixed up with the suspects,[157] the articles of suspicious property to be identified would be mixed up with other articles of a similar kind,[158] would also collect the *panch* witnesses who were to conduct the TIP. The witnesses that will be invited to identify, after doing so will be required to state by what marks or other means they were able to identify. The identification by each witness shall be made out of sight and hearing of the other identifying witnesses.[159] Rule 166(c) states that,

> An officer not below the rank of inspector shall, whenever possible, attend every test identification cases to see that it is properly conducted, and, unless the identification is held in the presence of a Magistrate, shall explain

---

[149] An order from the Court or the Collector or any other appropriate authority to the concerned *thana* for the release of the seized items under its custody, to be handed over to any as directed. Such orders are kept in record in M.O. File.

[150] See Appendix F for samples of the said documents prepared in the process of search and seizure.

[151] Rule 166(a), OPM.

[152] Rule 236(a), OPM.

[153] Rule 236(c), OPM.

[154] The procedures for the identification of property and suspected persons are provided in rules 166 and 236 of the OPM.

[155] *Birey v. State*, 1953 Cr LJ 1817 (All.); *Ram Bahadur v. State*, 1977 Cr LJ 1788 (All.). R. Deb, op. cit., pp. 77-78.

[156] Rules 166(b) and 236(a), OPM. *Bhaiyalal v. State of U.P.*, 1952 Cr LJ 143; *Ramkrishna v. State of Bombay*, 1955 Cr LJ 196 (SC); *In re Narayan Singh*, 1965 (2) Cr LJ 507 (M.P.). R. Deb, ibid, p. 78.

[157] The persons who would be called to be mixed up with the accused would of similar dress, age, religion and social status. Rule 236(a), OPM.

[158] Rule 166(d), OPM.

[159] Ibid; Rule 236(a), OPM.

> the procedure to the persons before whom the identification is held as well as to the witnesses and watch the proceedings on behalf of the police. In the absence of an inspector, the above duty will be performed by the investigating officer or any other sub-inspector but neither he nor the inspector should be present at the place of test while it is in progress.

Therefore, the police after arranging the TIP should completely obliterate themselves from the scene leaving *panch* witnesses solely in charge of the parade as evidence in regard to test identification parades held at the instance of the police and under their active supervision is inadmissible in evidence under s. 162 of Cr.P.C. Thus, once the *panch* witnesses were called for the purpose, the whole of the process of identification should be under the exclusive direction and supervision of the *panch* witnesses who would explain the purpose of the parade to the identifying witnesses, the statements involved in the process of identification would be statements made by the identifiers to the *panch* witnesses and would be outside the purview of s. 162 of the Code and hence be admissible in evidence.[160]

The precaution that need to be taken by the police is to prevent the identifying witness(es) from seeing the recovered property[161] or the suspects,[162] as the case may be, before the test identification. Particular care should also be taken to keep the suspect where the identifying witness cannot have access to it.[163] The case laws provide that wherever there arises the opportunity for the accused person(s) to be subject to a TIP, care should be taken that the physical identity of the concerned are not disclosed that is, their faces should be kept covered, at the time of the arrest and also wherever they are moved, that is, when taken to the court. While in custody, in the police lock-up (*hazat*), they be kept behind a '*purdha*' or screen, and be kept from the sight of the outsiders while in the jail. Even the photograph of the suspect to be identified should also not be shown to the identifying witness. The observance of these provisions before the conduct of the TIP need to be reflected in the Station Diary of the *thana* which should be produced before the Court to ensure the reliability of the TIP.[164]

The TIP has to be held without much delay[165] and before the accused goes on bail for once on bail, there is the chance of the accused not only being seen by the witnesses but they could also be influenced by the accused at large.[166] In case the above precautions are not taken that may greatly hamper the value of the evidence in identification.[167]

The police should ensure that all the procedural norms are strictly followed to ensure a fair conduct of the TIP and in that regard, the police manual also prescribes that the *panch* witnesses need to satisfy themselves. In the body of the report prepared in the event of the TIP, the persons

---

[160] *Ramkishan Mithanlal*, (1954) 57 Bom LR 600. R. Deb, op. cit.; **Ratanlal and Dhirajlal's The Code of Criminal Procedure**, op. cit., p. 233. Also see James Vadackumchery, **National Police Commission: Issues for Rethinking**, APH Publishing Corporation, New Delhi, 1998, pp. 66-67.

[161] Rule 166(a), OPM.

[162] Rule 236(a), OPM.

[163] Ibid.

[164] *State of U.P. v. Munni Dhimar*, 1954 Cr LJ 1819; *Parakinkar v. Tripura State*, 1955 Cr LJ 1292 (Tripura); *Asharfi v. State*, 1961 (1) Cr LJ 340 (All.). The absence of the precautionary measures in the conduct of the TIP may not necessarily result in the rejection of the TIP evidence. *Ramanathan v. State of T.N.*, AIR 1978 SC 1204: 1978 Cr LJ 1137. R. Deb, op. cit., pp. 79-81.

[165] The delay in conducting the TIP should be properly stated in the case diary so that no adverse presumption arises against such evidence. The Supreme Court in *Antar Singh v. State of Madhya Pradesh* rejected the test identification evidence due to unexplained delay of 12 months (AIR 1979 SC 1188: 1979 Cr LJ 715). R. Deb, ibid, pp. 79-80.

[166] *Hazara Singh v. State*, 52 CR LJ 482 (Cal.); *Ganga Singh v. State*, 1956 Cr LJ 181 (All.). R. Deb, ibid, p. 79.

[167] *In re Kamraj*, 1960 Cr LJ 358 (Mad.). The police oppose the bail where the TIP is still to be conducted but merely to hold the TIP bail cannot be refused. So in all consideration, it is imperative for the police to have the TIP as quickly as possible after the arrest of the accused. R. Deb, ibid, p. 80.

(*panch* witnesses) in whose presence the identification is held shall be required to testify in regard to the fairness of the manner in which the identification was effected.[168]

The empirical findings show that generally the procedural measures listed out are seldom followed so strictly in the conduct of the TIP. According to the information elicited from the complainant of a FIR of dacoity registered at the Sewaknagar *thana*, the identifying witnesses in this case had been called by the police on numerous instances wherever there was any apprehension of suspected robbers, to identify the same. On all such occasions including that where they finally identified the suspects as also some of their retrieved stolen property, the above stated measures were not followed during the TIP. The police too was present along with many other identifying witnesses who had gathered to identify their respective stolen property as also the accused who were huddled in one corner of the same room at the *thana* that apprehended the suspects and conducted the parade, which was situated in another district. The identification was done by the identifying witnesses in the presence and hearing of each other. The indignant complainant was unhappy over the apathy of the police and their false assurances on giving them the *zima* of their recovered property despite their utmost and ready cooperation extended at all times to the beck and call of the police.

The NPC has also taken note of the issue of restoration of stolen property to victims of crime. It observes that in current practice, the properties recovered by the police during investigation or otherwise are first transferred to court custody and their return to the rightful owner is ordered at a much later stage of the criminal proceedings. During the intervening period, there is considerable risk of (irreparable) damage to the property because of indifferent handling of the same at different stages of the processing of the case. The Commission has observed that successful detection of a property crime does not provide enough psychological satisfaction to the victim(s) unless the lost property is not only recovered but restored to them at the earliest. It has thus recommended for a change in the existing provisions in law to facilitate early return of the recovered property to the victim(s) concerned even at the stage of investigation, protected by appropriate bonds for their safe retention and later production in court.[169]

PROCESS AGAINST SUSPECT-AGENTS

Arrest:

The arrest and detention of a person for the purpose of investigation of an offence forms an integral part of the process of investigation.[170] Sections 41 and 154 of the Code deal with the powers of arrest by the police. The powers of the police to arrest a person without an order from a Magistrate and without a warrant as provided in s. 41(1) is confined to such persons who are accused or concerned with the offences that are enumerated under nine categories of cases (a-i) or are suspects thereof. The phraseology of this section entails on one hand a cognate character in consonant with s. 2(c) of the Code wherein the expression "cognizable offence" means an offence for which a police officer may arrest without warrant. Thus proceeding from s. 154, *vide* s. 156 of the Code, the derivative impression in correspondence with s. 41 is that the arrest of the accused is mandatory as part of the process of investigation. That is, from the moment a case is registered by the police of a cognizable offence they are empowered to arrest any person as part of the investigation into the case

[168] Rule 236(b), OPM. Such a certificate is indispensable to secure the reliability of the evidence in identification. *Asharfi v. State*, 1961 (1) Cr LJ 340 (All.). See R. Deb, ibid.

[169] **National Police Commission**, Fourth Report, June 1980, Chapter XXVII.

[170] *Baldev Singh*, 1975 Cr LJ 1662, 1665 (FB) (Punjab). See **Ratanlal and Dhirajlal's The Code of Criminal Procedure**, op. cit., p. 7.

'who has been concerned in the offence,' "or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists, of his having been so concerned."[171] This section is not exhaustive.

There are various other Acts, e.g. Arms Act, NDPS Act, SC/ST (Prevention of Atrocities) Act, POTA, etc. that comprise of the Special and Local Laws (SLL) which also confer such powers on police officers.[172] Many of these Acts that label certain behaviours against morals as offences are social laws that constitute the category of 'victimless crimes', where in nearly all such cases the police itself is the surrogate complainant.

Section 41 Cr.P.C. is a depository of general powers of the police officer to arrest but this power is subject to certain other provisions contained in the Code as well as in the special statute to which the Code is made applicable.[173] Section 41(1)(d) will have to be read in conjunction with the provisions contained in ss. 155 and 156. As s. 155(2) prohibits a police officer from investigating a non-cognizable offence without an order of the Magistrate, then in respect of such an offence a police official cannot exercise the powers contained in s. 41(1)(d). But in case of a person committing or accused of committing a non-cognizable offence in the presence of a police officer does not reveal its name and residence or does so that is believed to be false, the concerned person may then be taken into custody in order that the same may be ascertained.[174] Even in cases u/s. 34 Indian Police Act, 1861, the police shall exercise their powers of arrest without warrant.[175] It is not necessary that arrest is effected only on the occasion of the commission of an offence. The police have also been armed with extensive powers to prevent commission of cognizable offences (ss. 149-151), i.e. offences for which they could arrest without a warrant. If the person so concerned is believed to have "a design to commit any cognizable offence" and "cannot be otherwise prevented," the police officer can forthwith arrest "the person so designing" (s. 151).[176] Even in cases of bad livelihood, an officer may arrest any person belonging to one or more categories of persons as specified in s. 109 or s. 110 Cr.P.C.[177]

The powers given here are very wide indeed and their exercise is ordinarily summary. They suggest that the determination of the grounds for making the arrest is entirely left to the discretion of the police officer. From the very urgency of the cases the police have to act on their own initiative and of their own knowledge. The law makes it incumbent upon the police officer to form his opinion on the expressions "reasonable complaint," "credible information," "reasonable suspicion," and how it is to be constituted is "to depend upon circumstances of the particular case."[178] Even in the absence of formal complaint too, on suspicion can the police effect an arrest. An arrest made by a

---

[171] Section 41(1)(a), Cr.P.C.

[172] Cognizable offences are broadly categorised as those falling either under the 'Indian Penal Code' (IPC) or under the 'Special and Local Laws' (SLL). According to the *Crime in India* Report, offences under the IPC are categorised into seven major heads (namely, crimes against life/body, property, public order, women, children, economic crimes, and other IPC crimes) and the SLL comprises of mainly twenty-two Acts. See **Crime in India – 2002**, National Crime Records Bureau (NCRB), Ministry of Home Affairs (MHA), Government of India (GOI), New Delhi, 2004, p. 27.

[173] *Avinash Madhukar Mukhedkar v. State of Maharashtra*, 1983 Cr LJ 1833 (Bom.). See **Ratanlal and Dhirajlal's The Code of Criminal Procedure**, op. cit., p. 54.

[174] Section 42(1), Cr.P.C.

[175] As provided in rule 225 of the Orissa Police Manual. Section 34 of the Police Act states that "it shall be lawful for any police officer to take into custody, without a warrant, any person who within his view commits any of such offences namely, slaughtering cattle, furious riding, etc., cruelty to animals, obstructing and causing inconvenience or danger to the public, throwing dirt into the street, being found drunk or riotous, indecent exposure of person, neglect to protect dangerous places, unauthorised sale of tickets for admission to a place of entertainment."

[176] *Jagdish Chander Bhatia v. State*, 1983 Cr LJ NOC 235 (Del.). See **Ratanlal and Dhirajlal's The Code of Criminal Procedure**, op. cit., pp. 205-06.

[177] Section 41(2), Cr.P.C. Also see rules 185, 403 and 404, OPM.

[178] AIR 1950 Madh. Bharat 83. Arvind Verma, op. cit., p. 68.

police officer must be based upon definite facts and materials placed before it, which the officer must consider for itself, before it can take any action. It is not enough for arrest of a person under this section that there was likelihood of cognizable offence being committed in the future.[179] The existence of a warrant is equivalent to credible information,[180] and it matters little that the warrant is not entrusted to the police officer.[181]

The police in India being endowed with such latitude to ascertain situations that Professor Waite explains it as follows:

> Strange as it may be, the fact that the person arrested is in truth guilty, and guilty even of the particular felony for which the arrest was made, does not justify the arrest. The arresting officer may be quite right, may have apprehended a felon who for the sake of society should have been apprehended, may have made the arrest without undue influence and with all the requisite formality, and may nevertheless be guilty of an unlawful arrest. The rule is that an officer may lawfully arrest even an innocent person when he believes and has reasonable ground to believe that the person is guilty of a felony. But for some inexplicable reasons, it is not the law that he may lawfully arrest a person whom the court opines he had not reasonable ground to suspect.[182]

Thus in practice the duty of the police officer are not just ministerial, but that before the power of arrest is exercised, it has to apply its own mind in forming an opinion as entitled on the material and facts before it for the exercise of an independent judgment.[183] Similarly in case of preventive arrests or detention in custody as prescribed in s. 151 of the Code, the judgment whether a person is likely to commit an offence is thus entirely that of the police officer and it is also up to the officer's discretion whether the offence cannot be prevented without resorting to arrest. The police make constant use of this provision for maintenance of law and order, that is, to prevent any breach of peace that may be caused by an affray or rioting which are cognizable offences. Making arrests or detaining in police custody people till the threat of disturbance has passed is commonplace and it is mostly used in cases of political demonstrations or for managing large-scale assemblies. Though the court laid down that

> where no emergency for arrest which this section contemplates is shown to have existed, the attempt to arrest on part of the police is not only 'not strictly justifiable by law' but is illegal[184]

but in a subsequent ruling, the judges acknowledged that

> it is not open to the honourable court exercising jurisdiction...to go into the question whether in fact the police officer was justified in concluding that the necessity contemplated by this section really existed. The discretion is vested solely in the police officer and that discretion cannot be questioned.[185]

Therefore with great discretion embodied in these laws, caution and watchfulness are needed in exercising the wide powers conferred upon the executing agencies. Considering the case of victimless crimes where the police action is based not on the complaints from any aggrieved party and that of the role of the police in the enforcement of an array of social and economic laws, it shows that there is an overreach of criminal laws that is applied to a wide and varied range of activities from regulation of automobile traffic to anti-terrorism. Hence, whether or not to make preventive arrests, whether or not to arrest a person during investigation, and whether or not to pursue minor

---

[179] *Easih Mia*, (1962) 1 CR LJ 673. See **Ratanlal and Dhirajlal's The Code of Criminal Procedure**, op. cit., p. 54.
[180] *Gopal Singh*, (1913) 36 All 6. See **Ratanlal and Dhirajlal's The Code of Criminal Procedure**, ibid.
[181] *Ratna Mudali*, (1917) 40 Mad 1028. See **Ratanlal and Dhirajlal's The Code of Criminal Procedure**, ibid.
[182] Syed M. Afzal Qadri, op. cit., p. 139.
[183] The information that is received by the police officer need not to be a sworn information. *Subodh Chandra Roy Choudhri v. King Emperor*, AIR 1925 Cal. 278; *Devi Dayal v. King Emperor*, AIR 1929 Lah. 720. Syed M. Afzal Qadri, ibid, pp. 66, 98.
[184] *Gaman v. Emperor*, 1930. Arvind Verma, op. cit., p. 68.
[185] *Om Prakash*, 51, Cr LJ 143 (Mad.). Arvind Verma, ibid, p. 69.

infractions of law involves considerable discretionary powers for the police to exercise while discharging its functions.[186]

The police has no legal power to summon before it any person accused of an offence. The only manner in which the police can compel the attendance of such a person before it is by arrest.[187] The word "arrest" when used in its ordinary and natural sense means the apprehension or restraint or the deprivation of one's personal liberty to go where it pleases.[188] When used in the legal sense in the procedure connected with criminal offences, an arrest consists of taking into custody of another person under authority empowered by law, for the purpose of holding or detaining the same to answer a criminal charge or for preventing the commission of a cognizable offence. The words "custody" and "arrest" are not synonymous. In every arrest, there is custody but not *vice-versa* as custody is incident to arrest.[189]

The 'how arrest is made' as provided in s. 46 of the Code relates to actual seizure or touch of a person's body with a view to arresting is necessary. If the method of arrest is not performed as prescribed by s. 46, the arrest would be nugatory.[190] Arrest need not be by handcuffing a person but could be complete even by spoken words, unless the person resists or attempts to evade arrest,[191] in which case s. 46(2) empowers the police to use "all means" in effecting the arrest.[192] A police officer can also effect the arrest of a person by issuing an order to that effect by means of a telephonic message.[193]

This authority to arrest endows the officer with the power to significantly restrict individual liberty. The denial of the liberty of a person is a serious matter and is being viewed with all seriousness as such power if improperly utilised may result in irreparable damage.[194] Hence the concern is in regard to the manner of enforcement of laws by the police as it wields enormous power over life and liberty and so the obvious likelihood of several attendant malpractices or allegations of the same.[195]

According to the latest Crime in India Report, the all-India percentage of IPC crimes to total cognizable crimes during the year 2002 was merely 32 and the rest were non-IPC cases, i.e. SLL crimes. The all-India percentage variation in the arrests made under IPC crimes in the same year over the previous year was a marginal increase of 0.9, despite an equivalent percentage of decline in IPC crimes. Whereas the figures for Orissa was a considerable increase in the arrests by 9.9 percent as against an increase of 2.3 percent in IPC crimes during the same period. The all-India

---

[186] Syed M. Afzal Qadri, op. cit., p. 66; S.R. Sankaran, *Police Reforms: Need to Review Power to Arrest*, **Economic and Political Weekly**, Vol. XXXV, No. 47, November 18, 2000, pp. 4082-83.

[187] Rule 221(a), OPM.

[188] Rule 222 of the OPM states that "requiring a person's attendance by letter and deputing a constable to accompany him, with orders to prevent him from speaking to anyone, amounts to an arrest."

[189] Rule 222 of the OPM also defines "police custody" as "...custody on the authority of the police, every person kept in attendance to answer a charge in such a way that he is practically deprived of freedom shall be considered as in custody." See **Ratanlal and Dhirajlal's The Code of Criminal Procedure**, op. cit., pp. 54, 57.

[190] *Roshan Beebi v. Joint Secretary to Government of Tamil Nadu*, 1984 Cr LJ 134 Mad. (FB): AIR 1984 NOC 103 (Mad.); *Kutlej Singh v. Circle Inspector of Police*, 1992 Cr LJ 1173 (Knt.). See **Ratanlal and Dhirajlal's The Code of Criminal Procedure**, ibid, p. 57.

[191] Section 46(1), Cr.P.C. *Birendra Kumar Rai v. Union of India*, 1992 Cr LJ 3866 (All.). See **Ratanlal and Dhirajlal's The Code of Criminal Procedure**, ibid, p. 58.

[192] *Nazir*, (1952) 1 All 445: AIR 1951 All 3 FB. The expression "all means" has a wider connotation, which includes, besides the minimum force necessary, the taking of assistance from others in effecting the arrest. See **Ratanlal and Dhirajlal's The Code of Criminal Procedure**, ibid.

[193] Section 46(1)(i), Cr.P.C.; *Maharani of Nabha v. Province of Madras*, (1942) Mad 696. See **Ratanlal and Dhirajlal's The Code of Criminal Procedure**, ibid, p. 55.

[194] P. Devlin, **The Criminal Prosecution in England**, Oxford University Press, Oxford, 1960, pp. 12-13, in Syed M. Afzal Qadri, op. cit., p. 138.

[195] S.R. Sankaran, op. cit., p. 4083.

increase in the arrests during 2002 over the previous year under SLL crimes was 4.3 percent as against an increase of 0.9 percent in such crimes during that period. Though the national average of the arrest per case under IPC crimes (1.5) is higher than that under SLL (1.1), the corresponding figures for Orissa were 1.6 and 1.3, respectively. More specifically, in Orissa, the arrests under the Gambling Act and Excise Act alone constitute to be 78 percent of the total arrests made under SLL crimes during the year 2002.[196] Most of the arrests under such laws are primarily made on the basis of information and intelligence available to the police from their own undisclosed sources. In the absence of any complaint for such crimes as there is seldom any victim, the police play the role of the surrogate complainant. Thus arrests and detentions under such laws are prone to criticism and controversy, such as abuse of authority and excesses by the police.[197]

The National Police Commission observed that police practice of making arrests indiscriminately in the course of investigation is a source of considerable harassment and annoyance to the persons and their families. It further noted that a good number of arrests the police make are not really necessary from many points of view.[198] The Commission while referring to the quality of arrests dwelt at length on the scope for corruption and malpractices arising from the power of arrest available to the police in India. It also observed that by and large, nearly 60 percent of the arrests were either unnecessary or unjustified.[199]

The fact is that a majority of the arrests are for minor offences and are not justified from the point of view of crime prevention or for the prosecution of the accused. Research evidence obtained from official police documents, interviews of the police and also that of the public, especially the accounts of those affected by the former's action, all point towards the existence of inconsistency, differentiation and discrimination in the exercise of police discretion to arrest or not, particularly in respect of specific legislations, e.g. on gambling, bad livelihood, etc. Arrest without any significant justification is one of the serious encroachments upon the liberty of the subjects which can well be contemplated.[200] Thus no arrest should be made in a routine manner under the protective label of lawful executions. The National Police Commission reminds that arrest is not mandatory, rather is only discretionary under the law.[201] The Apex Court in *Joginder Kumar's* case endorsed and reiterated the observation of the Commission and emphasised that no arrest can be made merely because it is lawful for the police officer to do so. It was clearly stated by the court that the existence of power to arrest is one thing but the justification for the exercise of it is quite another.[202]

The Orissa Police Manual provides that the IO may effect an arrest unless he thinks that "he has received sufficient information to justify action u/s. 41, Cr.P.C...The stage of proceeding at which such a step is expedient is left to his discretion, but unnecessary arrests shall be avoided. In

---

[196] See **Crime in India – 2002**, op. cit., Table 1.2, p. 44; Table 1.5, p. 49; Table 1.6, p. 50; Table 1.7, p. 52; Table 12.1, p. 488; Table 12.3, p. 490; Table 12.5, p. 503; Table 12.7, p. 505; Table 12.9, p. 518.

[197] S.R. Sankaran, op. cit.; Ved Marwah, op, cit., p. 31.

[198] **National Police Commission**, Fourth Report, June 1980, Chapter XXVII, para 27.24, p. 7.

[199] **National Police Commission**, Third Report, January 1980, paras 22.20-22.28, pp. 30-32.

[200] *Ramprit v. King Emperor*, AIR 1926 Pat. 560. Syed M. Afzal Qadri, op. cit., p. 66.

[201] **National Police Commission**, Fourth Report, op. cit.

[202] A full bench of five judges of the Allahabad High Court [*Amravati v. State of U.P.*, 1996 Cr LJ 1347 (All.) FB] held through Judge Polak Basu that on disclosure of a cognizable offence, the arrest of the offender is a 'must' as laid down in *Vinod Narain (Dr.) v. State of U.P.* [1996 Cr LJ 1309 (All.)]. However, Judge M. Katju of the same High Court differed with the ruling, and was of the opinion that arrest is not a 'must' in a cognizable offence following the Supreme Court decision on Joginder Kumar's case [*Joginder Kumar v. State of U.P. and others*, AIR 1994 SC 1349: 1994 Cr LJ 1981] and referred the case to the Chief Justice for constituting a larger bench for reconsidering the decision in *Vinod Narain (Dr.) v. State of U.P.* See **Ratanlal and Dhirajlal's The Code of Criminal Procedure**, op. cit., pp. 60-61; S.R. Sankaran, op. cit.; S.R. Sankaran, *Criminal Justice System: A Framework for Reforms*, **Economic and Political Weekly**, Vol. XXXIV, No. 22, May 29 – June 4, 1999, p. 1318.

petty cases, arrest shall not be on mere suspicion."[203] Therefore, no arrest should be made without a reasonable satisfaction being reached after some investigation as to the genuineness and bonafide of a complaint and a reasonable belief both as to the person's complicity and the need to effect arrest. The emphasis should, in fact, be on the competence of the police in the investigation of the case and not on the power of arrest. The question of arrest should thus arise only after an investigation and is 'an incidental task in the entire exercise of investigation'.[204]

While s. 169 of the Code conveys the impression that in anticipation without any sufficient evidence can the police take a person into custody, its counterpart, s. 170 show that the accused arrested in every non-bailable case or that according to the subjective opinion of the police even in bailable case on the basis of sufficient evidence or reasonable ground be forwarded under custody to the Magistrate. The prevalence of such provisions of arrests protects a police officer who makes a wrong arrest under a bonafide mistake.[205] The arrest even if illegal does not affect the trial of the case.[206] There was the recommendation of the NPC for changes in ss. 2(c), 2(l), and 170 Cr.P.C.[207] that would help in changing the existing attitude of the police towards arrests and ensure that the arrest of a person is governed by public interest and the actual requirements of an investigation and not by mere desire of the police to show off their power.[208] But the nature of the discretion in the powers of arrest remains to be intact and the effect of recommendations in considering a regulated and controlled exercise of such powers is quite obscure as statutory and constitutional provisions have failed to safeguard the citizen from the likelihood of being "deprived of his life or personal liberty."

The provisions in the Constitution, the codified laws, and case laws that are in place as effective safeguards against any infringement of the fundamental human right to life and personal liberty,[209] are cognate in nature reaffirming the sanctity of such procedural requirements as based on the rule of law.

> Section 50 of the Code enjoins on every police officer that the person arrested without any warrant should immediately be intimated the full particulars of the offence and the grounds of his arrest.[210] The police officer cannot keep the reasons to itself; a citizen is entitled to know them, the grounds of his arrest. This is a constitutional right guaranteed under Art. 22(1) of the Constitution. S. 50 of the Code is in conformity with Art. 22(1) of the Constitution. The section confers a valuable right and non-compliance with it amounts to disregard of the procedure established by law.[211] The Constitution in the same clause of the article provides that the arrestee shall not be denied the right to consult, and to be defended by, a legal practitioner of his choice.

---

[203] Rule 171, OPM.

[204] S.R. Sankaran, op. cit.; Ved Marwah, op. cit.

[205] *Bhawoo Jivaji v. Mulji Dayal*, (1888) 12 Bom 377; *Dalip*, (1896) 18 All 246. See **Ratanlal and Dhirajlal's The Code of Criminal Procedure**, op. cit., p. 54.

[206] *Madho Dhobi*, (1903) 31 Cal 557; *Ravalu Kesigadu*, (1902) 26 Mad 124. See **Ratanlal and Dhirajlal's The Code of Criminal Procedure**, ibid.

[207] As suggested in its Third Report, paras 22.26 - 22.28, pp. 31-32.

[208] **National Police Commission**, Fourth Report, Chapter XXVII, para 27.24, p. 7.

[209] The meaning of Article 21 of the Constitution of India does not in any respect assume any differential character as the expression "life and personal liberty" remains to be an inalienable right also that of an accused. It includes human dignity, thus it encompasses within itself a guarantee against any violation of that value by the state or its functionaries.

[210] See in re *Madhu Limaye*, AIR 1969 SC 1014: 1969 Cr LJ 1440. See also *Christie v. Leachinsky*, (1947) 1 All ER 567. See **Ratanlal and Dhirajlal's The Code of Criminal Procedure**, op. cit., p. 60.

[211] *Govind Prasad v. W.B.*, 1975 Cr LJ 1249 (Cal.). It has been held in *Vimal Kumar Sharma v. State of U.P.* [1995 Cr LJ 2336 (All.)] that a person who has been arrested must be informed of the grounds of arrest with greatest despatch as soon as possible however, it may not be immediately. A year later a Full Bench of the Allahabad High Court [*Vikram v. State*, 1996 Cr LJ 1536 (All.)] held that the arrested person must be informed of the bare necessary facts leading to his arrest including the facts that in respect of whom and by whom the offence is said to be committed, date, time and place of occurrence of the offence and if this is contested by the accused of being not informed, it is the burden of the prosecution to establish that the requirements of s. 50(1) Cr.P.C. and Art. 22(1) of the Constitution have been fully complied with. See **Ratanlal and Dhirajlal's The Code of Criminal Procedure**, ibid.

Section 51 of the Code prescribes for passing a receipt in respect of articles seized, other than necessary wearing-apparel, from the search of the person arrested under a warrant which does not provide for the taking of bail, or under a warrant which provides for the taking of bail but the person arrested cannot furnish bail, as a precautionary measure for accounting for the articles.[212] Where the accused is not given the grounds of such arrest as per section 50 of the Code, the search under such conditions becomes illegal.[213]

Section 54 of the Code confers the right on an arrested person to have his medical examination done. It is the duty of the Magistrate to inform the arrested person about his right to get himself medically checked and direct the examination of the body of such person by a registered medical practitioner, when an arrested person alleges, either when he is produced before a Magistrate or at any time during the period of his detention in custody that the examination of his body will afford evidence which will disprove the commission by him of any offence or which will establish the commission by any other person of any offence against his body.[214]

Section 56, 57 and 76 of Cr.P.C. has the constitutional sanction *vide* Art. 22(2) of the Constitution of India which directs that the person arrested and detained in custody shall be produced before the nearest Magistrate within a period of 24 hours of such arrest excluding the time necessary for journey from the place of arrest to the Court of the Magistrate. Section 56 provides that a police officer shall on making an arrest without warrant produce the concerned before a Magistrate having jurisdiction in the case or before the OIC of the *thana*. Section 57 echoes clause 2 of Art. 22, mentioned above, but it is to be read with s. 167, as stated in rule 172(a) of the Orissa Police Manual that requires that an accused shall be sent forthwith to the nearest magistrate, together with the copy of the entries in the case diary, within the stipulated time period. The counterpart of s. 57, s. 76 becomes applicable in case of a person arrested under a warrant. Section 57 and 76 empowers the police officer to keep the arrested person in its custody for a period not exceeding twenty-four hours for investigation in relation to the case for which such arrest has taken place.[215]

Section 59 of the Code requires the OICs of *thanas* to report to the District Magistrate or to the SDJM, the cases of all persons arrested without warrant.

Through the creative interpretation of the fundamental rights guaranteed by the Constitution, a great deal of human rights jurisprudence was developed by the Indian judiciary. In a landmark judgment, over and above the existing procedural safeguards, the Supreme Court of India in *D.K. Basu v. State of West Bengal*[216] felt necessary as it laid down that in addition to the statutory and constitutional requirements, it would be useful and effective to structure an appropriate mechanism for contemporaneous recording and notification of all cases of arrest and detention to bring in transparency and accountability. To that effect, the court issued 11 commandments "to be followed in all cases of arrest or detention till legal provisions are made in that behalf as preventive measures."[217] The judges observed that "failure to comply with the requirements...shall apart from rendering the concerned official liable for departmental action, also render him liable to be punished for contempt of court and the proceedings for contempt of court may be instituted in any High Court of the country having territorial jurisdiction over the matter."[218] They further emphasised that the requirements referred flow from Arts. 21 and 22(1) of the Constitution and need to be strictly followed and these would apply with equal force to the other governmental agencies also having powers of arrest. The court clarified that the requirements are in addition to the constitutional and statutory safeguards and do not detract from various other directions[219] given by the court from time to time in connection with the safeguarding of the rights and dignity of the arrestee.[220]

---

[12] All the norms of search as discussed earlier also applies here and is necessary to be followed while acting under this section.

[13] *Rabindranath Prusty v. Orissa*, 1984 Cr LJ 1392 (Ori.). See **Ratanlal and Dhirajlal's The Code of Criminal Procedure**, op. cit., p. 61.

[14] This also includes commission of offence on the body of the arrested person by the police. Though this section also empowers the Magistrate to take into consideration the motive of the arrested on such demands as legitimate or a ploy to disturb or defeat the ends of justice.

Rule 221(b) of the Orissa Police Manual also provides such procedural safeguards to a person arrested by the police but herein, it enjoins upon the investigating officer to make enquiry about the welfare of the arrested person from the arrested per se.

[15] See section 167, Cr.P.C. The Orissa Police Manual *vide* rule 240 provides guidelines for the escort of the arrestee(s) to and from the *thanas* or posts to any place, either while being forwarded to the court, or when taken for medical examination, etc.

[16] *D.K. Basu v. State of West Bengal*, AIR 1997 SC 610: 1997 1 SCC 416.

[17] See Appendix G for the guidelines for arrest and detention as issued by the Supreme Court in *D.K. Basu's* case and also the provision of the insertion of a new section 50A, *vide* The Code of Criminal Procedure (Amendment) Bill, 2005, that contains certain provisions as enumerated by the SC in *D.K. Basu's* case.

[18] Para 37 in the Judgment of *D.K. Basu* case; <http://www.vakilno1.com/judgements/landmark_judgement/j16.htm>

[19] For instance, the Bombay High Court in *Christian Community Welfare Council of India v. Government of Maharashtra* [1995 Cr LJ 4223 (Bom.)] directed the State Government that each person after arrest be medically examined and details of the report be entered in the Station Diary. It was held in *Amar Nath* case [(1883) 5 All 318] that when an arrest is made under a warrant, the police officer must notify the substance thereof to the person to be arrested, or if so required, must show him the warrant (s. 75), else the arrest is not legal. See **Ratanlal and Dhirajlal's The Code of Criminal Procedure**, op. cit., p. 58.

[20] Para 39 in the Judgment of *D.K. Basu* case; <http://www.alrc.net/doc/mainfile.php/cl_india/143/#1>

> In consonance with s. 160(1) of the code, it is held that females be not arrested without presence of a lady constable and further no female be arrested after sun-set and separate lock-ups be provided for them.[221]

The Practice:

According to the Police Commission 1902-03, the colonial police used the powers of arrest in a way that afforded serious opportunity for malpractices. In the post-colonial constitutional democracy, according to the third report of the National Police Commission, the police powers of arrest and detention is identified as one of the chief sources of corruption in the police, and more than two decades later, with additional procedural safeguards, the situation does not appear to have improved much. The unarmed, civil police regularly flout these procedures with ostensible impunity. So needless to express awe at such societies where the role of the armed or para-military forces that has become an integral part of the civil administration operating under the Armed Forces Special Powers Act commit gruesome atrocities.

The researcher came across a number of cases of deviations in police practices. It is necessary to document some such deviations,[222] the findings of which are based on experiences of the 'publics' associated with the selected complaints, registered as FIRs or entries made in the Station Diary, opinions of the police and also that of the general public.

Case 1

In a rape case registered at Birjodi, the accounts of both the accused and the victim's father about the developments as it actually took place after the matter was reported to the police one morning were without any inconsistency.[223] The accused was immediately 'arrested' from his house the same day and was put in the *hazat* (lock-up). But entries in the SD of the *thana* related to this case show gross discrepancies in police conduct. It shows that the accused was arrested in the evening of the 3rd day. There is no conflict between the versions of the 'publics'[224] and the matter reflected in the SD over the fact that the accused and the victim were taken for medico-legal examination (MLC) in the early morning of the next day of reporting. According to the 'publics', they returned to the *thana* the same day after the MLC and the accused was put back in the *hazat* while the victim and her father were directed to go home. But there was no entry in the SD to that effect. Instead, an entry made in the evening of the 3rd day merely convey that a constable produced the accused before the OIC after getting him medically examined and the following entry inform the arrest of the accused. More so, it is quite intriguing that the crucial generic entry regarding 'the return of the escort party along with the 'publics' after their MLC' was not only conspicuously missing from the SD but also of the unexplained delay in producing the accused before the OIC of the *thana* in the evening of the 3rd day, since taken for MLC in the morning of the previous day. Another crucial entry that was missing in the SD was the fact about both the accused and the victim forwarded to the court on the morning of the 4th day and another very distinct irregularity was that the opening entry of the SD (that is usually made at 0800 hours) of the same day had a mention of one accused (in obvious reference to the accused of this case) in the *hazat* but the immediate subsequent entry stated that "there is no accused in the *hazat*".

It is pertinent to take into perspective the cognizant infirmity in regard to the arrest and custody of the accused. In *Munsamy Shunmugam v. Collector of Customs* case, it was held that,

> the concept of being in custody for enquiry cannot be equated with concept of actual arrest as the arrestees were earlier apprehended for interrogation on account of recovery of contraband from their possession and the next day they were arrested and produced before the Magistrate. Thus, apprehension followed by enquiry or interrogation and actual arrest were considered as two distinct aspects. [225]

In Case 1, the arrest was shown nearly three days after being taken into custody without ever being produced before the Magistrate. The fact of custody was also not reflected in the SD. More so, the recent observation of the Madras High Court in cognizance of a situation, severally similar to both the cases, is as follows:

---

[221] *Christian Community Welfare Council of India v. Government of Maharashtra*, 1995 Cr LJ 4223 (Bom.). See **Ratanlal and Dhirajlal's The Code of Criminal Procedure**, op. cit., p. 58. See the discussion in the text of fn. 235.

[222] Though there is copious evidence on police deviations from all the four *thanas*, the researcher would concentrate on one *thana* to analyse the regularity of such deviations.

[223] This case has already been dealt with in the previous chapter, from a different perspective, wherein it may be recalled that the victim and her father were compelled to rewrite the complainant. The official records show that the FIR was officially registered the next day morning.

[224] The victim's father and the accused of this case.

[225] 1995 Cr LJ 1740 (Bom.). See **Ratanlal and Dhirajlal's The Code of Criminal Procedure**, op. cit., p. 64.

> ...when the police had already seized the contraband which action was enough to file a case of possession of the contraband for commercial purposes. The accused should have first been produced before a magistrate, the police should have got them remanded and then taken them into custody.[226]

It can thus be observed that the detention of the accused in custody of the Birjodi police beyond the period of 24 hours without the authority of a Magistrate was in violation of the statutory and constitutional provisions [Art. 22(2) of the Indian Constitution and ss. 56 and 57 of the Code]. However, to give an impression of legality of its actions, the accused's detention and arrest were not reflected correctly in the SD as it actually took place.

Case 2

In the case of two FIRs filed by two parties against each other at Birjodi *thana*, similar irregularities were found in actual police practice. The allegations made by either sides were related to offences against public tranquillity and property, of indecent behaviour, and that affecting the human body. On the basis of the interviews of the 'publics' associated with this twin cases, the first FIR was filed just before midnight and the second FIR in the morning of the following day. This was found to be truly reflected in the entries in the SD. The common submissions of the 'publics' of both the FIRs that was not consistent with the entries of the SD was regarding the date and time of arrest. The police during its spot visit in response to the first FIR instead saw that the informant of the first FIR and its associates had seriously attacked the persons it had named as accused. On the basis of *prima facie* evidence, all the offenders that could be traced at that point of time were arrested from their place of residence much before the dawn of next day and put inside the lock-up of the *thana*. They thus became the accused in the second FIR and its complainant was the accused in the first FIR. Thereafter, almost the whole of the day saw attempts by the *bhadralok* of the village to compromise the dispute as also an attempt by one of the accused of the second FIR through a senior police officer of the area who tried to prevent the filing of the second FIR. When it all failed, the police was left with no option but to legally proceed with the cases. It had to therefore couch its actions in legalistic terms: the entries in the SD showed the time of arrest as late in the following day of the filing of the first FIR whereas it had actually taken place before dawn and in the early morning of the next day (that was more than 24 hours of actual arrest) they were all forwarded to the Court.

Herein, a repeat of the deviance by the same police of keeping the accused persons in custody without any valid or legitimate reason for more than 24 hours. It is evident that the police tried to force a compromise between the disputing parties, failing which it had to take the legal course but in the process the *post hoc* accounts were embellished in legally acceptable terms.

Case 3

The deviance of the Birjodi police in regard to detention seems to be pathological. In one of two cases dealt herein, two females, a mother and her ailing daughter, who had a new-born child along with her, were illegally detained on the charges of cruelty by the former's daughter-in-law. In the second case of alleged kidnapping, both the daughter of the informant of the complaint and the accused boy were wrongfully detained.[227]

In the 'subjection to cruelty' case, the women accused were brought to the *thana* by a male constable without informing of the reason and detained in the rainy night with a lady constable on guard on the verandah of the *thana* without any food, not even for the child, till the next day morning, when they were all forwarded to the court.[228]

Going by the accounts of the 'publics'[229] concerned in the case of kidnapping, it was almost a week after the complaint was lodged by the informant that his daughter and the accused abductor surrendered before a senior police officer of the region as efforts to compromise the matter did not succeed because of the informant not relenting on its demand to get back his daughter who was not only a minor but also of the social pressures as the accused belonged to a lower caste. The same day of their surrender, they were handed over to the OIC of the *thana*. Since then till the third day, the accused was put inside the *hazat* and the girl was detained on the verandah of the *thana* and that only during the nights, she was shifted to a room in the precincts of the *thana* with a lady constable on guard all the time. On the third day, they were taken for MLC and brought back to the *thana* and kept under the same way in detention. On the fourth day, as the police failed to produce them before the court, they were forwarded to the Magistrate in the morning of the next day. The station diary entries in regard to the development of this case reveals certain conspicuous irregularities of the police. Where it was established that the duo surrendered a week after the complaint, the SD entries show that the accused and the girl been sent for MLC the very next day morning after the FIR was lodged. The station diary gives no information of

---

[226] A. Subramani, *Police facing contempt action in Serijabanu case*, in **The Hindu**, Delhi, Saturday, November 22, 2003, p. 7.

[227] According to the complainant, the father of the girl, the OIC advised him to rewrite the FIR for making it a case of kidnapping. Generally, in cases of elopement, complaints are filed with charges of kidnapping.

[228] The court granted immediate bail to the sick woman with the newly-born child.

[229] Information was elicited from the complainant and his wife, the accused and his father and uncle, and the village *gram rakhi*.

the surrender and subsequent hand over to the Birjodi police, nor about how the police got hold of the accused and the girl that they were sent for MLC. More so, no explanation is recorded in the SD in regard to the inordinate delay in the return of the escort party and the duo, after more than two days since they left for the MLC.

The conduct of the police in regard to the detention of the ladies in the former case is questionable as it appears to be an infringement of the case law as provided in *Christian Community Welfare Council of India v. Government of Maharashtra.*[230] It is pertinent to note that no lady personnel was found to have been on duty at any of the *thanas* during the night. In the latter case, considering the unaccounted prolonged detention of the accused and the girl, who was supposed to have eloped with the former, for a period of five days at the *thana* without any valid reason shows the regularity with which the powers of arrest are flouted and evidently, the complicity of supervisory officers in such incidents. It is imperative to instantiate the nature and extent of omissions and commissions of the police with reference to the court's observations in the following two cases:

- Where a person was kept at the police-station since the morning of 27-9-90 but the arrest was shown to have been made only on 28-9-90, it was held that even if the police officer touches the body of the person to be arrested, or if he is confined or kept in the police station, or his movements are restricted within the precincts of a police station, it is undoubtedly a case of arrest and thus he was actually arrested on 27-9-90.[231]
- In *Serijabanu* case, Justice M. Karpagavinayagam of the Madras High Court while passing severe strictures on the police involved in the arrest of Serijabanu and her mother, asked the police chief, "what made you confine the women to a police station and bring them all the way to Chennai during night, without sleep? They may be offenders, but they are ladies. There was a State circular which said women should not be confined in police stations, are you aware of it."[232]

The discussion here concerns the police conduct while dealing with women and the issue of illegal detention.

All these said violations occurred despite the procedural safeguards that are aimed at protecting the women's rights and their protection in police affairs. For instance, there is a 1994 Bombay High Court judgment which lays down that women can't be arrested at night. For a woman on the call of law, a woman police has to do the honours. Even with regard to searches and physical checks or medical examinations of a woman arrestee, it has to be a woman police or doctor, as the case may be, *vide* ss. 47(2), 51(2), 53(2) of the Code. But a Supreme Court judgment in October, 2003 that has effaced such protective procedural laws, has been dubbed as a judgement that is set to overturn the modicum of decency offered to women under arrest. The new case law provides that if a woman police is not available, then their male counterparts can do the job, even at night. But it still retains the principle of ensuring the protection of women arrestee as the exemption of the presence of policewomen is conditional, only when the arresting officer is "reasonably satisfied" that a policewoman cannot be made available. While police officers welcome this as timely that would facilitate their work in the course of a criminal investigation, there has been voluble and loud criticism of such ruling. The argument is that this new liberal provision of arrest by male personnel increases the vulnerability of the women to police abuse. With incidents like the custodial death of Farida Tasleem Syed, whose postmortem report revealed injuries on the body that were consistent with custodial violence and gang rape, taking place in the same year that this ruling was made, such inhibitions and skepticism do not appear to be unfounded.

---

[230] 1995 Cr LJ 4223 (Bom.). See **Ratanlal and Dhirajlal's The Code of Criminal Procedure**, op. cit., p. 58. See the text of fn. 221.

[231] *Kultej Singh v. Circle Inspector*, 1992 Cr LJ 1173 (Karn.). See **Ratanlal and Dhirajlal's The Code of Criminal Procedure**, ibid.

[232] A. Subramani, op. cit. This observation of the court was irrespective of the seriousness of the offence, taking into consideration the severity of the penalty due under the NDPS Act. It needs to be noted that the detention of the women in the alleged case of cruelty may be a far lesser offence in comparison to *Serijabanu* case and, more so, the Birjodi police apparently did not consider the bad health of the ailing woman with her new-born child, who were inhumanely confined to the verandah of the *thana* throughout the rainy night.

The new ruling claimed as keeping with the new trends in crime, has the safeguards reserved that provides a recourse to fight if women are not regularly made available for such operations, in principle, it upholds the right of a woman to be arrested in the presence of a woman police. But the women human rights' activists retorted that the women's rights and the women themselves are violated even before they reach the court. This ruling has been dubbed as having 'chipped away at the ability of women to fight a system that doesn't understand them or their problems anyway' or that 'the Apex Court has taken away the one thing that they could use to hold their own against the police'. While those in defense of the ruling claim that protection of women's rights remains intact, it fails to convince because it is considered that "the language of rights must be absolute and can't be quibbled over." It has usually been the police who criticise the judicial controls on its functioning as irrational or as interference in complicating unnecessarily the task of detecting and apprehending criminals. In this case, it was the public who questioned the reasonableness and intelligence of the judges. The ruling was considered as in appropriate in view of the organisational standards and work environment of the police that was found inadequate to ensure the security of women. Whilst two of the four sample *thanas*, Sewaknagar and Lekhpur did not have a lockup at all, the requisite separate lockup for women remains a far distant proposition.[233] Two of the three rural *thanas*, Lekhpur and Yeshodabad, and the outpost of Birjodi had a lone woman constable. The urban *thana* had only one woman police officer of the lowest rank and woman constables also at its outposts. According to the rule in practice, the woman personnel could only be seen at the *thanas* or outposts only during the day time. It was learnt that this rule has been followed ever since the occurrence of a series of rape and murder of women police by their male colleagues. Therefore, in this context, the concern about the welfare of women in police is reasonable and bonafide.[234] The Code of Criminal Procedure (Amendment) Bill, 2005 that received presidential assent on June 23, 2005 but was soon kept in abeyance by the Union Government on July 14 following protests by the lawyers, contains an amendment of section 46 of the Cr.P.C. which will in effect reverse the 2003 Supreme Court judgement with the insertion of the following sub-section after sub-s. (3), namely:-

> "(4) Save in exceptional circumstances, no woman shall be arrested after sunset and before sunrise, and where such exceptional circumstances exist, the woman police officer shall, by making a written report, obtain the prior permission of the Judicial Magistrate of the first class within whose local jurisdiction the offence is committed or the arrest is to be made."[235]

Detention is a technique widely and frequently applied by the police in its daily operations. Sir Edmond Cox provides the subtlety with which it was practiced in the colonial days:

> Here oriental ingenuity comes in. The officer refrains from making any formal arrest as long as he can, perhaps three or four days. But meanwhile he cannot let any suspected persons go. He has, therefore, hit upon the plan of detaining them in a sort of informal custody, in which the accused are normally free men, but are not actually at liberty.[236]

It is most commonly resorted to during investigation as an instrument to intimidate the subject to give in to the compulsions of the police. Besides the most known purpose to extract information, it is also used to influence the nature as well as the outcome of a case under investigation. An instance of illegal detention can be observed in the following illustration:

---

[233] Besides a subordinate post of Sewaknagar, no *thana* or outposts have any separate lock-up for women. The one that was found to be existing was found to be used as a storeroom.

[234] See Saumya Roy, *Policing: Malefic Fiat?*, **Outlook**, December 29, 2003, p. 68; Gautam Budha Das, *Premá Pagalá Police*, **Sapthahiká** [Samaj Publication (Oriya Magazine)], Wednesday, July 10, 2002, pp. 10-15.

[235] **The Code of Criminal Procedure (Amendment) Bill, 2005**, Bill No. XXXV-F of 1994, Passed by both the Houses of Parliament (Rajya Sabha on the 4th May, 2005 & Lok Sabha on the 9th May, 2005), Assented to on 23 June 2005, Act No. 25 of 2005, Clause 6, pp. 2-3.

[236] K.S. Dhillon, op. cit., p. 116.

> In case of a FIR registered at the Yeshodabad *thana* that alleged of indecent behaviour, intimidation, and offences against property, no arrest was made and the IO submitted a final report stating that the charges made was a 'mistake of fact'. On the basis of the accounts of both the complainant and the accused, it was established that the conclusion of the police investigation was not in consonance with the fact of the case but such a report was made by the IO as the dispute was resolved between both the parties. The fact of the case was that the accused of the FIR was actually the victim of assault by the complainant but his complaint was not accepted by the police and instead a false case was foisted on him to force him to settle for a compromise. In the process he was also illegally confined inside the *hazat* and severely coerced.

The police find detention as an easy and convenient tool to address the problems reported to it. One such situational-encounter that the researcher experienced while with the police party on an evening patrol duty in Sewaknagar:

> the police picked up a youth and brought him to the *thana*. On the way over to the *thana*, the youth was enquired about the repayment of a loan he had taken from an old lady in the neighbourhood. He was illegally detained for long hours at the *thana* and subject to coercion in order to ensure a quick payback that he had promised to the lady while taking the loan.

It was also observed that in many instances of complaints on issues related to domestics and interpersonal relations, entries to which effect were found to be made in the station diary as non-cognizable or miscellaneous cases, the police depending on its will to take action on such reports generally prefer to adopt the same methodology. While the police is seen as a peace maker, the police view employing such methods as a matter of 'rule of prudence'.

Acting primarily on discretion in accordance with the situational exigency, the exercise of the power to arrest could reflect no steady distinctive pattern as could be discerned from the approach of the police in the following cases that were registered at different *thanas.*

Case A

The examination of a case of death of a pregnant woman in a remote area under the jurisdiction of Birjodi *thana* revealed that despite the complaint filed by the father of the victim alleging it as a case of homicide and, above all, the circumstantial facts that the death had occurred much within the stipulated period of seven years of marriage and that the partly mutilated body of the victim was found close to the house of the in-laws, the police did not see good enough reason to initiate immediate action but chose to wait for the autopsy report. Only after nearly ten days when the police sought to make arrests, the main accused were found absconding. According to the police, their inability to arrest the accused was due to the constrain of fuel that restricted their movement. As one officer had put it, "we cannot spend so much of money, wasting fuel in unnecessarily going around in the Police Jeep everyday, looking for them."

Case B

A woman complainant after receiving no assistance from the police in regard to the threat to her life from those who encroached upon her property, filed a complaint petition in the court. The Magistrate sent the petition to the OIC of the Birjodi *thana* u/s. 156(3) Cr.P.C. and a FIR was registered under the charges of criminal intimidation and assault to outrage the modesty of a woman, indecent behaviour, and causing hurt. But the problem still persisted and when the complainant went to the *thana* to enquire about the police action in her case, she was informed by an officer that as a FIR had been registered on the court's order, the accused could now be arrested. But she was suggested to pay a sum to facilitate that arrest so that the police could then coerce him for a permanent settlement of the dispute.

Case C

In case of a FIR registered at Yeshodabad *thana* on the basis of a complaint case filed at the SDJM court, the petitioner had alleged of police inaction as the cause of moving to the court. The police still did nothing to prevent the unceasing harassment of the victim and her family even after the court's orders. Instead, while showing its readiness to arrest the accused persons, the OIC also terrorised the complainant about the fallout of such action, that is, the harm that the accused may cause to her and the family. The complainant could no longer withstand the constant harassment from both the accused and the police and had to move out of that locality. She was not only ignorant about who the IO was in her case but was also unaware that a 'final report' had already been submitted in the case and the reason cited was 'insufficient evidence'.

Case D

Under the same *thana*, in case of a FIR registered under the charges of trespass and causing damages to property, intimidation, indecent behaviour and causing simple hurt to the body, there was unusual police activity not only at the quotidian level but also from that of the principal supervisory officer of the district, with the immediate arrest of the accused taking place. The complainant happened to be a political activist.

Case E

In a twin case, registered at Sewaknagar *thana*, with charges of more serious offences against body and property than as made in Case D, and despite the existence of injury reports, no arrests were made in these cases.

The above cases do not provide the existence of any standard rule or norm of arrest that was observed by the police. It can be suggested that the normative consideration for an IO in the exercise of its discretion to effect an arrest is to restrain the movement of the accused or suspects so as to ensure their presence during investigation and trial. The police responses to enquiries on arrest[237] were quite formal and legalistic as none gave any opinion on the general criteria that characterise their exercise of the discretion in determining an arrest. While according to some respondents, the practice remains strictly within the bounds of the prescriptive laws, others suggested that apprehension and detention of the accused was followed by arrest provided any evidence could be collected during such period of detention.

Law in democracy is a complex network of rules to regulate interrelations in the society that also includes the functioning of the institutions and in the process its interface with the citizens. It is found that new set of rules are conceived from time to time to ensure giving effect and validity to the already existing statutory and constitutional provisions. The vital part of the legal process is the interaction between the police and the public. With the growing sensitisation of human rights, it has been an ongoing process within legalism to ensure the efficacy of the procedural safeguards that are in place to guarantee the rights and dignity of a citizen. The latest guidelines introduced by the apex court in *D.K. Basu* case that redefines policework is specifically aimed at enforcing a fair exercise of the powers of arrest and detention.

The perusal of the necessary documentary source, mainly the station diary that is considered to be the mirror-reflection of all activities of the *thana*, have provided this study with the authentic evidence to test the import and effectiveness of the court directives to check unlawful police practices. The experience of policework attained by the researcher as a participant-observer also corroborates to that analysis of the actual police practice vis-à-vis the inhibitory rules.

In view of the statement of compliance of the procedural requirements during arrests in the SD, it is evident that the police disposition has not quite yet changed. The common remarks that were generally found in almost all the entries in the SD that recorded the arrest of an accused appeared as thus: "put the accused inside the *thana hazat* after observing all formalities of the *hazat* rules," and "directed the sentry to guard the accused inside the *hazat*." But empirical observations revealed that these were found to be merely expressions to give an impression of compliance of rules. The reported instances of deaths in police custody by suicide show police laxity and negligence on part of the police in observing the *hazat* rules[238] because a reading of the rule 239-B of the OPM shows that the guidelines issued for the safe custody of the arrestee is comprehensive and ensures prevention of casualties by such means as suicide. The other remarks in reference to the compliance of the rules of arrest that were also found but occasional were "explained the grounds of arrest and detention at the *thana*," "intimated their family members about his arrest", and "intimated his relative (name who is informed) and residing in (name of residence) about the arrest of the accused." In no case of arrests made by the police of all the four *thanas* that, according to the information in the SD, the arrestee having been sent for medical examination in observance of the prescriptions made in *D.K. Basu* case. It was only in cases where there was the necessity for collecting evidence

[237] Item nos. 32 and 94, Police Opinion Schedule.

[238] During the years 2000 and 2002, there had been an increase in the custodial deaths due to suicide by 8.3 and 50 percent, respectively, over its previous years. See **Crime in India – 1999**, NCRB, MHA, GOI, New Delhi, 2001, Table 79C, p. 371; **Crime in India – 2000**, NCRB, MHA, GOI, New Delhi, 2002, Table 79C, p. 364; **Crime in India – 2001**, NCRB, MHA, GOI, New Delhi, 2003, Table 79C, p. 511; **Crime in India – 2002**, op. cit., Table 13.4, p. 534.

relating to the reported offence. For e.g. as was found in an entry in the SD of Lekhpur, the ASI who made the arrest stated that 'while the accused in the process of resisting the arrest received injuries about which the arrestee itself complained of pain and accordingly he was sent for medical examination'.[239] No *thana* ever follows the procedural laws with regularity. There were also strange findings in regard to the entries in the SDs of all the four *thanas* that showed the apprehension of the accused brought to the *thana* but eventually no entry would show the arrest of the accused, or even at times, an accused shown to have been arrested goes missing in the entries of the station diary as one could find no mention about it in the subsequent entries.

The participant-observer found that the officer(s) executing an arrest, with or without an warrant, seldom conduct themselves in accordance with the SC's requirements, i.e. the Arrest Memo[240] is never drawn up at the time of arrest, information about the arrest is not being conveyed to such persons as required unless they are present during the arrest, instead of making the arrestee aware of his right to inform someone of the arrest is sometimes been offered the willingness to inform of the arrest to anyone, and the entry in the diary never contains the name of the best friend of the arrestee who is required to be informed of the arrest nor that of the officer in whose custody the arrestee is.[241] In the case of the death in the custody of the Birjodi police during the researcher's fieldwork, it was found that the police had flouted all existing rules that regulate the powers of arrest. The SD had no entries about the arrest and custody of the victim as it was in pendency. Thus the SD, reportedly on the direction of the superior police officers, was updated with accounts of the required entries made *post hoc* for the investigating team to then seize it as one of the material evidence of the custodial death.

A substantial proportion of the entire police sample was ignorant of the SC's guidelines for arrest issued in the *D.K. Basu* case. That is, though almost all of the investigating officers knew about some of the new procedural requirements that they were required to follow, that is, the paperwork required for the arrest, most of them did not know that they were prescribed in the *D.K. Basu* case. Only three respondents, the In-Charge of the urban *thana*, and the OIC and a senior SI of Lekhpur, were fully aware about the guidelines in detail.[242] None of the respondents felt the necessity of informing the arrestee the grounds of the arrest as it was presumed that the arrestee knew about the reasons of the arrest, be it valid or otherwise.[243] Moreover, the norms regarding the use of handcuffs as has evolved through case law and NHRC's observations too remain unknown to a much larger proportion of the police sample.[244]

There are definite challenges that the participant-observer did experience that the police generally encounter during arrests. Some of them can be discerned from the following two instances:

---

[239] See Appendix H for a sample of the 'Form of Medical Examination of Injured Persons' and Appendix I for a sample of the 'Inspection Memo' as prescribed by the SC in *D.K. Basu* case.

[240] See Appendix J for a sample of the 'Memo of Arrest'.

[241] The NPC in its fourth report has also recommended for the incorporation of a new section 50-A in Chapter V of Cr.P.C. requiring the police to give intimation about the arrest of a person to anyone who may reasonably be named by him to avoid agonising suspense to the members of his family about his whereabouts.

[242] Item no. 33, Police Opinion Schedule. The researcher found a few registers that were newly incorporated into the lists of registers, maintained at the Lekhpur *thana*. These registers recorded information of compliance as per the "Implementation of Orders of Apex Court of India in *D.K. Basu v. State of W.B.*" They are Arrest Register, and for Inspection Memo, Arrest Memo, for the List of approved doctors received from Director of Health Services. The Circle Inspector in its Inspection Report (see fn. 246) has instructed for the maintenance of "Interrogation Register".

[243] Item no. 85.

[244] Item no. 44. Rules 241-242 of the OPM provides the guidelines necessary for the use of handcuffs. The NPC has laid down the guidelines regarding use of handcuffs as it found that the threat of putting handcuffs on persons under arrest is another source of corruption and harassment. The NHRC has issued a directive on the use of handcuffs or leg chains. See Appendix K.

- The police party of Yeshodabad on specific inputs of the whereabouts of an accused in a rape case, who had been evading arrest, raided his house in a far flung village at around two hours past midnight. The team went on foot, leaving the police jeep at a far distant place, in order to launch a surprise raid. The women folk of the house physically resisted the police party from entering the house, verbally abused as also threatened to file false charges against them. The participant-observer too joined the police in pacifying the members of the house to empathise with the inconvenience caused by this inevitable process of policework. The lone female member of the police party, a home guard, was instructed by the senior officer to conduct the search of the house but in vain. The police then called upon the husband of the victim as also the *gram rakhi* to keep them informed about the movements of the accused.
- In an unscheduled late night raid by the Lekhpur police on a house while on their way back to the *thana* after a preliminary enquiry into a complaint, the warrantee was arrested. Here too, the police had to abandon the police jeep far away from the village and traversed through the agricultural fields, canals and jumped fences to reach the house of the warrantee that was identified by the *gram rakhi* of the village. The police party including the participant-observer lay seize on the house, guided by the *gram rakhi* as he who knows well about the area and its inhabitants, to deter the warrantee from fleeing as he had been evading arrest for a long time. One of the officers enquired about the presence of the warrantee from his wife and on receiving a response in the negative, the officer quickly moved into the one room tenement and found the warrantee sleeping on the floor. The woman was infuriated over the late night police raid and shouted at the police with invectives. The police did not react to such outbursts but gave the arrestee enough time to collect the necessary belongings and asked his wife to arrange for his bail from the court.

It is pertinent to point out procedural infringement in the second instance of arrest made by the Lekhpur police, wherein the accused to be arrested had a non-bailable warrant against him for non-appearance in the court.[245] The visible act of omission on part of the officer while making the arrest amounts to violation of s. 75 of the Code, according to which the officer should have had the warrant on his possession that was required to be shown to the warrantee while the arrest was made. While the arrestee appeared to have been aware of the existence of such a warrant, the officer effecting the arrest notified the reason of the arrest. The police account for such unintended deviation is comprehensible. To apprehend a warrantee, the police has to travel to the far remote villages and the raids have often been disappointing as sometimes the warrantee either manage to give the police a slip or not found as per the information received by the police. Thus, it is not possible and prudent to singularly pursue the targets, unless circumstances demand so, as such errands necessitate requisite resources like fuel, enough and appropriate personnel and the time. So the unscheduled raids come with other tasks that may have taken the police to such places where the police as on ease and convenience attempt at arresting the warrantees.

In fact before moving onto this successful raid, the officer had earlier tried for another warrantee in another nearby village but failed to find the *gram rakhi* of that village who give critical support to such operations.

Thus, the task of apprehending the warrantees has not been easy for the police. In the case of the pursuit by the Yeshodabad police, it was learnt from the villagers that the warrantee usually wandered around freely in the village, but the *gram rakhi* can do little to nab him nor make any overt attempt to facilitate the police in making an arrest. In fact, when the women folk saw the presence of the *gram rakhi*, assuming that he had alerted the police, they attacked him who tried to be chivalrous in the presence of the police. Later, he was exhorted by the officer against revealing its involvement as otherwise it may endanger his welfare. The reasons for most of the attempts to arrest during the nights has been obvious, i.e. to catch the warrantee unawares. The father of a dowry victim was quite appreciative of the Lekhpur police's successful pursuit in nabbing the accused persons under inconceivably difficult and dangerous conditions at night where the police party had to travel long distances on foot through tough terrain. The participant-observer as an unsuspecting

[245] A sample of such NBW is produced in Appendix L.

bait once figured in a plan of the same police to nab an accused who had till then always succeeded in evading arrest.

Documentary evidence show poorly of the police, mainly the rural *thanas*, in regard to the execution of warrants. The scrutiny of the Inspection Notes on Lekhpur *thana*[246] revealed adverse remarks by the inspecting officer against the performance of the police with regard to the information provided in the Process Register.[247] It also records the explanation by the OIC of the *thana* for the very high pendency rate of the non-bailable warrants – the reason given was inaccessibility to different parts of the jurisdiction, and the submission was that after the harvest, it will be convenient to reach the remote villages.[248] The Inspection Report on the Yeshodabad *thana*[249] stated that 'the Process Register shows that the pendency of the warrants have increased quite substantially in comparison to that of the last year'. The Inspection Report on Birjodi *thana*[250] also makes similar observation regarding the execution of warrants.[251]

If this is essentially the adversity that characterise the conditions of policework, making it more difficult is the social map of policing. But these are not the factors that deter the police from following the procedural requirements nor the failure to do so can be attributed to the cause of their poor awareness level of the same. The Madras High Court recently took cognizance of a case wherein it asked the chief of the police to read a relevant portion of the Supreme Court order in the *D.K. Basu* case, and then observed that 'the police had thus violated the guidelines laid down therein'. In reference to the conclusive evidence that the arrests of the accused persons were made on July 10, and the police admission that a telegram to their relatives, informing them of the arrest, was sent only at 10.54 a.m. on July 12, the judge ruled that "this is a clear case of violation of Supreme Court guidelines," and stated that the police chief had acted in a "hurried manner to please somebody."[252]

It is worth noting that integral to the policing function is the task of interpretation of the situational exigency that determine the consequent police action. This discretionary judgment becomes the yardstick to evaluate the propriety of the police action vis-à-vis the procedural requirements. In fact, it is the situationally located learning of how to function where and when, that equips the police with an understanding to define situations in particular ways. Respondents when asked to explain the practice, 'wherein people ever rounded up or detained in ways, though give the

---

[246] Source: **Inspection Note Book** of Lekhpur *thana*, p. 10. Inspection Report of the Circle Inspector who conducted inspection of the *thana* during the second half of the year 2002. Chapter IV of the Orissa Police Manual (rules 35-49) provides the requisite guidelines for the inspection and supervision of *thanas* by the officers of the different supervisory ranks. It also provides the general directions and instructions for the conduct of inspection of the police-stations. All the Inspection Notes are kept in record in a register called the Inspection Report Book, *vide* rule 135, Orissa Police Manual.

[247] The record of the nature of all the warrants as received and executed by the *thana* and those that are pending disposal are maintained in the Process Register. It also records the nature of the warrants against whom recall orders were produced and those that are disposed off or returned due to wrong address, or in case the warrantee died before execution of the concerned warrant, or in jail or for some other cause. The summons that are received from the courts are also entered into this register and its status are also recorded therein. All *thanas* do not follow a similar pattern in regard to the maintenance of the Process Register. The general pattern that is followed, as found in Birjodi and Sewaknagar *thana*, is that the Register is divided into four parts with regard to the non-bailable warrants as received from High Courts/Session Court; in G.R. cases; in Non-FIR cases, and in Miscellaneous cases.

[248] There are no proper connectivity to many villages in normal times, and increasingly more villages become inaccessible during the monsoon. The geography of a large expanse of this region is such that it has become a safe haven for criminals and anti-socials from the neighbouring regions.

[249] Source: **Inspection Note Book** of Yeshodabad *thana*. Inspection was conducted by the Circle Inspector of the region towards the end of the year 2002.

[250] Source: **Inspection Note Book** of Birjodi *thana*, p. 12. Inspection conducted by the ASP towards the end of the year 2002.

[251] See rules 108, 109, and 286-94, OPM, that deal with the work processes in relation to warrants.

[252] A. Subramani, op. cit.

meaning of an arrest, are never shown as arrest in the record', provided answers that correspond to the judicial conception expressed in *Munsamy's* case.[253]

But there existed a general dismissive attitude amongst the entire spectrum of the police operatives at the quotidian level towards the judiciary for having created obstacles in its functioning by issuing irrational directives as procedural safeguards. While the second officer of Yeshodabad *thana* expressed his ire at the judicial fiats that has arguably impeded their efficiency, the OIC of Sewaknagar *thana* claimed that the SC rules in *D.K. Basu* case are superfluous as they are found to be inoperable in most situations of arrest. He pointed out that adverse working conditions dispel the possibility of compliance with procedural norms if the larger objective is to be achieved. For instance, resistance offered by the public during arrests compel the police to adopt diversionary tactics to make arrests. For the police, the host of procedural laws are not merely a set of safeguards for the public, but also a set of working conditions which, under increasingly liberal opinions by the courts, are becoming increasingly arduous. The police thus sees itself poised to work in a milieu filled with extraneous restrictions imposed unilaterally on it while completely absolving the public of any responsibility in the process of policework. In its operational environment, these procedural requirements appear highly irrational as they do not conform to the existing realities of policework.

Therefore, as Cain perceives, the consequent infringement of the rules becomes an obvious occupational necessity in order to achieve their work objectives.[254] Nevertheless, non-adherence to the procedural rules of arrest remains a problem in view of the possibility of abuse. Ved Marwah, a former police practitioner, admits that arrests are sometimes made because of pressure from the public and the media, as also at times to assuage or counter public criticism against it for ineffectiveness.[255] But he does not mention which was empirically obtained that the police can effect arrest and also delay a legitimate arrest on motivated grounds. The police respondents attributed the cause of such practices to the political as well as departmental intervention [item no. 104]. This view was shared by nearly 76 percent of the entire public sample [item no. 3(liii)].

There are suggestions made by various review bodies on the police and the criminal justice system in general to reform the police powers of arrest but they are yet to be implemented. For instance, the Supreme Court while issued the necessary guidelines for arrest in *D.K. Basu* case in 1997 had observed that they shall be followed by the police in all cases of arrest and detention till legal provisions are made in that behalf as *preventive measures.* But no legislative measures have been formulated in that regard.

The National Police Commission in its third report, while considering the 'power of arrest' as one of the chief sources of corruption in the police, laid down some guidelines for making arrests. It recommended that an arrest during the investigation of a cognizable case can be justified in the following circumstances, i.e. where

i. the case involves a grave offence like murder, dacoity, robbery, rape, etc., and it is necessary to arrest the accused and bring his movements under restraint to infuse confidence among terror stricken victims;

ii. the accused is likely to abscond and evade the processes of law;

iii. the accused is given to violent behaviour and is likely to commit further offences unless his movements are brought under restraint;

iv. the accused is a habitual offender and unless kept in custody, he is likely to commit similar offences again.

[253] See fn. 225; Item no. 90.
[254] Mike Brogden, et al, op, cit., p. 35.
[255] Ved Marwah, op. cit.

The Commission also suggested that "departmental instructions may insist that a police officer making an arrest should also record in the case-diary the reasons for making the arrest, thereby, clarifying the conformity to specified guidelines."[256]

The Law Commission of India, in its 177th Report,[257] has suggested sweeping changes in the criminal laws to maintain, as it states, 'a balance between the liberty of the citizen and the societal interest for the maintenance of peace, law and order'. It can be assumed that implicit in this expression of the Commission's felt necessity to regulate the power of arrest by the police is the dilemma of democracy-police conflict. While democracy represents liberty and freedom, the inevitability of the institution of police represent restriction and the imposition of the state's authority on the individual. Hence to rationalise the conceptual difference, the Commission recommends the following amendments to the Code of Criminal Procedure, 1973:[258]

i. According to the Commission, s. 41 of Cr.P.C. which deals with the arrest of persons is vague and ambiguous as it provides such powers where the police may arrest any person without an order or warrant from the Magistrate. Hence it recommends amendment of this section.

ii. It also recommends deletion of sub-section (2) of s. 42 as it considers this section unnecessary and superfluous.

iii. Further, insertion of a new provision, 60A, has also been recommended to provide that arrest be made strictly in accordance with the provisions of the Code. The Commission stated that "complaints of abuse of power of arrest are continuing unabated in the country and very often it is the poor and persons without official or political clout who become the victims of police excesses." It feels that large number of arrests are made in bailable offences, most of which are bound to be non-cognizable offences. It, therefore, recommended that first, "no person shall be arrested for offences which are at present treated as bailable and non-cognizable." Instead all these offences could be brought under the category of non-cognizable offences and no arrest shall be made by police in these cases and no court shall issue an arrest warrant." Secondly, in offences that are treated as bailable and cognizable, no arrest shall be made but an "appearance notice" be served on the accused directing him to appear at a police station or before a magistrate as and when required. Thirdly, offences that are punishable with seven years' imprisonment, at present treated as non-bailable and cognizable, these should be treated as bailable-cognizable offences.

iv. It has observed that the health, safety and well-being of the arrested should be the responsibility of the detaining authority. Accordingly, it recommended the substitution of s. 54 (that deals with examination of arrested persons by medical practitioner) by insertion of a new s. 55A to provide that it should be the duty of the person having the custody of an accused to take reasonable steps for the health and safety of the accused.

v. The Law Commission has suggested that the guidelines and safeguards issued by the Supreme Court in *D.K. Basu* case in 1996 to be observed in respect of arrest should be incorporated in Chapter V of the Cr.P.C. along with consequences for not complying with such provisions.

vi. The Commission has also dealt on the accountability of the police and enforcement agencies. Accordingly, it recommends for the insertion of new sections - 41A to 41D - to include the procedure of arrest and duties of police officers. It provides that the violation of these provisions should constitute an offence within the meaning of s. 166 of the IPC.

The Malimath Committee Report suggests a few changes in the arrest laws.[259] It recommends that:

i. A provision in the Code be made to provide that no arrest shall be made in respect of offences punishable only with fine, offences punishable with fine as an alternative to a sentence of imprisonment (*vide* Rec. no. 43).

ii. In the schedule to the Code for the expression "cognizable, the expression "arrestable without warrant" and for the expression "non-cognizable" the expression "arrestable with warrant or order" shall be substituted (*vide* Rec. no. 44).

iii. The Committee recommended for the review and reenactment of the IPC, Cr.P.C. and Evidence Act may take a holistic view in respect to punishment, arrestability and bailability (*vide* Rec. no. 45).

iv. Consequential amendments shall be made to the first schedule in the column relating to bailability in respect of offences for which the Committee has recommended that no arrest shall be made (*vide* Rec. no. 46).

---

[256] James Vadackumchery, op. cit., pp. 106; S.R. Sankaran, op. cit. The Commission's proposals may yet to be formally accepted to be legislated upon, but they certainly figure amongst the informal norms that govern the police discretion while making an arrest.

[257] Law Commission of India (Fourteenth, Justice Jagannadha Rao), Ministry of Law and Company Affairs, Government of India, **One Hundred and Seventy-Seventh Report: Laws Relating to Arrest**, 2001. In making the recommendations, the panel had taken into consideration the Supreme Court's judgments in *Maneka Gandhi* case (1978), *Joginder Kumar v. State of U.P.* (1994), and *D.K. Basu v. State of W.B.* (1996).

[258] *Meet to discuss 'law of arrest'*, **The Hindu**, Delhi, Saturday, January 20, 2001, p. 4; <http://www.hinduonnet.com/2003/01/01/2003010101871300.htm> <http://pib.nic.in/archieve/Ireleng/Iyr2002/rdec2002/31122002/r311220022.html>

[259] **Committee on Reforms of Criminal Justice System** (Chairman Dr. Justice V.S. Malimath), op. cit., p. 244.

v. Even in respect of offences which are not arrestable, the police should have power to arrest the person when he fails to give his name and address and other particulars to enable the police to ascertain the same. Section 42 of the Code be amended by substituting the word "any" for the words "of non-cognizable" (*vide* Rec. no. 47).

Bail:

The police has on hand another prescriptive process that follows the arrest of an accused or suspect with or without a warrant and that is its decision to either forward the arrestee to the Court[260] or take bail from such person. The Code of Criminal Procedure lays down the provisions as regards bail for which purpose they are broadly classed into two categories in consonance with the classification of the offences, bailable and non-bailable. The police powers to admit to bail is contained in ss. 436, 437, 438, and 441 of the Code.

In respect of bailable cases, as under section 436, the grant of bail is a matter of course. The police-officer in charge of a *thana* is empowered to take bail from the accused in his custody and so the release may be ordered on the accused as he thinks fit on such person executing a bond and even without sureties [s. 436(1)].[261] The invested intent in the conception of this provision, that states, 'where a person who is arrested is not accused of a non-bailable offence, no needless impediments should be placed in the way of his being admitted to bail', is that 'in such cases the person is ordinarily to be at liberty, and it is only if he is unable to furnish such moderate security, if any, as is required of him, as is suitable for the purpose of securing his appearance, pending enquiry, that he should remain in detention.'[262]

The fundamental principle of our system of justice is that a person should not be deprived of his liberty except for a distinct breach of law. Thus, in relation to the exercise of the discretion conferred by the Code to exercise the powers vested in the OIC of a police-station, *vide* s. 436, the congeries of contingencies conjured up by the concerned police officer for consideration with regard to the circumstances under which the matter of bail needs to be decided has evolved over the years that can be obtained from the observations as made by the judiciary.

The basic rule is to release him on bail unless there are circumstances suggesting the possibility of his fleeing from justice or thwarting the course of justice.[263] The object of bail is to secure the appearance of the accused as per the conditions to be laid down by the police officer. Thus in light of the gravity of the offence and the reasonable belief of the guilt of the accused, other considerations that determine the grant of bail are: the reasonable apprehension that his presence at large will intimidate witnesses, or that he will use his liberty to suborn evidence, or create such other troubles that is against the interest of the public or the State.

---

[260] In the forwarding of the arrestee to the Court, documents are also sent along with escorted by the personnel (generally constables) for which the P.S. issues command certificate for the said duty. The escort party hands over the custody of the arrestee and the related documents at the Office of the Court Sub-Inspector (CSI). Along with the documents, the arrestee is then taken to the appropriate Court and presented before the Magistrate. In the Court, if there is a bailer to give bail for the arrestee (provided it is a bailable offence and the Court grants bail), the arrestee could so be released. If there is none to give bail for him or the Court after examining the case, refuses to grant bail, then the arrestee will be sent to jail custody. Then the CSI takes him back, prepares the custody documents and sends him to the jail.

[261] See Appendix M for a sample copy of the Bail Bond.

[262] *Mir Hashamali*, (1917) 20 Bom LR 121; *Kanubhai Chhaganlal*, 1973 Cr LJ 533. See **Ratanlal and Dhirajlal's The Code of Criminal Procedure**, op. cit., pp. 667-68.

[263] *State of Rajasthan v. Balchand*, AIR 1977 SC 2447: 1978 Cr LJ 195; *Gudikanti Narasimhulu v. Public Prosecutor*, A.P., AIR 1978 SC 429: 1978 Cr LJ 502. See **Ratanlal and Dhirajlal's The Code of Criminal Procedure**, ibid, p. 668.

The Court too takes into consideration similar matters as does the police in the event of granting bail, as has been observed by the Supreme Court in various cases.[264] The discretionary power of the Court to admit to bail is not arbitrary, but is judicial, and is governed by established principles.[265] The provision in regard to bailable cases, s. 436 empower both the police and the Court to grant bail. Their complementary existence as components of the criminal justice system show that the same considerations are invoked by the Courts, as done by the police, in its juridical process of acting on the matters of bail. The Courts on many occasion, while elucidating the importance of bail and releasing the accused on bail, have stated that the police officer is "duty bound" or in other words, 'a statutory duty has been imposed upon both a police officer in charge of a *thana* and a Court to release a person arrested for a bailable offence on bail as soon as he is prepared to furnish a bail. They are further authorised as they think fit instead of taking bail from such arrestee, release him on furnishing a personal bond.'[266] Thus, the function of the police in regard to bail provisions is quasi-judicial in nature.[267]

In non-bailable cases, the accused may be released on bail. Section 437 of the Code gives the Court or a police-officer power to release an accused on bail, arrested without warrant in a non-bailable case, unless there appears reasonable grounds that the accused has been guilty of an offence punishable with death or with imprisonment for life. When a person is released on bail, the order with reasons therefor should be in writing [s. 437(4)]. In actual practice, according to the submission of the police practitioners, the police power to release the accused or the suspect on bail is restricted to bailable offences. The police were found to be far too conservative over invoking the provision of s. 437 though they realise the powers vested on them in that regard.

The examination of a rape case that occurred in Yeshodabad during the fieldwork of the researcher, wherein the accused person, arrested on charges of this grave offence, that is non-bailable and punishable with imprisonment for life, was released on bail by the police, showed major discrepancies and ambiguities. The SD entries relating to the case revealed that

> the accused person was brought to the *thana* by the investigation officer of this case early in the morning and was later sent for medical examination. As soon as he returned from the hospital after being medically examined, towards the evening he was "arrested and detained for further investigation" in the *thana hazat*. The next day morning, after more than 24 hours since the arrested person was brought into the *thana*, the IO of this case, as per the direction of the In-Charge of the *thana*, released him on bail as per bail bond prepared by the officer.

The visible procedural infirmities in the above recordings of the process undertaken by the police, in relation to dealing with the accused of the offence, are:

i. The "arrest" was done in total non-compliance with the rules as laid down by the apex court in *D.K. Basu* case,
ii. The accused was kept in *hazat* which was not recorded in the station diary and the said act was assumingly in violation of the *hazat* rules.
iii. At the time of granting the bail, it is a statutory obligation cast upon the police officer, *vide* s. 437(4), to record the reasons in writing for doing so. The officer makes no record of the

---

[264] *Hussainara Khatoon v. Home Secretary, State of Bihar*, AIR 1979 SC 1360: 1979 Cr LJ 1036; *Rameshwar v. State of Assam*, AIR 1952 SC 405; *Bekaru Singh v. State of U.P.*, (1963) 1 SCR 55: AIR 1963 SC 430: (1963) 1 Cr LJ 335; *State v. Captain Jagjit Singh*, AIR 1962 SC 253; *Talab Haji Hussain v. Madhukar Purshottam Mondkar*, (1958) SCR 1226: 60 Bom LR 937; *Ratilal v. Asst. Collector of Customs*, AIR 1967 SC 1639: 1967 Cr LJ 1576. See **Ratanlal and Dhirajlal's The Code of Criminal Procedure**, ibid, pp. 668-70; R. Deb, op. cit., p. 22; Syed H. Afzal Qadri, op. cit., pp. 99-100.

[265] **Ratanlal and Dhirajlal's The Code of Criminal Procedure**, ibid, p. 667.

[266] *State of Gujarat v. Lal Singh*, AIR 1981 SC 368; *Kanubhai Chhaganlal v. State of Gujarat and Another*, 1973 Cr LJ 533 (Guj.); *Crown v. Makan Lal*, 48 Cr LJ 659 (Lah.). See Syed H. Afzal Qadri, op. cit., pp. 100-01.

[267] As also in non-bailable cases, the police, although to a limited extent, share with the Court the power to release an accused on bail (s. 437, Cr.P.C.).

reasons for releasing the accused person who was charged of a non-bailable offence and that too,

iv. more than 24 hours after his apprehension, without being produced before the Court.

Besides the above documentary evidence, the interviews of the 'publics' of both sides and other documents disclosed that under the aegis of the OIC of the *thana* both the parties agreed to resolve the matter that involved monetary compensation to the victim and a compromise petition was submitted to that effect at the *thana* wherein it was undertaken by both parties to refrain from doing anything against the other in the future, especially that would harm the future of the victim. It is pertinent to note that soon after the notices were served by the IO u/s. 160, Cr.P.C. to the victim and u/s. 161, Cr.P.C. to her father and brother, separately, for the medical examination of the victim, the accused was released on bail as per the direction of the OIC, who in fact facilitated the compromise. It shows that the victim was not given reasonable time on the decision to undergo the medical examination. The fact that the victim's family members showed initial reluctance for the medical examination, cannot by itself appear to constitute as "reasonable grounds" for the police to think correctly about the guilty of the accused of a grave offence so as to hastily enlarge him on bail. Moreover, the withholding of the recording of the reasons therefor, that was evidently conspicuous by its absence, increasingly makes the grant of the bail suspect.

Another area of concern in the system of bail is the bail bond. Section 441 contemplates furnishing of a personal bond by the accused person and a bond by one or more sufficient sureties conditioned with the time and place for his appearance. The critical aspect about this section is the discretionary power of the police officer to fix the amount of the bond for such sum of money that it thinks sufficient that shall be executed by such person to be released on bail. It has been held that

> an accused person is entitled as of right to bail, provided the necessary conditions prescribed by law are fulfilled and under this section that contemplates the execution of a bond with sureties, the amount of the bond is not to be excessive and is to be fixed with due regard to the circumstances of each case. The amount of the bond should be in accordance with the position in life occupied by the person to be released on bail. Further, not monetary suretyship but undertaking by relations of the petitioner or organisations to which he belongs may be better and more relevant.[268]

It is imperative to realise that, as stated earlier about the unnecessary and unjustifiable arrests that take place, the problem worsens when many of these, arrested even for petty crimes, fail to find sureties even after bail is granted and remain in jail even for terms exceeding the maximum period of imprisonment for the offences allegedly committed by them. The plight of the poor in the present bail system has been aptly conceived by P.N. Bhagwati, who headed the Legal Aid Committee appointed by the Government of Gujarat in 1970 while being the Chief Justice of Gujarat High Court. It is as follows:

> The bail system causes discrimination against the poor since the poor would not be able to furnish bail on account of their poverty while the wealthier persons otherwise similarly situated would be able to secure their freedom because they can afford to furnish bail. This discrimination arises even if the amount of bail fixed by the magistrate is not high, for a large majority of those who are brought before the courts in criminal cases are so poor that they would find it difficult to furnish bail even in a small amount. The evil of the bail system is that either the poor accused has to fall back on touts and professional sureties for providing bail or suffer pretrial detention.[269]

The Supreme Court has held that unnecessarily inhibitive condition ought not to be imposed while granting bail as that would be onerous to make it beyond the reach of the accused. The insistence on

---

[268] *Daulat Singh*, (1891) 14 All. 45; *Rajballam Singh*, (1943) 22 Pat. 726; *Niamat Khan*, (1950) 30 Pat. 886; *Banarashidas*, (1937) Nag. 168; *State of Rajasthan v. Balchand*, AIR 1977 SC 2447: 1978 Cr LJ 195; *Mohd. Tariq v. Union of India*, 1990 Cr LJ 474: 1989 All LJ 85. See Syed H. Afzal Qadri, op. cit., pp. 99, 101; **Ratanlal and Dhirajlal's The Code of Criminal Procedure**, op. cit., pp. 668-69, 674.

[269] S.R. Sankaran, op. cit., pp. 1319-20.

local surety has in present practice become more liberal as it constitute to be discriminatory and violative of Art. 14 of the Constitution. Bail in its fundamental concept is a security for the prisoner's appearance to answer the charge at a specified time and place. Thus in the consideration of such security, though it is natural and relevant to take into regard the nature of the crime charged and the test of reasonable belief of the guilt of the accused thereunder, the Orissa High Court has held that the bail order should not be so unreasonable, harsh and oppressive so as to result in denial of the bail itself. It has been held that in the refusal of bail lies the commission of a restriction on personal liberty of the individual guaranteed by Art. 21 of the Constitution and therefore such refusal must be rare. Justice V.R. Krishna Iyer of the Supreme Court once ruled: "Bail is the rule, jail is the exception."[270] The Code of Criminal Procedure (Amendment) Bill, 2005, mentioned earlier, *vide* clause 35(a), amends the first proviso in sub-s. (1) of s. 436, Cr.P.C., to correct the present anomaly as it will make it compulsory for the police officer to release a person who is arrested is not accused of a non-bailable offence, "if such person is indigent and is unable to furnish surety."[271]

The decision-making autonomy in the matter of bail is one of the critical spheres in the unrecognised diversity of policework where the personnel is enjoined upon the responsibility to follow not only the norms of rule of law but also those other considerations as discussed in this section that are equally imperative and should structure the administrative discourse to rationalise its discretionary judgment. There are no hard and fast rules regarding grant or refusal of bail, each case has to be considered on its own merits. The matter always calls for judicious exercise of discretion.

The validity of the assumption that 'powers that entail application of discretion in the exercise of such powers cause to effect possible breach,' i.e. breach is concomitant of discretion, is contained in the very judicial pronouncements on the matter of bail, some that could be construed on account of the abuse of bail power by the police.[272] A number of factors operate in the refusal or grant of bail in bailable offences. Breach is confined not only to be in any act of refusal but may also be committed in any grant of bail. Almost all police respondents agreed that it is necessary on their part to inform the arrestee of its entitlement to bail as the case may be [item no. 93] and also in relation to the discretionary powers on the matters of bail, they talked about the same procedural requirements and other norms for consideration that are discussed herein [item nos. 34 & 96]. In practice, they claim that such entitlements do not come unencumbered but subject to conditions. For instance, the refusal to grant bail on the grounds that the arrestee failed to provide a bailer or that the surety not accepted as not satisfied about either their identity, solvency, or reliability are not unnecessary but inevitable legal inhibitions. But an improper refusal by the OIC to release a person on bail in a bailable offence will amount to dereliction of duty.[273]

Among other reasons, according to the OIC of Sewaknagar *thana*, the Courts have become too liberal on account of bail in all cases except only on heinous crimes. He claims that the offenders have also become aware of such easy bail. The habitual offenders and the warrantees are not easy to apprehend and when the police do after much difficulty, it is undone by the Court's quick dispense of bail, disregarding the opposition by the police. As a result, it mounts pressure on the already

---

[270] *Moti Ram v. State of Madhya Pradesh*, 1978 Cr LJ 1703: AIR 1978 SC 1594; *Anwer Husain v. State of Orissa*, 1995 Cr LJ 863 (Ori.); *Babu Singh v. State of Uttar Pradesh*, 1978 Cr LJ 651: AIR 1978 SC 527; *Afsar Khan v. State of Karnataka*, 1992 Cr LJ 1676 (Kant.); *Keshab Narayan v. State of Bihar*, 1985 Cr LJ 1857: AIR 1985 SC 1666. See **Ratanlal and Dhirajlal's The Code of Criminal Procedure**, op. cit.

[271] **The Code of Criminal Procedure (Amendment) Bill, 2005**, op. cit., p. 9.

[272] The censures of the police by the Supreme Court in *Som Chand Singhvi v. B.B. Chakravarti* [AIR 1965 SC 588] and *State of Gujarat v. Lal Singh* [AIR 1981 SC 368]. See Syed H. Afzal Qadri, op. cit., p. 100.

[273] *Dooloo Mull v. Dewan Singh*, 1868, P.R. 2 Cr.; Syed H. Afzal Qadri, op. cit., p. 68.

beleaguered police as the offender is back, on the loose in the society. The officer narrated an instance where three habitual offenders declared as bad characters (BCs) were granted immediate bail by the Court despite being produced with reports of charges under sections of bad livelihood and pleading by the police against the bail, so the hapless police contacted the legal counsel whose services the BCs generally seek for the bail and he admitted that 'they are here to commit crime because that is their livelihood'. So the fear or the likelihood of the accused being released on bail by the court, even in cases of serious violent crimes, according to Ved Marwah, is one of the reasons why the police keeps an accused illegally under prolonged detention. Ved Marwah adds that such practice is widespread and often enjoys the approval of public opinion, media and the government.[274] But implicit in this denial of bail is an increasing tendency of the police to dispense its own style of justice by inflicting punishment on the offender. Where it has been held that bad records and police predictions of criminal prospects to invalidate the bail plea are admissible in principle but shall not stampede the court into a complacent refusal,[275] the countervailing measures that constitute illicit police practices find an absorbing official rationale in the factoral name of 'administrative expediency'.

There is noticeable deviations in the matter of bail. It was found that the practice of 'minimization of offences' that was discussed in the previous chapter in relation to burking of crime, also takes place in cases where the police seek to out of the way oblige someone with the privilege of bail, for e.g. in a case where there is a charge also of a non-bailable section amongst other sections of bailable offences, the IO in order to favour the guilty with the grant of bail would delete the non-bailable offence from the final form. The researcher while at an outpost of Sewaknagar *thana* witnessed an incident where the distressed relatives of a youth, accused of a non-bailable offence amongst other charges of lesser offences, assisted by their legal counsel pleaded hard with the IO of the case to drop the charge made under Arms Act in the final form as that would facilitate the grant of easy bail.

The bail provisions lay down that once the accused is released on bail for a particular offence, the Magistrate ceases to have any jurisdiction to commit him to police custody, least to say, that the police too cannot take him into custody unless the Court cancels his bail.[276] It also includes the bail obtained u/s. 438 of the Code that has lent a new perspective whereby a person in apprehension of an arrest may obtain anticipatory bail from the Court in advance. Thus the abuses of the bail provisions by the police, committed as it were out of their disenchantment with the unjustifiable grant of easy bail by the Courts without appreciation of the police report, if any, or that of the circumstances of the offence charged under, have come into notice.

In an instance of such police deviance that was held by the Apex Court as guilty of (criminal) contempt of court, the proved allegation was that the appellant, a police officer, arrested the respondent disregarding bail order in a case against the respondent related to alleged assault on a police officer of a police-station of which the appellant was in charge.[277] The case history, as was conceived by the Apex Court, is as follows:

> The appellant is a police officer. At the relevant time, i.e. on 13th November, 1990, he was the officer-in-charge of the police station in question. A police officer of that police station had reported that respondent had assaulted him on 30th September, 1990, which was the immersion day of Goddess Durga while he was on duty

[274] Ved Marwah, op. cit.
[275] *Gudikanti Narasimhulu v. Public Prosecutor*, A.P., AIR 1978 SC 429: 1978 Cr LJ 502. Ved Marwah, ibid, p. 101.
[276] *Chadayam Makki Nandanan v. Kerala*, 1980 Cr LJ 1195 (Ker.). Syed H. Afzal Qadri, op. cit., p. 68.
[277] *Bijay Kumar Mohanty v. Jadu alias Ram Chandra Sahoo*, AIR 2003 SC 657. [Also see 1993 Cr LJ 3311 (Orissa)]. The same police-station constitutes as one of the four sample *thanas* for this study.

> and the respondent had been asked by him to give side to other image (Medha) to pass. A case was registered against the respondent. In connection with the aforesaid case, the respondent was arrested by the appellant on 13th November, 1990 from his residence at 7:30 a.m. He was kept in police custody and was produced before the Magistrate on 14th November. The respondent in respect of this very case had been granted bail by the Sessions Judge on 6th November, 1990. The respondent had obtained certified copy of the order of bail on 7th November. The respondent was produced before the Magistrate on 14th November when his advocate produced a certified copy of the order of the Sessions Judge and, thus, he was released by the Magistrate.[278]

On the question whether the respondent had produced before the appellant, the certified copy of the order of bail at the time of his arrest or not, the Supreme Court observed that

> According to the respondent, it was produced. In the proceedings of contempt that were initiated by the High Court, on receipt of reference from the Sessions Judge, appellant denied that the copy of the bail order was produced before him. The High Court, on appreciation of evidence, held that copy of the bail order was produced before the appellant who arrested the respondent despite it. The appellant was held guilty of contempt and was sentenced for civil imprisonment for a period of seven days. Under these circumstances, the appeal was filed under Section 19 of the Contempt of Courts Act, 1971.[279]

The Supreme Court concluded that

> When the respondent was arrested, the certified copy of the bail order was shown to the appellant in the presence of the respondent's mother who was examined as a witness. The appellant crushed the order. The said order, as already noticed, was examined by the High Court before arriving at the finding that it bears marks of violence. The appellant admitted that as per his belief the respondent had been granted bail. If that was so, appellant would have given an opportunity to the respondent to produce that order instead of arresting him despite that belief. The appellant wanted to arrest the respondent any way. The case related to an alleged assault on a police officer of a police station of which the appellant was in-charge. No fault can be found with the finding of the High Court that the act was a result of revenge which prompted the appellant to act against his belief that the respondent had been granted bail and act against such a belief. The High Court has rightly held the appellant guilty of contempt of Court.[280]

The apology tendered by the appellant belatedly after a lapse of nearly 12 years was viewed by the Court as not sincere and was merely to escape the punishment. In reference to the contention that fine be imposed instead of imprisonment, it was held that "in a matter of this nature, ...mere sentence of fine would not meet ends of justice."[281] The Court thus ruled that "no interference is called for in the judgement and order of the High Court."[282]

The Apex Court held that by the arrest in disregard of the bail order, "the respondent was deprived of his personal liberty."[283] But it sounded that, "It is of paramount public interest that the people, after obtaining an order of the Court, should not feel helpless or without any remedy when such order is flouted."[284] The Court further observed that

> Police officers are supposed to be the members of a disciplined force. It is of utmost importance to curb any tendency in them to flout orders of the Court. It is more so when flouting of order results in deprivation of personal liberty of an individual. If protectors of law, to take revenge, defy court orders they will have to be sternly dealt with and appropriate punishment inflicted also with a view to send a message across the board that such an act cannot be countenanced. [285]

The court exhorted that

> The rule of law is the foundation of the democratic society. The judiciary is the guardian of the rule of law. If the orders of the Court are disobeyed with impunity by those who owe an obligation to the society to preserve the rule of law, not only would individual litigants suffer, the whole administration of justice would be brought into disrepute.[286]

---

[278] *Bijay Kumar Mohanty v. Jadu alias Ram Chandra Sahoo*, AIR 2003 SC, paras 2 and 3, p. 658.

[279] The Supreme Court held that the contempt proceedings under section 19 of the Contempt of Courts Act, 1971 are quasi-criminal. Ibid, para 10. See *Mrityunjay Dass and another v. Sayed Hasibur Rahaman and others*, AIR 2001 SC 1293: 2001 AIR SCW 1162: 2001 Cr LJ 1702: (2001) 3 SCC 739.

[280] *Bijay Kumar Mohanty v. Jadu alias Ram Chandra Sahoo*, AIR 2003 SC, paras 4, 9 and 11, pp. 658-59.

[281] Ibid, paras 12 and 13, p. 660.

[282] Ibid, para 13.

[283] Ibid, para 12.

[284] Ibid, para 5.

[285] Ibid, para 1, p. 658.

[286] Ibid, para 7, p. 659.

In this case, the Court demonstrated an uncompromising posture to any such police deviance in the following citation:

> In *Advocate General, Bihar v. M.P. Khari Industries*,[287] this Court said that ".... It may be necessary to punish as a contempt a course of conduct, which abuses and makes a mockery of the judicial process and which thus extends its pernicious influence beyond the parties to the action and affects the interest of the public in the administration of justice. The public have an interest, an abiding and a real interest and vital stake in the effective and orderly administration of justice, because unless justice is so administered, there is the peril of all rights and liberties perishing. The Court has the duty of protecting the interest of the public in the due administration of justice and so it is contempt of Court not in order to protect the dignity of the Court against 'Contempt of Court' may seem to suggest, but to protect and to vindicate the right of the public that the administration of justice shall not be prevented, prejudiced, obstructed or interfered with."[288]

Remand:

When any investigation cannot be completed within 24 hours of the arrest of an accused *vide* s. 57 of the Code and that there are reasonable grounds for believing that the accusation or information is well-founded and the station officer is further in a position to show satisfactory grounds for the application for a special order for the detention of the accused in police custody u/s. 167 Cr.P.C., the OIC of the *thana* or the IO, not below the rank of sub-inspector shall forward the accused to the nearest Judicial Magistrate (whether or not he has the jurisdiction to try the case), together with a copy of the entries in the case diary relating to the case, and report the matter to the Superintendent, but in no case shall the accused remain in police custody for a longer time than is reasonable without the authority of a Magistrate.[289]

It is also required that the grounds upon which the remand is needed shall be clearly stated in the application to the Magistrate. A mere general statement that the accused may be able to give further information is not a good ground.[290]

The Magistrate to whom the accused is forwarded may authorise the detention of the accused, that is, remand him either to police or judicial custody as it thinks fit[291] for a term not exceeding fifteen days in the first instance,[292] including one or more remands, i.e. within this period of fifteen days, there can be more than one order changing the nature of such custody either from police to judicial or *vice versa*.[293] Ordinarily, the accused will be in police custody even where there may be other agencies at the moment serving the civil administration.[294]

After the expiry of the first period of fifteen days in detention, if there are adequate grounds, the Magistrate may extend the remand of the accused person which can only be in judicial

---

[287] AIR 1980 SC 946: 1980 Cr LJ 684: (1980) 3 SCC 311.

[288] *Bijay Kumar Mohanty v. Jadu alias Ram Chandra Sahoo*, AIR 2003 SC, para 6, pp. 658-59.

[289] Article 22(2), Constitution of India; Section 167(1), Cr.P.C.; Rules 172(a), (b) & (c), OPM.

[290] Rule 172(d), OPM.

[291] Where the accused surrendered in the Court and the prosecution applied for police custody, but the prayer could not be granted till the expiry of first fifteen days, it was held that the Magistrate rightly refused police custody (*Bhajan Lal v. State of U.P.*, 1996 Cr LJ 460 (All.). In another case, where on an application of the Yeshodabad police for the remand of the accused persons who surrendered in the Court, the Magistrate granted police custody (Station Diary of Yeshodabad *thana*).

[292] Where a Judicial Magistrate is not available, it is the Executive Magistrate that does the needful with the procedures remaining the same except that the detention will be for a term not exceeding seven days and any further extension of the remand will be done by the competent Magistrate with the Executive Magistrate transmitting all the records of the case to the nearest Judicial Magistrate. Section 167(2A), Cr.P.C.

[293] Section 167(2), Cr.P.C. *Krishnaji P. Joglekar*, (1897) 23 Bom 32; *Engadu*, (1887) 11 Mad 98; *G.K. Moopanar, M.L.A. v. State of T.N.*, 1990 Cr LJ 2685 (Mad.). See **Ratanlal and Dhirajlal's The Code of Criminal Procedure**, op. cit., p. 260.

[294] Where members of the army or the para-military come in aid of civil authorities for maintenance of law and order, they have absolutely no authority or power of investigation or interrogation. The Court has held that the remand of accused to the army custody on prayer of IO is highly improper, illegal and *ultra vires* of the Constitution. *Shri Joyanta Borbora v. State of Assam*, 1992 Cr LJ 2147 (Gau.). See **Ratanlal and Dhirajlal's The Code of Criminal Procedure**, ibid, p. 259.

custody,[295] for a period not exceeding ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or for a term of not less than ten years [clause 2(a)(i)], or sixty days where the investigation relates to any other offence [clause 2(a)(ii)]. It is held that any prayer for extension of time for completing investigation must be made by the IO before the expiry of the period prescribed and not after it.[296] The first period of fifteen days mentioned in s. 167(2) of the Code as also the extensions thereafter, has to be computed from the date of such detention after being forwarded to the Magistrate in accordance with sub-section (1),[297] and there cannot be any detention in police custody after the expiry of first fifteen days[298] even in a case where some more offences are found to have been committed in the same transaction at a later stage. The police can obtain remand to its custody from judicial custody if the same arrested person is involved in a different case arising out of a different transaction for first fifteen days.

The object of the requirement that the accused, in very case, to be produced before a Magistrate for purposes of remand is to enable the Magistrate to see that the remand is necessary;[299] giving remand through a court hearing entails a chance to the accused to plead his case before the Magistrate who would then decide on the custody as it thinks fit.[300] The section requires the Magistrate to grant the remand in the presence of the accused and that whether or not he was so brought before the Magistrate can be proved by his signature on the order authorising detention. The Supreme Court in *S.K. Dey* case held the order of remand passed in the absence of prisoner in Court as highly unsatisfactory.[301]

Though physical production of the accused before the Magistrate is desirable, yet the failure to do so would not *per se* vitiate the order of remand if the circumstances for such non-production stands to be beyond the control of the police.[302] The 'appreciation of the circumstances' is highlighted in the observation of the Karnataka High Court in *Noor Jehan v. State of Karnataka*, where the accused's remand was not extended because of his non-production as he was ill and confined to the hospital. It held that the presence of the accused for extension of custody is not necessary in all circumstances, particularly when it is not possible to produce him, as in this case, and the Magistrate ought to have granted the extension of the accused's remand. Thus, non-production

---

[295] From a conjoint reading of the main part of the sub-section with Proviso (a), it is understood that police custody cannot be granted after the lapse of the first fifteen days. *State v. Ravinder Kumar Bhatnagar*, 1982 Cr LJ 2366 (Del.). See **Ratanlal and Dhirajlal's The Code of Criminal Procedure**, ibid, p. 260.

[296] *Dilip Kumar Das v. State of W.B.*, 1993 Cr LJ 837 (Cal.). See **Ratanlal and Dhirajlal's The Code of Criminal Procedure**, ibid, p. 265.

[297] *Chaganti Satyanarayana v. A.P.*, (1986) 2 SCC 141: AIR 1986 SC 2130; *Arjun Singh v. State of Rajasthan*, 1987 Cr LJ 1236 (Raj.); *State of J.K. v. Abdul Rashid*, 1988 Cr LJ 834 (J&K); *Shivanna v. State by Arasikera Rural Police*, 1992 Cr LJ 2287 (Karn.). See **Ratanlal and Dhirajlal's The Code of Criminal Procedure**, ibid, pp. 257, 261, 263, 265.

[298] *CBI Delhi v. Anupam J. Kulkarni*, AIR 1992 SC 1768: 1992 Cr LJ 2768. See **Ratanlal and Dhirajlal's The Code of Criminal Procedure**, ibid, pp. 257-58.

[299] *Bal Krishna*, (1930) 12 Lah 435. Syed H. Afzal Qadri, op. cit., p. 70.

[300] It was held in *Khatri v. State of Bihar*, popularly known as the "Bhagalpur Blinding case," [(1981) 1 SCC 632: AIR 1981 SC 928: 1981 Cr LJ 470], that the Magistrate or Sessions Judge before whom the accused appears is under an obligation to inform the accused that if he is unable to engage a lawyer on account of poverty, he is entitled to obtain free legal service at the cost of the State. The Supreme Court has given necessary directions to Magistrate, Sessions Judges and State Government with guidelines to be followed in this regard.

The police have no right to refuse to allow the legal adviser of an accused person, remanded to their custody, to interview him, or his relatives to supply him with food and clothing, as long as they satisfy themselves that no objectionable articles are supplied. [*Llewelyn Evans*, (1926) 28 Bom LR 1043: 50 Bom 741] The right of the accused to consult and to be defended by a lawyer of his choice is guaranteed under Art. 22(1) of the Constitution of India. See **Ratanlal and Dhirajlal's The Code of Criminal Procedure**, op. cit., pp. 260, 265.

[301] *Sandip Kumar Dey v. Officer In-Charge, P.S. Sakchi, Jamshedpur*, AIR 1974 SC 871. Syed H. Afzal Qadri, op. cit., pp. 70-71. See Explanation II to the proviso of sub-s. 2 of s. 167, Cr.P.C.

[302] *Ramesh Kumar Ravi v. State of Bihar*, 1987 Cr LJ 1489 (Pat.). See **Ratanlal and Dhirajlal's The Code of Criminal Procedure**, op. cit., p. 260.

is not a ground for release of the accused. Clause b of the proviso to sub-s. 2 of s. 167 of the Code statutorily recognises this proposition now. It is also required that the Magistrate ordering the detention of the accused must record his reasons in writing and that a copy of such order shall be forwarded to the Chief Judicial Magistrate (CJM), *vide* sub-ss. 3 and 4 of s. 167, respectively. In fact, the same Karnataka High Court in *K.A. Abbas v. Sri Satyanarayan Rao* held the CJM's continuous extensions of custody without the production of the accused before it as illegal, stating that the Court should be satisfied that reasonable grounds exist for not producing the accused, which are to be recorded.[303]

The intention of the Legislature in regard to ss. 57 and 167 of the Code is that, to meet the requirements of justice, an accused person should be produced before the Magistrate and *vide* the former section, the nearest Magistrate, that is, with as little delay as possible.[304] This purports to secure the dignity of the accused as that of the police by its disciplined conduct. In the production of the arrestee before the Magistrate, ss. 57 and 167 conjointly provide a crucial opportunity to the arrestee to exploit the rights conferred upon him *vide* s. 54. At such an interface, it is incumbent upon the Magistrate to inform the arrested person about its right to get medically examined who may if there is commission of any offence against his body to report such offence so that it can be proved by a medical examination approved by the Magistrate.[305] It is a rule now that the arrestee is required to be medically examined every 48 hours during his detention in custody.[306]

According to the police respondents, the police remand is often sought in cases of property related offences, and serious crimes when the investigation is not complete [item no. 92]. But the difficulties in the remand process, according to the In-Charge of Sewaknagar *thana*, stems from the interventions administered by the courts that has created an arduous set of working conditions that frustrate their work towards the realisation of the substantive criminal law. For instance, as revealed by the officer, the process of obtainment of remand is long drawn and there is more uncertainty in the grant of police custody by the courts. Thus, the police is constrained to circumvent the law. One of the most common practice is illegal detention, where the accused or a suspect is kept in confinement without showing formal arrest for such arrests are not easy to make and when produced before the court, they are either released on bail or the remand is denied. For e.g., in a property related offence, the accused is a prize catch as it is expected to provide clues about many other reported crimes and also about the involvement of others in such trade, but such information cannot be obtained within the stipulated period of formal arrest, thus detained without showing arrest till such time as desired. He laments at the adverse impact of the increasingly liberal opinions by the courts on the investigation work of the police that according to him was easier in the past: besides the extraneous restrictions imposed by the courts, the offenders have become increasingly aware of the legal process, about their rights and the procedural limitations on the police which they exploit it to their advantage, in the process, offsetting the balance as it has gone on to provide more protection to the offenders than facilitating the police regarding their apprehension and conviction.

---

[303] *Noor Jehan v. State of Karnataka*, 1993 Cr LJ 102 (Karn.); *K.A. Abbas v. Sri Satyanarayan Rao*, 1993 Cr LJ 2948 (Karn.). In *Khatri v. State of Bihar*, *Sandip Kumar Dey* and *Hussainara Khatoon* cases, it was held that the Magistrates need to see that the accused is produced before the court when the remand order is passed and cautioned the Magistrates that in granting remand they should not act mechanically. **Ratanlal and Dhirajlal's The Code of Criminal Procedure**, ibid, pp. 257, 260, 261, 264. Syed H. Afzal Qadri, op. cit., pp. 110-11.

[304] *Queen Empress v. Engadu*, (1887) 11 Mad 98. Syed H. Afzal Qadri, ibid, pp. 69-70.

[305] *D.J. Vaghela v. Kantibhai Jethabhai*, 1985 Cr LJ 974 (Guj.). See **Ratanlal and Dhirajlal's The Code of Criminal Procedure**, op. cit., p. 63.

[306] Rule 8 of the SC guidelines in *D.K. Basu* case. See Appendix G.

Recently, in the *Serijabanu* case where the accused, Serijabanu and her mother were held for nearly two days by the Madurai police, violating cl. 4 of the SC guidelines laid down in *D.K. Basu* case, Mr. Justice Karpagavinayagam maintained that the accused persons should have first been produced before a Magistrate, the police should have got them remanded and then taken them into custody. When the police respondent, the chief of Madurai city police who was held responsible as the entire police team had acted under his instructions, said that the petitioners were not produced before the Magistrate as he apprehended that police custody might not be granted, the judge said, "still worse. It shows you did not have faith in the judiciary." Thus making known the powers of the High Court, the judge declared "to initiate contempt proceedings against all police officials involved."[307]

In relation to illegal detention, the National Police Commission admits that:

> The fact that they cannot hold on to him for more than 24 hours and whatever information they expect to ascertain from him to be secured within that period makes them adopt several malpractices including the use of third degrees methods to pressure the accused persons.[308]

The Commission further adds:

> This peculiar requirement of convention and practice drives police officers to make false statements before the Magistrate and they would merely be requiring to verify several facts mentioned by him and continue with his examination.[309]

The Commission, therefore, recommends amendment in s. 167 of the Code to facilitate easy remand to police custody in the interest of investigation whenever required. This recommendation of the Commission is in contrary to what the Law Commission found that "remands were being granted much too leniently, that the police would continuously come back to the Magistrate pleading that investigation was not complete and that if the suspect were let go the case would be damaged irreparably. In effect, arrest was not the climax of investigation; it was the prologue."[310]

The intent of the remand policy as expressed by the Court has been that detention in police custody should be allowed only in special cases and for such limited period as the exigencies of the case might require.[311] In accordance with such a conception, the cl. (ii) of proviso (a) to sub-s. (2) of s. 167 provides that at the expiry of the remand period of ninety or sixty days, as the case may be, the accused person shall be released on bail if prepared to and does furnish a bail but his further detention does not *ipso facto* become illegal or void. But if the charge-sheet is not submitted within the said period then, notwithstanding anything to the contrary in s. 347(1), Cr.P.C., the accused would be entitled to an order for being released on bail subject to the usual provisions. Moreover, if the charge-sheet is submitted within the said period, the remand comes to an end and consequently the provisions of s. 167(2), proviso (a), ceases to operate. Thus under such conditions, it is held that the right of the accused to be released on bail after the expiry of the said period, 90 days or 60 days, as provided in cls. (a) and (b) of the proviso to sub-s. (2) is an absolute and indefeasible right. The purpose of s. 167 is said to protect the accused from unscrupulous police officers.[312]

---

[307] A. Subramani, op. cit.; The context of the contempt proceedings in this case seems to be similar to that of in *Bijay Kumar Mohanty v. Jadu alias Ram Chandra Sahoo*, discussed earlier.

[308] **National Police Commission**, Fourth Report, Chapter XXVII, para 27.27, p. 9.

[309] Ibid.

[310] David H. Bayley, op. cit., p. 169.

[311] *Jai Singh v. Emperor*, (1930) 6 Luck 36: 33 Cr LJ 287. See **Ratanlal and Dhirajlal's The Code of Criminal Procedure**, op. cit., p. 13.

[312] *State of U.P. v. Laxmi Brahmananda*, AIR 1983 SC 439; *Nethala Vinod Prabhu v. State of A.P.*, 1979 Cr LJ NOC 90 (A.P.); *Nawal Sahani v. State of Bihar*, 1989 Cr LJ 733 (Pat.); *Babubhai Parshottamdas Patel v. State of Gujarat*, 1982 Cr LJ 284 (Guj.) (FB). See **Ratanlal and Dhirajlal's The Code of Criminal Procedure**, ibid, pp. 261-63.

In consonance with such a process, striking a cord of procedural regularity, sub-ss. (5) and (6) have been introduced with a view to see that there is no unnecessary delay in investigation. Thus the outer limit of six months, except only in exceptional cases where the IO satisfies the Magistrate or the Sessions Judge for an extension, the investigation shall be stopped by an order of the Magistrate. Any investigation that continues beyond six months or a charge-sheet is filed after the expiry of six months without the extension of time, they would be considered as in contrary to law and held illegal and quashed, respectively.[313] It was held that inordinate delay encroaches upon the right of 'speedy trial' of the accused and further investigation was directed to be stopped and the accused discharged.[314] The rationale behind the policy for a speedy investigation is that delay would not only cause for the opposite party to suborn evidence, influence witnesses and deflect the course of justice or that the disinterested witnesses may not only loose the interest but also fail to remember the details of the occurrence, but that "it may legitimately lead to the grievance of the accused that the work of the investigation is carried on unfairly or with an ulterior motive."[315] In *Santa Singh's* case, the accused were acquitted on the grounds of suspicious delays that have occurred in the important steps in the course of the investigation.[316] The Supreme Court severely criticised both dilatory investigation and tardy administration of justice and held both to be violative of Article 21 of the Constitution.[317]

Thus, intrinsic in the given legal procedures is the established interest justifying the cause of speedy investigation, a matter of right for the accused as also that for the defendant that are integral to the rule of law. In the light of the above discussion, it appears that the Malimath Committee goes overboard in its following recommendations:[318]

1. Section 167(2) of the Code be amended to increase the maximum period of police custody to 30 days in respect of offences punishable with sentence more than seven years. (Rec. no. 28)
2. Section 167 of the Code which fixes 90 days for filing chargesheet failing which the accused is entitled to be released on bail be amended empowering the Court to extend the same by a further period up to 90 days if the Court is satisfied that there was sufficient cause, in cases where the offence is punishable with imprisonment above seven years. (Rec. no. 29)
3. A suitable provision be made to enable the police take the accused in police custody remand even after the expiry of the first 15 days from the date of arrest subject to the condition that the total period of police custody of the accused does not exceed 15 days. (Rec. no. 30)
4. A suitable provision be made to exclude the period during which the accused is not available for investigation on grounds of health, etc., for computing the permissible period of police custody. (Rec. no. 31)

There have been constant reiterations over a period of time now with regard to bringing in structural reform in the criminal justice system so as to avoid delay in the investigation of cases. To that effect, the First Law Commission in its Fourteenth Report (1958), the National Police Commission in its First and Sixth Report, the 14th Law Commission in its 154th Report (1996), and 16th Law Commission in its 177th Report (2001), the Report of the Committee on Police Training, the Ribeiro Committee, the Padmanabhaiah Committee on Police Reforms, the Bureau of Police Research and Development (BPR&D) and also the Malimath Committee have all recommended for

---

[313] *Subrata Patra v. Director of Panchayat*, 1995 Cr LJ 115 (Cal.). See **Ratanlal and Dhirajlal's The Code of Criminal Procedure**, ibid, pp. 261-64.

[314] *Phanindra Nath Maity v. State of W.B.*, 1996 Cr LJ 590 (Cal.); *Kadra Pehadiya v. State*, 1981 Cr LJ 481 (SC). See **Ratanlal and Dhirajlal's The Code of Criminal Procedure**, ibid, p. 264; R. Deb, op. cit, p. 22.

[315] *R.P. Kapur v. State of Punjab*, (1960) 3 SCR 388: AIR 1960 SC 866: 1960 Cr LJ 1239. R. Deb, op. cit., p. 82.

[316] *Santa Singh v. State of Punjab*, 1956 Cr LJ 930 (SC). See R. Deb, ibid.

[317] *Nimeon Sangma v. State of Meghalaya*, 1979 Cr LJ 941 (SC); *Hussainara Khatoon v. Home Secretary, State of Bihar*, AIR 1979 SC 1360: 1979 Cr LJ 1036, 1045, 1052. The SC, in these cases, directed some prisoners to be discharged, some cases to be withdrawn and some other cases to be finished within a fixed time limit. See R. Deb, ibid.

[318] **Committee on Reforms of Criminal Justice System** (Chairman Dr. Justice V.S. Malimath), op. cit., Recommendation nos. 28-31, p. 243.

the creation of a separate wing of investigation with clear mandate that would be separated from police staff engaged in the maintenance of law and order.[319] This has been conceived in regard to consolidate the actual policework in a legalistic mould.

Interrogation:

The most significant aspect of the process of criminal investigation is the necessity to interrogate those who are acquainted with the facts and circumstances of the case to find out the truth, i.e. to find out whether the accused has committed an offence or not and if there is a suspicion that he has done so, to collect evidence against him.[320] Interrogation forms the most crucial aspect of police operations, a defining stage in the overall criminal justice process of case construction and disposition. The predominantly popular understanding constitute a delimited conceptualisation of the interrogation as a methodology designed primarily to elicit confessions and other inculpatory evidence. Such a narrow focus belies the varied nature and functions of the interrogation as a crucial dimension of daily operations, as well as it neglects the subtleties of its influence as a determinative stage on the entire criminal justice process. Thus to situate interrogative practices in terms of the overall structure and dynamics of policework will depend upon the conceptualisation of interrogation as part of an extended investigative process organised according to a series of frequently contradictory social, legal, organizational, and occupational norms.[321]

Interrogation is an engagement process that represents one of the first points of contact between the police and the 'publics' related to the case, as s. 161 of the Code do not distinguish those who are interrogated as complainant, victim, accused, accomplices or witnesses. Such contact serves as a critical forum in which initial information and impressions are exchanged. Hence, the definition of the police interrogation is broadened to embody not only the legally circumscribed act of active police questioning under conditions of arrest or detention but also more informal exchanges between police and suspects prior to the laying of a formal charge. This blurring of the conceptual boundary between interrogation as an informal practice and as a legally and spatially defined exchange is critical given that the initial exchanges are often instrumental in arousing and substantiating initial police suspicions, and thus in constituting the basic parameters for case construction and disposition.[322]

There is an absence of research in India on the interrogation as a technique that serves the police in its routine policing activities. This section deals on the empirical examination of the interrogative practices and drawing upon the available Anglo-American literature to fashion a conceptual and theoretical framework for the understanding of the dynamics of police interrogation within the criminal justice process.

The defining characteristic of the modern police interrogation is its almost widespread endorsement by the policing community as a necessary component of any effective investigation, a

---

[319] Ibid, Recommendation no. 15, pp. 339-40; R. Deb, op. cit., p. 83; **National Police Commission**, First Report, February 1979, Chapter II, para 2.6, p. 14, and Sixth Report, March 1981, para 48.15; Ribeiro Committee, First Report (October 1998) and Second Report (March 1999);
<http://pib.nic.in/archive/Ireleng/Iyr2002/rdec2002/31122002/r31122002.html>
<http://www.humanrightsinitiative.org/programs/aj/police/india/initiatives/summary_padmanabhaiah.pdf>
<http:www.humanrightsinitiative.org/publications/police/recommendations_ribeiro.pdf>

[320] Syed H. Afzal Qadri, op. cit., pp. 68-69, 150.

[321] James W. Williams, *Interrogating Justice: A Critical Analysis of the Police Interrogation and Its Role in the Criminal Justice Process*, **Canadian Journal of Criminology**, Vol. 42, Issue 2, April 2000, pp. 209-240 (Source: EBSCO Database: Academic Search Premier). Richard A. Leo, *Police Interrogation and Social Control*, **Social and Legal Studies**, Vol. 3, 1994, pp. 93-120 (Source: EBSCO Database: Academic Search Premier).

[322] James W. Williams, ibid.

crucial means of collecting information, a key stage in the justice process, despite the fact that in the contemporary justice process evidence obtained by scientific methods such as forensic data and eyewitness accounts are considered as more reliable and valid. The law provides that all confessions made to a police officer or to others while in custody of a police officer, unless made in the presence of a Magistrate, are inadmissible in evidence.[323]

Nevertheless, interrogation continues to remain to the IOs as a key investigative practice. The rationale of its role may not be reduced to the technical function of eliciting confessions, providing inculpatory evidence, and/or generating relevant information pertaining to other crimes/cases as part of an overall search for an objective truth. Beyond the apparently limited technical value, it has come to play an irreducible role in the justice process as a means of establishing culpability of suspects, and subsequently, preparing the cases against them. As Baldwin argues, "It has now become something of a truism to observe that, in most criminal cases, the crucial stage is the interview at the police station, for it is at that stage that a suspect's fate is as a rule sealed."[324]

An alternative critical approach to the understanding of this notable aspect of police operations lies in reframing the interrogation in relation to the wider structure and context of policework and that interrogative practices must specifically be viewed as natural extensions of the police activities of case construction and legitimation. This follows from an interpretive approach to policing which conceives of the police interrogation functions as an integral component of a general process of the production and legitimation of (police) narrative accounts of criminal behaviour. This stems from its existence as an interactional medium and dramatic ritual through which police narratives of criminal acts are not only tested, elaborated, and reaffirmed, but also endowed with the organizational and personal commitments of the individuals concerned. It is the relative success of the police in constructing and justifying the narrative accounts, and excluding competing accounts in the process, that is believed to be largely determinative of the case outcomes. Thus interrogation can be conceptualised as social encounters, between the police and the potential suspect, fashioned as a source to confirm, justify and legitimate initial narrative accounts developed by the police.[325]

An integral part of this process of legitimation is the reconciliation of any lingering ambiguities with the official account of the event. In this way, a narrative is created that highlights the police account of the exactitude of the case, that is, the suspect's guilt and selects out mitigating facts and circumstances. It thus involves a process of translation, simplification, and naturalisation of the complexities and ambiguities of life events into the codified narratives which constitute the foundation for both immediate police action, and the subsequent treatment of suspects as they are transformed into cases and processed through the criminal justice system. Thus in the process of production and legitimation of police accounts of the case, the suspect's viewpoint is ultimately

---

[323] Article 25 and 26, Indian Evidence Act, 1872. Generally speaking, statements of a confessional nature made by an accused whilst in police custody cannot be used for any purpose, see the section of this chapter that deals on oral testimonies.

Section 162, Cr.P.C. does not affect the provisions of s. 27 of the Indian Evidence Act, 1872 and therefore information leading to the discovery of a fact made to the police and admissible u/s. 27 of the Evidence Act, is not rendered inadmissible u/s. 162 and do not offend against Art. 14 of the Constitution of India. *Ramakrishna v. State of Bombay*, 1955 Cr LJ 196 (SC). See R. Deb, op, cit., p. 91.

[324] John Baldwin, *Police Interview Techniques: Establishing Truth or Proof?*, **British Journal of Criminology**, Vol. 33, No. 3, 1993, p. 326.

[325] James W. Williams, op. cit. Also see Richard V. Ericson and Patricia Baranek, **The Ordering of Justice: A Study of Accused Persons as Dependants in the Criminal Process**, University of Toronto Press, Toronto, 1982; Michael McConville, et al, **The Case for the Prosecution**, Routledge, New York, 1991, p. 327.

either ignored or incorporated into the police account through an active process of engagement between the public and the suspect that involves negotiation, persuasion, coercion and violence for the latter to accept a particular, predetermined rendition of events. This leads McConville et al to conclude that "the interview is not designed to elicit the suspect's own account of the incident, rather the suspect is invited to accede to the officer's view of the case. Where the suspect asserts innocence or introduces evidence which would support a defense, this is generally ignored."[326] Baldwin asserts that, "it is evident, therefore, that the idea that police interviewing is, or is becoming, a neutral or objective search for truth cannot be sustained, because any interview inevitably involves exploring with a suspect the details of allegations within a framework of the points that might at a later date need to be proved. Instead of a search for truth, it is much more realistic to see interviews as mechanisms directed towards the 'construction of proof'."[327]

In the interrogation process, the police as followers and upholders of societal norms, not only identify the suspect and construct the account of its violation of the same norms, but also make the suspect to recognise itself that the specific social norms have been violated, an act which is intended at a symbolic reaffirmation of the dominant social norms and values and as a display of respect for the police. This is consistent with the more general characterisation of policework as involving the maintenance and reproduction of order on an operational, rather than formal level, that is, based on informal processes rather than the application of the principles of law.[328]

Therefore, in the interrogative process, the questions asked are not of any true probative value. While the extraction of confession is one specific outcome of the process, the more fundamental part is the commitment that the interrogation fosters, on the part of both the police and the accused or suspect, to the official account of events. For the police, interrogation ritual provides them with an opportunity both to confirm previous suspicions about a case and actively to incorporate the suspect into the official account through the elicitation of confirmative statements. The latter function provides the suspect with an authentic subject-position within the police narrative, the legitimacy of which is bolstered as the suspect's involvement in the case is articulated in their own words, rather than those of the interrogator. It thus results in the suspect's reluctant identification with the police position and the police account becomes the recognised framework around, and according to, which the organisational action has to be articulated. The end result of this entire process – conceptualised as an interactional, critical sense-making medium through which the police reinforce their commitments to particular criminal identities and renditions of events which they have themselves constructed in accordance with the routine demands and structures of their work – is the legitimation of the organisational narrative, and the police actions that were taken in its defense.[329]

Another crucial legitimating function fulfilled by the police interrogation that follows from the position of the police as key representatives of the socio-normative order, and consequently, a critical point at which the boundaries between appropriate and inappropriate behaviour are negotiated, is that it may be viewed as a mechanism for both identifying deviations from the status quo, and shaming those responsible for such deviations. Through this Durkheimian ritual, the social boundaries and norms as well as the position of the police as the irrefutable representatives and

---

[326] James W. Williams, ibid.
[327] John Baldwin, op. cit., p. 327.
[328] James W. Williams, op. cit.; Paul Chevigny, **Edge of the Knife: Police Violence in the Americas**, The New Press, New York, 1995, p. 6.
[329] James W. Williams, ibid; John Baldwin, op. cit., p. 341.

arbiters of this normative order are legitimated and reproduced. The interrogative practices have received the greatest critical attention. As this informal interactional process transpires under conditions of autonomy and low visibility and is premised upon both a presumption of guilt and the intention of an expeditious outcome, the interrogation emerges as a potential threat to the principles of fairness, standards of procedures established by law and subsequently, the attainability of justice within the criminal justice system. Given the foundation of the police interrogation within an assumption of guilt on part of the police, it not only fosters commitments to false or misleading police narratives, but this assumption also underlies the techniques employed in interrogative settings for the production of evidence which is consistent with the initial police hypothesis. The outcome which may be either false confessions, or inculpatory evidence is most commonly attributed to the coercive and manipulative nature of interrogations and the psychological principles upon which they are based. The reality is that interrogations are typically organised according to informal processes, practices, and relationships which bear little relation to formal legal proscriptions, whether in the form of legislation or case law, and that in effect involve blatant disregard for the rights of the accused or suspect. It is within the context of these processes that the police interrogation may be understood to impact future stages of the criminal justice process independently of its stated technical functions, and thus, to bear an important responsibility in the case outcome and other substantive injustices.[330]

One of the key structural element of the informal processes of policework is the practice of informal tribunal system which exists as a popular and successful form of case disposition. Interrogation is most frequently brought to bear upon this informal dimension of justice as with its own account of a case. The police in the process of the informal exchanges with the public prior to the laying of a formal charge, convince all players involved that the best course of action is an expedient, conciliatory, and informal resolution. The means adopted in the process for such outcomes, as could be seen in the discussion on the informal tribunal process in the previous chapter, are often not based on legalities and thus objectionable.

The process of interrogation comprises of the act of an impeller-custodian against a person in its custody by arrest, police remand, or even where the custody *per se* is unauthorised. The police habit of charging the people, then beat up with standardised crimes even got the name of mock crime.[331] In India, unlike that under the English legal system where the process of interrogation is subjected to judge's rules, the legal freedom conferred upon the police has considerable scope for abuse amounting to occurrences of crime in its custody, e.g. assault of various types, homicide and rape. There are also allegations of fake encounter killings against the police. The larger problem is that the victims of the commonly reported incidents of police violence are generally the poor alleged in case of petty crimes. Studies conducted by several Commissions, scholars and non-governmental organisations have found that the worst form of official violence that take place in station houses are that termed as "third degree methods" which has become a part of the routine police activity to elicit information.

One who has any familiarity with criminal law as it operates in practice would be aware of the general inconsistency between the pious imprecation against the practice and the recurring unlawful, impressible pressures put upon the person in custody in the process of interrogation. Torture and deadly force represent a signal form of official violence. The rationale often extended is

[330] James W. Williams, ibid; Paul Chevigny, op. cit., p. 253.
[331] Paul Chevigny, ibid, p. xi.

obvious, to obtain information, though it has other functions that are mentioned early in this section. All violence used by officials are primarily against the relatively defenseless. It expresses the distancing and control functions.[332]

Custodial crime continues unabated till the present day; the grounding of the very device of interrogation that comprise of various innovative techniques adopted by the police can be ascribed to the occupational culture as the historicity of such practices go back to the times well beyond British India.[333] As early as 1859, the commission to investigate alleged cases of torture in the then Madras Presidency, commonly known as Torture Commission, pointed out that police torture was widely prevalent in those times as well. The Indian Police Commission, 1902-03, noted that

> a serious complaint against the police is the unnecessary severity with which they often discharge their duty and the unnecessary annoyances they inflict on the public.

It said on this point:

> The system of investigation which commends itself to the indolent and inefficient police officer is to make life a burden for everyone who is likely to be in any way acquainted with the facts until he tells all he knows, and to extort by all means incriminating statements or confessions from suspects. The evidence before them shows that the practice of working for confessions is exceedingly common.

Various State Commissions in post-colonial India too have recorded the prevalence of such unlawful practices, an observation to that regard is made by the U.P. Police Commission, 1960-61:

> We regret to note that the old and crude methods of investigation still continue to persist. Complaints of beating, physical torture, maltreatment and harassment by police officers is not wanting.

The Gore Committee on Police Training, 1972-73 pointed out the structural causes of custodial violence. The National Police Commission in its fourth report noted that "the use of force against an individual in their custody in his loneliness and helplessness is a grossly unlawful and most degrading and despicable practice."[334] The Supreme Court has made various observations and passed strictures in regard to the police operations concerned with the investigation of cases. It observed that torture is essentially an instrument to impose the will of the strong over the weak. It held that custodial violence is a naked violation of human dignity and degradation which destroys, to a very large extent, the individual personality; it is a calculated assault on human dignity and whenever human dignity is wounded, civilisation takes a step backward. It is pertinent to note some reflections of the Apex Court on the manner in which interrogations are conducted by the police:

> We are deeply disturbed by the diabolical recurrence of police torture resulting in a terrible scare in the minds of common citizens that their lives and liberty are under a new peril when the guardian of the law gore human rights to death.[335]
>
> Police believe more on fists than on wits, on torture more than on culture. They believe all is well with the police, the critics are always in the wrong. Nothing is more cowardly or unconscionable than a person in police custody being beaten up and nothing inflicts a deeper wound on our constitutional culture than a state official running berserk regardless of human rights. Article 21, with its profound concern for life and limb, will become dysfunctional unless the agencies of law in the police...establishments have sympathy for the humanist creed in that Article.[336]

Unprovoked and uninhibited violence against persons in police custody has become a norm in police operations and as a serious problem as it aggravates to an extent resulting in casualties. In such

---

[332] Ibid, pp. 11-12.

[333] See John Beames, **Memoirs of a Bengal Civilian**, Chatto and Windus, London, 1961, pp. 140-45; J.C. Madan, **Indian Police**, Uppal Publishing House, New Delhi, 1980, pp. 216-218; C.E. Gouldsbury, **Life in the Indian Police**, Chapman and Hall Ltd., London, 1913, pp. 280-81[rept. Delhi, 1977]; A.S. Gupta, **Crime and Police in India (Upto 1861)**, Sahitya Bhawan, Agra, 1974, pp. 8-9; R.P. Kangle, **The Kautilya Arthasastra, Part II**, University of Bombay, 1963, p. 313; K.S. Dhillon, op. cit., Chapter 2, 3, 5, and 6; A.S. Gupta, **The Police in British India (1861-1947)**, Concept Publishing Co., New Delhi, 1979, p. 204.

[334] **National Police Commission**, Fourth Report, op. cit., para 27.26, p. 8.

[335] *Raghubir Singh v. State of Haryana*, 1980 Cr LJ 801 (SC). Syed H. Afzal Qadri, op. cit., pp. 107-08.

[336] *Kishore Singh Ravinder Dev v. State of Rajasthan*, AIR 1982 SC 625: (1981) 1 SCC 503. Syed H. Afzal Qadri, ibid, p. 108; S.R. Sankaran, op. cit., p. 1319.

cases, the accused police personnel are charged of culpable homicide.[337] Since the year 1999, there has been an increase in the reported incidents of deaths in police custody, at the all-India level, till the year 2002 which registered a decline of 6.7 percent over its previous year. (See Table 5.1.) During 2000, deaths in custody while on police remand increased by a phenomenal 90.5 percent over 1999, but subsequently, there has been a decline by 7.5 and 16.2 percent in 2001 and 2002, respectively. The deaths in police custody of persons who were taken into custody by police themselves had declined by 11.6 percent in 2000 but increased substantially in the following year by 39.5 percent and remained constant the next year.[338]

TABLE 5.1

REPORTED INCIDENTS OF CUSTODIAL DEATHS DURING 1998-2002 AT ALL-INDIA LEVEL

Year	Death of persons remanded to police custody by court	Death of persons not remanded to police custody by court	Total custodial deaths	Percentage variation over previous year
1998	-	-	46	15
1999	22	43	65	41.3
2000	40	38	78	20
2001	37	53	90	15.4
2002	31	53	84	-6.7

The other most grievous crime that occur in custody is rape by the police. There were 4 reported cases of custodial rape in 1998 and 1999, 2 in the year 2000 and 3 in 2002. There were no such incidents in the year 2001.[339] The conviction rate in cases of custodial crime has been quite low.

TABLE 5.2

PERCENTAGE OF CONVICTION OF POLICE PERSONNEL TRIED IN CUSTODIAL DEATHS DURING 1998-2002[340]

Year	Personnel tried	Conviction percentage
1998	41	17.1
1999	31	0.0
2000	21	23.5
2001	-	-
2002	-	-

[337] See **Crime in India – 2002**, op. cit., Chapter 13, pp. 529-40. The Report though identifies "assault" along with "death" and "rape" in police custody as "custodial crimes," it does not provide information on cases of assault. More so, it further classifies the deaths in custody as the following: Deaths in police custody/lock-up are categorised under two heads (i) of persons remanded to police custody by court, and (ii) of persons not remanded to police custody by court. Other deaths in police custody are accounted under (i) at the time of production/proceedings in court/journey connected with investigation, (ii) during hospitalization/treatment, (iii) due to accidents, (iv) by mob attack/riot, (v) by other criminals, (vi) by suicide, (vii) while escaping from custody, (viii) while escaping from police custody. For this study, the crimes that are taken into consideration are deaths in lockup while on and without police remand and by suicide, and custodial rape only for the obvious stronger presumption of possible police involvement in such incidence. Section 176, Cr.P.C. and rule 203(b) of the Orissa Police Manual provides the processes to be followed in the event of death in police custody.

[338] **Crime in India – 1998**, NCRB, MHA, GOI, New Delhi, 1999, Table 13.1, p. 311, Table 13.4, p. 313; **Crime in India – 1999**, op. cit., Table 79, p. 368, Table 79A, p. 369; **Crime in India – 2000**, op. cit., Table 79, p. 361, Table 79A, p. 362, also p. 356; **Crime in India – 2001**, op. cit., Table 79, p. 508, Table 79A, p. 509, also p. 505; **Crime in India – 2002**, op. cit., Table 13.1, p. 531, Table 13.2, p. 532, also p. 529.

[339] **Crime in India – 1998**, ibid, Table 13.4, p. 313; **Crime in India – 1999**, ibid, Table 13.1, p. 364; **Crime in India – 2000**, ibid, Table 13.1, p. 357; **Crime in India – 2001**, ibid, Table 13.3, p. 506; **Crime in India – 2002**, ibid, Table 13(C), p. 530.

[340] **Crime in India – 1999**, ibid, Table 13.4, p. 365; **Crime in India – 2000**, ibid, Table 13.3, p. 358; **Crime in India – 2001**, ibid, Table 81, p. 515; **Crime in India – 2002**, ibid, Table 13.5, p. 536.

Of the persons sent for trial during 1998-2000 as shown in Table 5.2, the conviction rate was 17.1 percent in the first year, that dwindled to nil in the following year, and recorded 23.5 percent in 2000. Since the year 2001, 'Crime in India' reports have not been carrying such information. Table 5.3 shows that the conviction rate has been an absolute zero in all the cases in which trials have been completed since the year 1998.

TABLE 5.3
DISPOSAL OF CASES IN CUSTODIAL RAPE DURING 1998-2002[341]

Year	Case in which trials were completed	Acquitted	Conviction
1998	5	5	0
1999	1	1	0
2000	1	1	0
2001	2	2	0
2002	2	2	0

The process of interrogation, according to Legrande, suggests that the police will accomplish behind their closed doors precisely what the demands of our legal order forbid: make a suspect the unwilling collaborator in establishing guilt by subtler and harsher devices. They employ various means for the extraction of confessions and admissions.[342] Police brutality, as Berki observes, goes with police efficiency. The 'law' is both tyrannical and negligent.[343]

In a constitutional democracy, the manifestation of institutional violence in the routine policing activities as a means of social control is a scandalous rule of democratic politics. The understanding within the operatives of police power about the utility of violence as a wanted physical interference with a subject is an offshoot of the quest for the eradication of crime, an explosive and paradoxical burden, or "impossible mandate". This reinforces the rational-calculating preference for coercion of suspects in the station houses to successfully complete investigation and particularly where necessary to recover stolen property as pressures of competence and performance emanate from all quarters of the society, organisational, political and societal. The body of crime that the police are mostly asked to prevent, the "common crimes", are those considered as committed by the poor and the lower classes, identified as the "symbolic assailants". Thus, the police, as a matter of routine, make arrests[344] mostly under suspicion in such cases and resort to illegal detention to extract information and confession of guilt that involve application of force. In such cases then the police also extorts a sum for the release of the suspects. Such coercive tactics employed by the police often has the support of the dominant class as it depends on the police to handle the problems of social control of that category (Lee's 'police property') that poses a threat to the former's societal space.[345] No greater proof of such an assumption could be found, according to Ribeiro, as was exhibited in the infamous Bhagalpur blinding case where the members of the dominant section of the society egged on the police who ran amuck in the streets of Bhagalpur, gouging out the eyes of those suspected as thieves.[346]

[341] **Crime in India – 1999**, ibid, Table 13.3, p. 365; **Crime in India – 2000**, ibid, Table 13.3, p. 358; **Crime in India – 2001**, ibid, Table 81, p. 515; **Crime in India – 2002**, ibid, Table 13.5, p. 536.
[342] "Soft" confession or what is sometimes called an "admission." Syed H. Afzal Qadri, op. cit., p. 151.
[343] R.N. Berki, **Security and Society: Reflections on Law, Order and Politics**, J.M. Dent & Sons Ltd., London, 1986, p. 14.
[344] It has been seen, as discussed in the section on "Arrests," that most of the arrests take place in case of less serious crimes and many such arrests have also been identified as unnecessary.
[345] Mike Brogden, et al, op. cit., p. 99.
[346] Julio Ribeiro, *Indian Police: Reflecting Social Ills*, **The Indian Express**, Friday, 4 August, 1995, New Delhi.

The researcher came across various victims of official violence who were subject to illegal and arbitrary arrests, illegal detention, physical and verbal assault, extortion, harassment of the suspect's family members, etc. Two incidents of custodial crime that occurred at two different *thanas*, during the same period when the researcher was on his fieldwork, are dealt to examine the police disposition and its propensity to violence especially while dealing with suspects in case of offences against property.

Custodial Crime – Case 1

A case of torture was registered at Sewaknagar *thana* against two police officers of the same *thana* at the direction of the SP as against a petition filed by the complainant with the Human Rights Commission. In this case, it was alleged that on the basis of a mere verbal report of theft that also mentioned the suspect, the police in absence of a FIR picked up the suspect and dealt with him in a manner that they were themselves charged by the suspect of wrongful confinement and torture, causing hurt and putting in fear of injury to make him confess that (i) he committed the theft and (ii) to point out where the stolen property is deposited or (iii) cause to restore the said stolen item.[347]

Custodial Crime – Case 2

The incident of custodial death of a youth, an accused in a case of theft, in the custody of Birjodi police, *prima facie* due to the infliction of torture to extract information regarding the stolen property and the confession of guilt is descriptively analysed as follows.[348]

On Day 1, the youth was subject to name-calling by a few over which he picked up a fight and later in the day while returning from the market, he was accused of a theft case registered at the Birjodi *thana* and forcibly taken away by a few locals into a school and beaten up. Later, he, a resident of a nearby village that falls under the jurisdiction of the neighbouring thana (X), was handed over to the police of Birjodi *thana* who numbering around 7-8 with arms conducted a late night raid at the house of the accused, under complete darkness and without warrant to search for the stolen television. He was also brought along whose hands were tied at the back, and was profusely bleeding from the mouth. The father of the accused not being able to identify the police when asked them of the *thana* they belonged to, received severe tongue-lashing and was lied that they belonged to X *thana*, under whose jurisdiction its house actually falls. Whence nothing was found after ransacking the house, the police turned their ire toward the accused and banged his head onto the wall in frustration. The aged father fell at the feet of the senior police officer accompanying the raid and prayed for mercy in sparing his son as he was badly wounded. In a fit of rage, the officer using profanity kicked at the old man on his chest to remove him from their way. As they left with the accused in the police jeep, they gave no information on enquiry about where he was being taken to.

On Day 2, the father of the accused on receiving information about his son reached the Birjodi *thana* late in the morning with some money to get his son released but a SI scoffed at the meagre sum and asked him to get a hefty sum and also a bailer along tomorrow. He pleaded mercy for some lowering the extortion amount. He then sought assistance from the accused's brother-in-law who was scared to approach the police because of his own bitter experiences with the same police in the case of the abduction of his minor daughter. After failing on all attempts for the release of his son, he went back home to arrange for the money as demanded by the SI.

On Day 3, after arranging the required money from selling off his goats, the accused's father along with the accused's brother-in-law as a bailer left for the *thana* as on the way they were hurried by a Home Guard who provided the information of urgent summons from the OIC of the Birjodi *thana*. In the meanwhile, the OIC of another neighbouring *thana* (Y), and the Circle Inspector, located in Y's area, along with a local influential person, the relative of the complainant of the case, came over to the house of the accused and asked his wife and mother to accompany them to the *thana* along with the land documents for the bail of the accused as nothing could be found against him. At this moment because of the intervention of the local people, they pretended as if everything was normal and agreed to instantly release the accused but demanded for certain documents to be signed and thus took the signatures of two respectables of the neighbourhood and that of the victim's wife on a blank paper. On their way over to the *thana* in the jeep, the victim's

[347] Similar cases that can be referred are: *Sham Kant v. State of Maharashtra*, AIR 1992 SC 1879: 1992 Cr LJ 3243; *State of Himachal Pradesh v. Ranjit Singh*, 1979 Cr LJ NOC 210 (HP); *Chand Ahuja v. Gautam K. Hoda*, 1987 Cr LJ 1328 (P&H).

[348] First-hand information regarding this case was gleaned from various sources, the family members of the victim, the *bhadralok* of the village and the local representative. The station diary of this period was not available at the thana as that was seized as part of the evidence for the investigation into the custodial death. It was learnt that the station diary was found been pending for long and not up-dated as per the procedural rules when it was seized. Thus, according to the duty roster, the DCO for the period of this incident was asked by the superior police officers present at the *thana* after the incident to update it, accordingly. Hence, no gain-saying of the possibility of *post hoc* manipulations that certainly would have crept into the accounts of the relevant entries.

wife and the local representative heard the police inform over the VHF about their coming to the thana and simultaneously gave direction for bringing the accused's father and the brother-in-law as soon as possible.

The wife of the accused and the representative were the first to reach the *thana* followed by the father and brother-in-law of the accused. The Asstt. Superintendent of Police then broke the news of the unfortunate incident to all the four that the accused has committed suicide in the *hazat*.

The family members were then offered to have a look at the victim. The representative on seeing the gory site complained of nausea and wanted to go out but was forcibly confined to the *thana* as the police did not want the news about the death to reach the public. The scene inside the lockup was as follows: the victim (height of an average Indian adult) was on a kneeling position, resting upon the railing of the window of the *hazat* that was less than 3 ft. from the ground. He had all his clothing except the shirt that was wrapped around the neck and one end of it loosely fastened on to the railing of the window. *Prima facie*, it was evident that he had died due to excessive bleeding from the wound inflicted in his gluteal region. The lower part of the body was drenched with blood and there was also blood all over the floor of the *hazat*. The victim's brother-in-law was forced by the ASP to untie the victim's dead body and bring carry it with some help to the waiting police vehicle.

All the family members of the victim present at the *thana* along with the representative were huddled into different vehicles and taken along with the victim's body for postmortem. When the representative requested to let go, it was turned down and scoffed at as the police felt that he would inform the people about this and create a stir. The representative revealed that the police took nearly 10 to 15 signatures of all on various documents and blank paper as well without bothering to inform the nature and reason for seeking the signatures. On one count when the victim's father refused to put his signature unless he calls someone from his community and get to know the reasons for such signatures, it infuriated the OIC of Y *thana* who in excitement pulled out the service revolver at the old man who without then acquiesced. The same officer was also heard speaking to the Circle Inspector about 'successfully taking the dead body out of the *thana* area eluding the people who have had no knowledge of the custodial death, otherwise the implications would have been certainly grave'.

As they reached the district hospital, the arrangements for the autopsy were in place that started off immediately. Some more papers were signed at the pre- and post-autopsy stage. After the postmortem was conducted, a formal opinion was sought by the police from the family members about 'what to do with the body'. When the latter wanted to take the body back to the village, they were derided for as the police thought that it would create a law and order problem. The father of the victim was persuaded against such an idea and was pressurised to agree to the cremation of the body there itself which was carried out *tout-de-suite*. They were then all brought back to the Y *thana* from where they were sent to their village in a private vehicle. Just before that the ASP told them that they would get compensation from the CM's Relief Fund and so should not listen to anyone as there will be lot of touts to exploit them.

On the next day, Day 4, the victim's wife along with a group of villagers went to the Birjodi *thana* where the victim was killed to file a complaint against the police personnel of the *thana*, the OIC of Y *thana* and the Circle Inspector (CI), charging them of killing her husband. But no male member was allowed to enter the *thana* premises. The police refused to accept the report citing that as the complainant was illiterate, the person who had written the complaint on her behalf needed to testify. This was purportedly done to scare away the concerned person and so to avoid the registration of the report. But as the author of the complaint verified it, the police had to accept the report and gave a copy of it, duly acknowledged.

The brother of the victim had also filed a similar complaint with the X *thana* under whose jurisdiction they reside and also lodged a FIR against the OIC of Y *thana* and the CI for having taken him on deceit, for having conspired the killing, for the mental torture and harassment due to forcible confinement and for forcibly taking the signatures. He was later approached by the CI for a mutual resolution of the problem.

The gross irregularities in this episode were:

a. The police of Birjodi *thana* did not inform the police of the X *thana* (as u/s. 166, Cr.P.C.) under whose jurisdiction they entered to search the residence of the victim. The police of the latter *thana* were never informed nor were they anyway involved at any stage of the case and they were also willing to give the same in writing to the victim's family.

b. There was absolute no compliance of the norms and guidelines of search. Lest could be said of the finer details as mentioned in the Cr.P.C. (s. 165) and the Orissa Police Manual (rule 165), that is, even though there was no electricity in the house of the victim, the raid was conducted without proper lighting and also without any lady police in the team as they ransacked the house, misbehaving with all members of house, including the victim's wife.

c. The Birjodi police demanded a certain sum for the release of the accused.

d. He was detained for more than two days without showing formal arrest.

e. The signatures of the respectables as witnesses and victim's wife that was taken on a blank paper was later found with the members of the Human Rights Protection Cell (administered by the police in Orissa) that was fraudulently used as a documentary proof by the Birjodi police to legitimise its search of the house of the victim.

f. It is a common practice followed at all the *thanas* that the arrestee or suspect when put inside the *hazat*, in contrary to the provisions as provided in rule 239-B(c) of the OPM, is stripped off all the clothing except the lower undergarment. But how could on this occasion, the accused was let in with all the clothing.

g. Lastly, the police is found to make arrests in far less serious cases as in this incident on 'suspicion of theft'. Hence it was imperative that all involved in the case, namely, the police personnel who picked up the accused, the officer who arrested and under whose custody the accused was kept in the *hazat*, and the sentry constable on guard should all have been arrested on charges of culpable homicide as it happens in general cases for in no other case can the apprehension of influencing the course of investigation, and tampering with the evidence be more greater and plausible. Taking into consideration the conviction rate in custodial death cases, mere registration of a case and

suspension or transfer of a few personnel do not constitute any convincing lawful action against those who committed such heinous crime.

The examination of the above custodial crimes show the susceptibility of the investigative process to systematic police biases. It is pertinent to note, from the interactional outcomes between the researcher and the members of the four *thanas*, that the difficulties of the police relating to the near impossibility of making any recovery of the stolen articles in property-related offences[349] and other related problems in the justice process, as discussed earlier, puts the police in a precarious position that impels them to adopt such techniques for expeditious case outcomes.

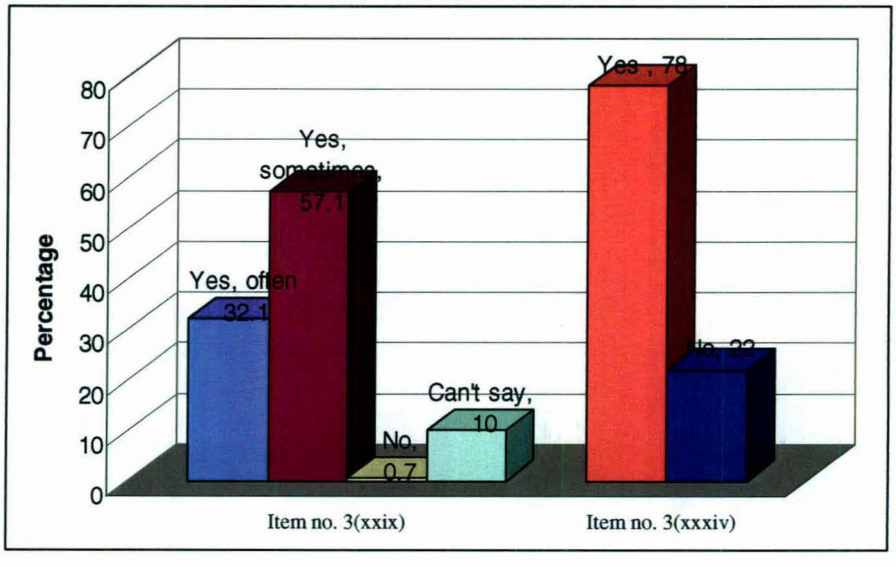
Such instances of custodial crime are a culmination of the violence that pervades the work culture of the police. But there are other factors that are responsible for it as demonstrably from the above case, the extraneous pressures from the influential members of the society and also that of the police department. In fact, some of the scrupulous administrators maintained that the use of force or the threat of such use in securing confession is sometimes justified by the situational exigencies. On this point, the National Police Commission has made the following observation:

> We note with concern the inclination of even some of the supervisory ranks to countenance this practice in a bid to achieve quick results by short-cut methods. Even well-meaning officers are sometimes drawn towards third-degree methods.[350]

But third-degree is only one aspect of the larger problem of police brutality, that has been a tool indiscriminately used in all aspects of policework and not merely to elicit confessions. Though scarcely would any member of the public admit of not being aware of police atrocity, the public opinion survey showed that there were no marked difference between the rural and urban samples in their responses to related questions. On the question whether the police use force against people, nearly 90 percent of the total respondents felt that they do. This was reaffirmed by the responses to the question, 'whether people knew someone of their acquaintance who have been beaten up by the police,' as nearly four-fifth of the total rural respondents answered in the positive. With regard to the frequency of such behaviour of the police, while three out of every nine respondents believed that police often use force, rest felt that it is used sometimes.[351] (See Figure 5A.)

FIGURE 5A

EXPERIENCE OF USE OF FORCE BY POLICE



[349] It was evident from the Inspection Note on Sewaknagar *thana* that the recovery had been just 23 percent of the total estimated worth of property stolen, of only the reported cases of theft. See fn. 112, Chapter 4.

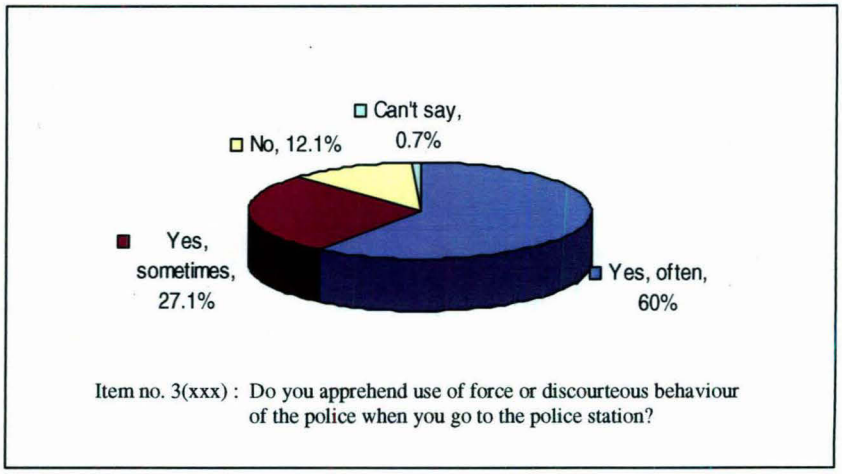
[350] **National Police Commission**, Fourth Report, op. cit.

[351] Item no. 3(xxix) & 3(xxxiv). Most of these questions have multiple responses.

In regard to the question whether they apprehend discourteous behaviour or use of force against them when they approach the police [item no. 3(xxx)], the number of people who had such apprehension remained almost the same as those who felt police use force. But there was a cent percent increase as three-fifths of the entire sample most often feared the use of force or rude behaviour from the police. While in the earlier question there was nearly no one who could give an opinion in favour of the police, more than ten percent of the total respondents expressed no fear of the police and that constituted nearly 35 percent of the economically dominant class. (See Figure 5B.)

FIGURE 5B

APPREHENSION OF FORCE WHEN APPROACH THE POLICE



The first-hand experience in terms of both near-personal and personal encounters[352] of the respondents were found to be vastly different. The sight of a person been beaten by the police was quite a common phenomenon in both rural and urban areas. An average of nearly 69 percent of the total respondents have had witnessed such a scene [item no. 3(xxxi)]. But personal experiences of such police behaviour were relatively fewer as also because some of them never had an encounter with the police. Only 31 percent had ever been threatened unduly by the police [item no. 3(xxxiii)]. But again when it comes to knowing about others experience with the police, it was found that most of the respondents, nearly 78 percent, had known someone who was physically abused by the police [item no. 3(xxxiv)] When asked about what occasioned such police action, the most commonly stated situations were: problems related to law and order or public order; while dealing with mischievous characters/suspects; on disrespect to police orders; on resisting arrest; motivated by influence or pressure, political or organisational; when attempting to compromise a dispute; against those creating public nuisance; in case of domestic issues like where improper conduct is reported or witnessed, for instance, on the complaint of an old couple that they are not being looked after or mistreated by their son, or in matters of domestic violence; etc.[353]

The survey showed that little more than 80 percent of the total respondents believed that that those called to the *thana* for investigation are treated unlawfully. The most common forms were intimidation, assault and verballing. As nearly one-third of the respondents felt that such police attitude has been indiscriminate, nearly one-half of an equal proportion of respondents couldn't say at all on the issue and the other half also had no knowledge but only hearsay accounts of police ill-

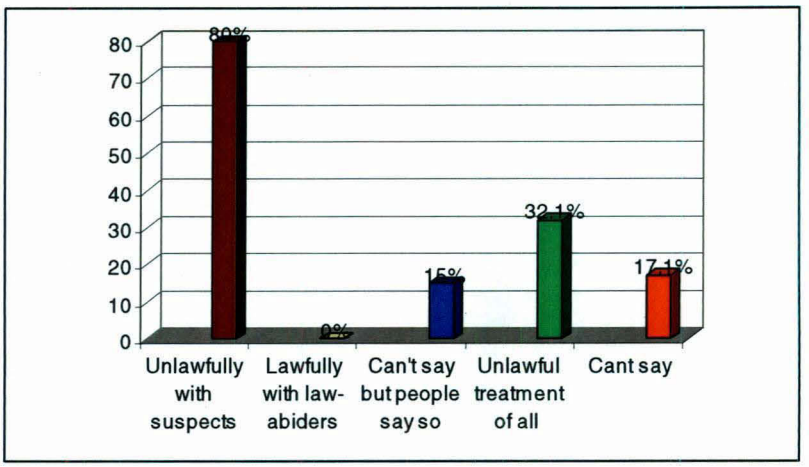
[352] Near personal encounters are defined as those situations where one has been an witness to something without being a participant in the event.

[353] Item no. 3(xxxii) & 3(xxxiv).

treatment during questioning. Nearly eight out of every ten people opined that the suspects are highly susceptible to harsh and cruel treatment. Interestingly, there was none who could feel that the police were respectful to the law-abiders [item no. 3(xxiv)]. (See Figure 5C.)

FIGURE 5C

POLICE TREATMENT WITH THOSE DURING INVESTIGATION

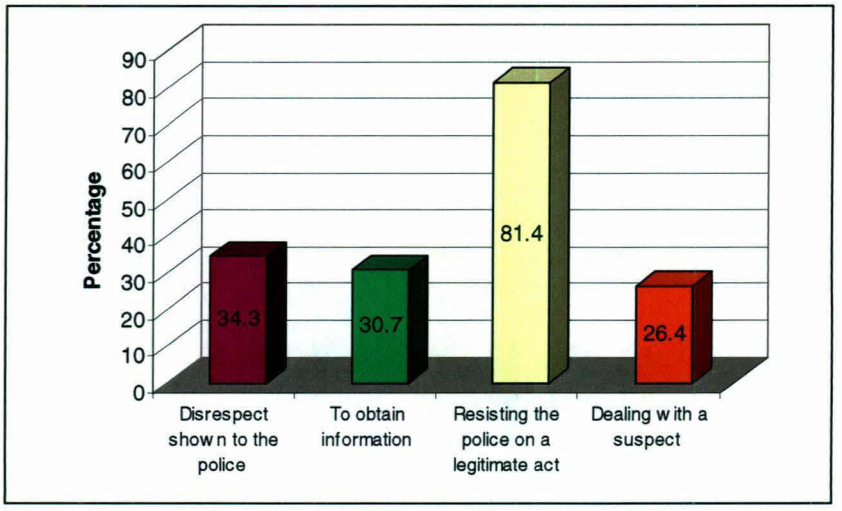


Survey Question [3(xxiv)]: How do the police treat people called to the police station for investigation?

It is an encouraging development over the years if Bayley's survey findings in regard to the question on (i) 'whether the police would be justified in beating a suspect whom they knew to be guilty but would not confess' and (ii) 'whether the police should use physical force against a suspect who had robbed the respondent in order to get him to confess', is compared with the findings of this study. Bayley found the public appraisal of police methods as one of condemnation in the abstract, but when faced with real crime settings becomes less critical and particularly when they themselves are the victims. In the present day context, as the survey for this study showed there exists an appreciation of the situation while passing a judgement on the methods employed by the police in its work processes, e.g. 'to obtain information' and 'while dealing with a suspect'. An overwhelming 80 percent of the respondents showed a considerate attitude towards the police for roughing up someone who obstructed it while performing a legitimate act.[354] (See Figure 5D.)

FIGURE 5D

CIRCUMSTANCES IN WHICH USE OF FORCE JUSTIFIED



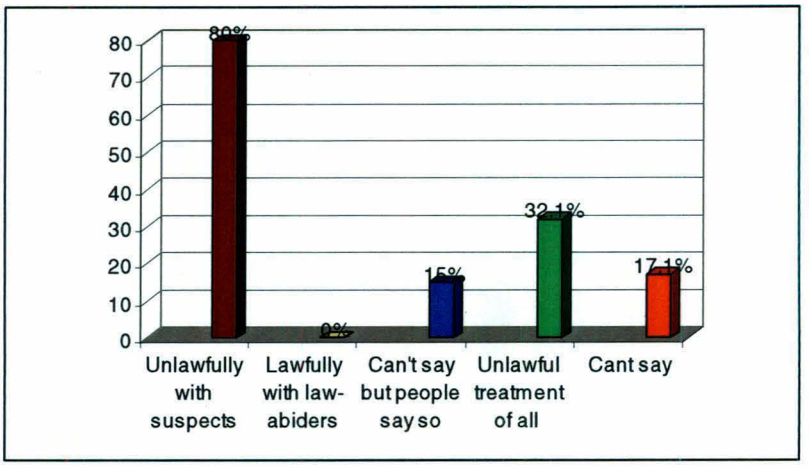
Questionnaire item no. [3(xxxvi)]: When do you think a policeperson is justified in roughing up or using force?

[354] Item no. 3(xxxvi). Bayley's findings showed that an average of 70 percent of the general public were in favour of the use of physical force against the suspect. See David H. Bayley, op. cit., p. 171.

treatment during questioning. Nearly eight out of every ten people opined that the suspects are highly susceptible to harsh and cruel treatment. Interestingly, there was none who could feel that the police were respectful to the law-abiders [item no. 3(xxiv)]. (See Figure 5C.)

FIGURE 5C

POLICE TREATMENT WITH THOSE DURING INVESTIGATION

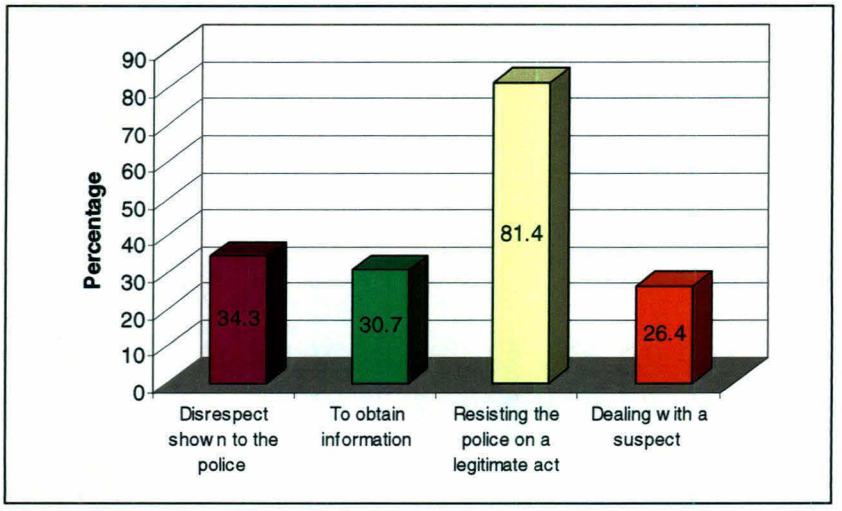


Survey Question [3(xxiv)]: How do the police treat people called to the police station for investigation?

It is an encouraging development over the years if Bayley's survey findings in regard to the question on (i) 'whether the police would be justified in beating a suspect whom they knew to be guilty but would not confess' and (ii) 'whether the police should use physical force against a suspect who had robbed the respondent in order to get him to confess', is compared with the findings of this study. Bayley found the public appraisal of police methods as one of condemnation in the abstract, but when faced with real crime settings becomes less critical and particularly when they themselves are the victims. In the present day context, as the survey for this study showed there exists an appreciation of the situation while passing a judgement on the methods employed by the police in its work processes, e.g. 'to obtain information' and 'while dealing with a suspect'. An overwhelming 80 percent of the respondents showed a considerate attitude towards the police for roughing up someone who obstructed it while performing a legitimate act.[354] (See Figure 5D.)

FIGURE 5D

CIRCUMSTANCES IN WHICH USE OF FORCE JUSTIFIED



Questionnaire item no. [3(xxxvi)]: When do you think a policeperson is justified in roughing up or using force?

[354] Item no. 3(xxxvi). Bayley's findings showed that an average of 70 percent of the general public were in favour of the use of physical force against the suspect. See David H. Bayley, op. cit., p. 171.

It thus shows that not majority of the people support the use of violence as a technique in policework. Only 20 percent justified the use of third-degree methods to obtain confession under circumstances where there is no other evidence available and the IO is certain about the guilt of the person. The urban residents were more sensitive about the suspect's rights than their rural counterparts as their proportion against the use of coercive methods were 11 percent and 24 percent, respectively [item no. 3(xlix)]. But there were mixed stories available: an instance that was discussed earlier in this work, where a judge had shown his enthusiastic support to the police to employ illicit methods to obtain information from the suspects of the burglary on his house; a resident, lawyer by profession, of Sewaknagar was not only considerate to pardon the thief after the recovery of the stolen article but had earlier requested the police not to torture the suspect during interrogation.

In general, the function of brutality in policework is recognised and believed to be integral to successful policing. Torture in custody, illegal detentions, and unjustified harassment of the publics are more frequent than is known just as the 'dark figure' of crime – the volume of unreported crime – is by its very nature unknowable. Any act of torture amounts to a tort. In law, physical invasion by one person of the body of another, if it is not consensual and not authorised by a specific legal provision, becomes the tort of assault or battery and may constitute aggravations thereof, depending on the amount of force used. So far as criminal liability is concerned, the IPC contains adequate provisions to punish those who inflict physical pain on others. It makes no difference if the offender is a police officer or public servant. There are, however, sufficiently potent legal remedies to seek redress. Sections 220, 330, 331, and 342 of the IPC provides for punishment with regard to wrongful confinement with malicious or corrupt intent and inflicting injury for extorting confession in regard to the commission of an offence or creating fear in the mind of the other to commit anything wrong. The Indian Police Act, 1861, *vide* s. 29, provides that

> every police officer...who shall offer any unwarrantable personal violence to any person in his custody, shall be liable, on conviction before a Magistrate, to a penalty not exceeding three months, pay or to imprisonment, with or without hard labour, for a period not exceeding three months, or to both.

Besides these, the Cr.P.C. itself contains adequate provisions to safeguard against possible abuse of power, oppression or other ill-treatment at the hands of those wielding authority over the life, liberty and peace of citizens.

The how to actually conduct an examination of anyone related with the facts and circumstances of the case has been in existence at least since 1940 as laid down in rule 162(a) of the Orissa Police Manual. It states that,

> Investigating officers should carefully abstain from causing unnecessary harassment either to the parties or to the public generally. Only persons likely to assist the enquiry materially should be summoned to attend. The proceedings should be as informal as possible, and the questioning of witnesses should be conducted in a manner that will not be distasteful. Whenever convenient, the investigating officer should go to an important witness rather than summon him. Witnesses should be examined separately, and not in the hearing of each other or of any individual whatsoever. The more an officer succeeds, in keeping an investigation screened from the view of others, the better he will be able to secure the confidence of those who are acquainted with the facts of the case or are in a position to give valuable information. The questioning of a witness should be done with the utmost coolness and patience, and the investigating officer must not lose his temper if the witness is found to be lying or withholding facts. It should also be remembered that even if a witness has the best information to speak the truth, he may make inaccurate statements on account of bad observation, defective comprehension or weak memory. In such cases, the investigating officer should help him, by reminding him of collateral facts or taking him to the places of occurrence, to re-construct correctly. If however the witness gives indications that he is deliberately lying, the investigating officer should find out the motive for it, carefully think out his in a

> rogatoris and confront the witness with facts which he cannot get over, so that he may eventually speak the truth.[355]

Similarly, there has also been in place, some of the following norms for handling an arrestee:

> Directly an accused person is paced under arrest, the investigating officer shall ask him whether he has any complaint to make of ill-treatment by the police and shall enter in the case diary the question and answer. If an allegation of ill-treatment is made, the investigating officer shall there and then examine the prisoner's body, if the prisoner consents, to see if there are any marks and shall record the result of his examination. He shall further note whether there is reason to believe that marks found are, attributable to causes other than ill-treatment, such as resistance to arrest. If the prisoner refuses to allow his body to be examined, the refusal and the reason shall be recorded. If the investigating officer finds reason to believe the allegation of ill-treatment, he shall at once forward the prisoner with his complaint, the record of corporal examination, any other evidence available and, if possible, the police officers implicated, to the nearest Magistrate having jurisdiction.
>
> In the case of an unidentified person full descriptive rolls should be entered in the case diary.[356]

The Manual also provides instructions for examination of arrestees whose object is to protect police officers against charges of torture founded or injuries received before the prisoner came into their hands; responsibility for safe custody; and rules for the custody of arrestees, a copy of which shall be hung up in the office and rules (d)-(i) that comprises of the duty instructions for the sentry constable on guard of the arrestees in the *hazat* shall be hung up near the *hazat* door.[357] In actual practice, the police neither show any concern to function procedurally nor the existing situation despite newly prescribed guidelines seems to bring any perceptible change in the police actions that would hinge on legalities. The National Police Commission's observations illustrate the present conditions:

> lock-ups do not exist in many police stations. The arrested persons are handcuffed and chained to window bars in the main room or verandah in some police stations. Even where lock-ups exist, they are short of space and are not fit for human beings. Some of them are cramped, gloomy, damp and unhygienic.[358]

Keeping in view the 'recipe' rules (common-sense knowledge) of the police subculture about the interrogation as a critical instrument in the investigation work of determining case outcomes, it is imperative to take into account the observation of the National Police Commission to realise why such a work process of the police has generated serious concerns despite the fact that the Police Manual has in sufficient detail, as stated above, set the standard for that police activity.

> Any process of interrogation implies the questioning of a person more than once with reference to a variety of facts with which he may be confronted in succession. This process will, therefore, result in the building up of some kind of pressure on the mental state of the person questioned. This, in our view, is inevitable in any process of interrogation but when it crosses the limits of a mere pressure of facts building on the mind of the interrogated person and gets into the domain of physical pressure being applied on him in any form, it becomes despicable. Unfortunately several police officers under pressure of work and driven by a desire to achieve quick results, leave the path of patient and scientific interrogation and resort to the use of physical force in different forms to pressure the witness/suspect/accused to disclose all the facts known to him.[359]

Hence, an inventory of safeguards that have come into effect and many recommendations in this regard that still await official consideration for incorporation into the body of laws to refurbish police practice as well as make significant contribution to the development of human rights jurisprudence.

The First Law Commission's opinion in its Fourteenth Report that articles 25 and 26 of the Indian Evidence Act should not be repealed was also supported by the State Police Commissions of Uttar Pradesh, Maharashtra and Bihar, except that the Bihar Police Commission disagreed with the experiment suggested that the confessions made to officers of the rank of Deputy Superintendent and above could be admitted in court if the officer himself had conducted the investigation, as it discriminated between the ranks of the investigating officers. Instead the Bihar Police Commission

---

[355] Rule 162(a), Chapter IX, OPM.
[356] Rule 221(b), Chapter XI, OPM.
[357] Rules 238, 239-A & 239-B, OPM.
[358] James Vadackumchery, op. cit., p. 150.
[359] **National Police Commission**, Fourth Report, op. cit., para 27.26, p. 8.

exhorted that the police should not rely too much on confession as the sole determinant of case outcomes, rather should devote their energies to gather physical evidence or eyewitness testimonies.[360]

The Malimath Committee on Reforms on Criminal Justice System builds upon the experiment suggested by the Law Commission in the 1960s to recommend that

> Section 25 of the Evidence Act may be suitably amended on the lines of Section 32 of POTA 2002[361] that a confession recorded by the Supdt. of Police or Officer above him and simultaneously audio/video recording is admissible in evidence subject to the condition that the accused was informed of his right to consult his lawyer.[362]

It is pertinent to take note of the Bihar Police Commission's disagreement on accepting the discrimination made between the ranks of the IOs. It is whether on the basis of any ethical norms of occupational integrity is unknown, but it emphasises the understanding that traditionally bears the official explanation to rationalise any act of torture wherein the blame is laid on the untrained and inefficient policemen, largely referring the brutality to be at the hands of older policemen of the cutting-edge level. It seems to be true looking at the accused in the two cases of custodial crimes that were dealt in this section. It is interesting to note that in the first case, along with an old hand, the co-accused belonged to the new generation of officers. At the same time, it appears that the concern shown by the National Police Commission on the proclivity of the supervisory and well-meaning officers to countenance third-degree methods is significantly topical.[363]

The judiciary have passed severe strictures on several occasions on the people at the helm of affairs of governance. Some of the latest instances are: (1) the Police Commissioner of Madurai City was held by the Madras High Court to be the *prima dona* of an operation involving the arrest of two women that was in violation of the procedures established by law, in the *Serijabanu* case. (2) A Supreme Court bench in a custodial death case attributed the serious threat to human rights of citizens posed by the increasing number of cases of custodial violence, torture and lock-up deaths in the country to the

> devilish devices adopted by those at the helm of affairs who proclaim from roof tops to be the defenders of democracy and protectors of peoples' rights and yet do not hesitate to condescend behind the screen to let loose their men in uniform to settle personal scores, feigning ignorance of what happens and pretending to be peace-loving puritans and saviours of citizens' rights.[364]

The Commission taking note of the police image that has suffered due to such practices observed that,

> we consider it most important for improving police image that the senior officers and the supervisory ranks in the police deem it their special responsibility to put down this practice at the operational level in police stations and elsewhere.[365]

The revolution in the legal jurisprudence comes in the wake of imparting a humane perspective into what is being held as a paradigmatic shift in the present criminal justice process. The Supreme Court of India, in *D.K. Basu v. State of W.B.* took cognizance of the existence of custodial crimes after a

---

[360] David H. Bayley, op. cit., fns. 59-62, pp. 173-74.

[361] Section 32 of POTA (Act No. 15), 2002 in cl. (1) provides that a confession made by a person before an officer not below the rank of Supdt. of Police be recorded in writing or on any mechanical or electronic device shall be admissible in the trial of such person for an offence under POTA.

[362] **Committee on Reforms of Criminal Justice System** (Chairman Dr. Justice V.S. Malimath), op. cit., Recommendation no. 37, p. 243. The Padmanabhaiah Committee on Police Reforms recommended for the deletion of ss. 25 and 26 of the IEA and confessions made to the police officers of the rank of the Superintendent of Police and above should be made admissible in evidence.
<http://www.humanrightsinitiative.org/programs/aj/police/india/initiatives/summary_padmanabhaiah.pdf>

[363] Syed H. Afzal Qadri, op. cit., pp. 151-54.

[364] A. Subramani, op. cit.; *Supreme Court frowns on custodial deaths*, **The Hindu**, Delhi, Thursday, September 11, 2003, p. 1.

[365] **National Police Commission**, Fourth Report, op. cit.

letter was sent to the then Chief Justice of India drawing attention to newspaper reports regarding death in police lock-ups and custody. While delivering the landmark judgment in this case in December 1996, that included the laying down of specific guidelines to be followed by the investigating agency for arrest, detention and interrogation of any person, the observations of Justice Anand are of the same genre to that made in September 2003 by a bench comprising Justice Doraiswamy Raju and Justice Arijit Pasayat while awarding Rs. 1 lakh to a family, which lost its breadwinner due to torture in police custody. It stated that

> the expression 'life or personal liberty' in Article 21 of the Indian Constitution includes the right to live with human dignity. The rights inherent in Articles 21 and 22(1) of the Constitution require to be zealously and scrupulously protected. We cannot whisk away the problem. Any form of torture or cruel, inhuman or degrading treatment would fall within the inhibition of Article 21 of the Constitution, whether it occurs during investigation, interrogation or otherwise. There is an inbuilt guarantee against torture and assault by the State or its functionaries. It is, therefore, difficult to comprehend how torture and custodial violence can be permitted to defy the rights flowing from the Constitution.[366]

In the code laid down in *D.K. Basu* case, one of the rights recognised is the right of the arrestee "to meet his lawyer during interrogation, though not throughout the interrogation."[367] The Fourteenth Law Commission in its 177th Report, while recommending for the incorporation of these directions of the Apex Court in Chapter V of the Cr.P.C., also suggested for the insertion of new sections 41A to 41D that included the 'right of the arrested person to have advocate during interrogation'.[368] These are in contrast to the understanding of the National Police Commission on the presence of third party during the examination of the accused, which is as follows:

> We have been told of the difficulty faced by police officers by the insistence of some accused persons, particularly the rich and the influential, that their lawyers should be present by their side when they are examined by the police. Examination of a person either as a witness or accused by a police officer in the course of an investigation relates to the facts within the exclusive knowledge of the persons concerned and there is really no need for him at that stage to have the immediate assistance of anybody else by his side to be able to answer the questions put by the investigating officer. Further, the facts put before a witness or accused by the investigating officer and the facts ascertained from a witness or accused in the course of his examination have to be kept confidential at the stage of investigation and it might prejudice the course of investigation if they get known to a third party and several others through that party. We, therefore, consider it desirable to make a specific provision in law that when a person is examined by a police officer under section 161, Cr.P.C., no other person shall, except in the exercise of powers under the law have the right to be present during such examination.[369]

The Anglo-American legalism is highly evolved in terms of protecting the rights of the accused and ensuring the just and fairness of the process of interrogation. In England, the privilege of counsel for a prisoner charged with felony was first allowed in 1836. It was in 1932 that the United States Supreme Court for the first time had the opportunity to deal with such issue that arose in the famous *Scottsboro* case[370] wherein nine black boys tried in Alabama for rape of two white women, were found guilty and sentenced to be hanged in the trial without the aid of counsel. The SC struck down the conviction and held that it was the duty of the Court to assign counsel to the accused on the following raison d'être of such right:

> Even the intelligence and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel, he may be put on trial without a proper charge and convicted on improper evidence. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of man of intelligence how much more true is it of the ignorant and illiterate, or those of feeble intellect.[371]

---

[366] paras 17 and 22 of the SC judgement in *D.K. Basu* case; *Supreme Court frowns on custodial deaths*, op. cit.
[367] rule 10, para 36 of the SC judgement in *D.K. Basu* case.
[368] <http://pib.nic.in/archieve/Ireleng/Iyr2002/rdec2002/31122002/r311220022.html>
[369] **National Police Commission**, Fourth Report, op. cit., para 27.11, p. 4.
[370] *Powell v. Alabama*, 287 U.S. 45 (1932).
[371] <http://www.ebc-india.com/lawyer/articles/97v8a3.htm>

Such privileges were later expanded to the stage of police investigation when in 1964, in the case of *Escobedo v. Illinois* [378 U.S. 478 (1964)], the right to have legal counsel present during police interrogation was recognised. In this case

> Danny Escobedo was arrested without a warrant for the murder of his brother-in-law, made no statement during his interrogation, and was released the same day. A few weeks later, another person identified Escobedo as the killer. Escobedo was rearrested and taken back to the police station. He was handcuffed and during the interrogation for four hours which followed, officers told him that they "had him cold" and that he should confess. Escobedo asked to see his lawyer, but was told that an interrogation was in progress, and that the couldn't just go out and see his lawyer. Soon the lawyer arrived and asked to see Escobedo. Police told him that his client was being questioned and could be seen after questioning concluded. Escobedo later claimed that while he repeatedly asked for his lawyer, he was told, "Your lawyer doesn't want to see you." Eventually, Escobedo confessed and was convicted at trial on the basis of his confession.

Upon appeal, the U.S. Supreme Court overturned Escobedo's conviction; taking note of the famous Wickerham Report that mentioned the prevalence of police brutality to extort confession, Justice Warren ruled that counsel is necessary at police interrogations to protect the rights of the defendant and should be provided when the defendant desires. It stressed the need for protective devices to make the process of police interrogation conform to the dictation of the privilege, that is the Sixth Amendment for right to counsel extended to all critical pretrial phases of criminal procedure.[372] Such privileges got fine tuned in subsequent cases:[373]

In *Edwards v. Arizona* [451 U.S. 477 (1981)], the SC established a "bright-line rule" for investigators to use in interpreting a suspect's right to counsel, in other words, once a suspect, who is in custody and who is being questioned, has requested the assistance of counsel, all questioning must cease until an attorney is present.

In 1990, the Court refined the rule in *Minnick v. Mississippi* [498 U.S. 146 (1990)], when it held that interrogation may *not* resume after the suspect has had an opportunity to consult his or her lawyer when the lawyer is no longer present. Thus, interrogation stops when the suspect requests for attorney.

In 1994, however, the Court, in the case of *Davis v. United States* [512 U.S. 452 (1994)], "put the burden on custodial suspects to make unequivocal invocations of the right to counsel." That is, the suspect must make unambiguous request for attorney.

In the area of suspect rights, no case is as famous as that of *Miranda v. Arizona* [384 U.S. 436 (1966)],[374] decided in 1966, that is regarded as the centre-piece of Warren court due process rulings.

> The case involved Ernesto Miranda, 23, a poor ninth-grade dropout, who was arrested in Phoenix, Arizona, and accused of having kidnapped and raped an 18 year-old woman. At police headquarters, he was identified by his victim. After being interrogated for two hours, Miranda signed a confession which formed the basis of his later conviction on the charges.

Upon appeal to the U.S. Supreme Court, the Court rendered, what some regard as the most far-reaching opinion to have affected criminal justice, the Miranda's conviction unconstitutional because

> The entire aura and atmosphere of police interrogation without notification of rights and an offer of assistance of counsel tends to subjugate the individual to the will of his examiner.

Justice Warren wrote for a 5-4 majority in the case, a suspect in police custody

> must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation. After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer the questions or make a statement.[375] But unless and until such warnings and waiver are demonstrated by the prosecution at the trial, no evidence obtained as a result of interrogation can be used against him.

---

[372] Frank Schmalleger, **Criminal Justice: A Brief Introduction** (Second Edition), Prentice Hall, New Jersey, 1997, p. 157.
[373] Ibid.
[374] Ibid, pp. 157-59; N. Skene, *The Miranda Ruling: Equality of Justice*, **Congressional Quarterly Weekly Report**, 6/8/91, Vol. 49, Issue 23, p. 1546 (Source: EBSCO Database: Academic Search Premier).
[375] In *Edwards v. Arizona*, it was held that it would be considered that Miranda waived if suspect initiates conversation.

Thus, to ensure that proper advisement of rights due criminal suspects by the police at the time of arrest, prior to the beginning of any questioning, these rights appear on a *Miranda Warning Card*[376] that is read over to the suspects who are then asked to sign a paper which lists each right, in order to confirm that they were advised of their rights, and that they understand each right. Questioning may then begin, but unless suspects waive their rights not to talk or to have a lawyer present during interrogation.

The Constitution's Fifth Amendment's privilege against self-incrimination provides the right to remain silent unless one chooses to speak in the unfettered exercise of his own will during a period of custodial interrogation. It states that "no person...shall be compelled in any criminal case to be a witness against himself. This means testimony, not physical evidence." It was in Miranda case that for the first time this protection was also applied to the pressures of police interrogation – during which suspects could have a lawyer. Justice Warren's objective was to reduce the imbalance between the rich and the poor, strong and weak, government and individual.

The Indian legal jurisprudence too provides similar guarantees to its citizens as enshrined in the Constitution. Article 22 and 20(3) of the Constitution of India secures the right of the citizen to consult and defend oneself by a legal practitioner and the privilege against self-incrimination, respectively. But these privileges are yet to be extended to orientate the rights of the 'publics' within the structural-functional framework of policework processes as to the amplitude of the criminal procedures in the United States. The right to have a counsel, first introduced on the basis of the recommendation of the Law Commission in its 48th Report, in s. 304 of the Cr.P.C. in 1973 when England had had it in 1836 and the U.S. in 1932, remains restricted only to the trial stage of the criminal procedure.[377] Despite the observation of the Apex Court in 1981, in the *Khatri* case, that the obligation to provide legal aid to the indigent accused does not arise only when the trial commences but arises right since the accused is produced before the nearest Magistrate as required by s. 57 of the Code and Article 22(1) of the Constitution,[378] neither the Legal Aid Scheme has been calibrated to that effect nor the State has made any legal provisions to give effect to the rights as has evolved out of the interpretations of the judiciary. Least to state, the Supreme Court while issuing the guidelines in the *D.K. Basu* case in 1996 had prefaced it with the words that they are to be followed "till legal provisions are made in that behalf as preventive measures."[379] The Sixteenth Law Commission in its 177th Report in 2001 also made a recommendation for its incorporation into Chapter V of Cr.P.C., but no legislative measures yet to that effect. It is probably keeping in view the requisite stringency in the law to meet contingencies emanating from acts of terrorism, that the newly enacted POTA of 2002, though do not provide the right to counsel to a suspect during interrogation under the Act, *vide* clauses (2) and (3) of s. 32 makes it incumbent upon the police

---

[376] See Appendix N for the Miranda Rights Warning Card.

[377] The Supreme Court held that it is the duty of the Magistrate or the Sessions Judge to inform the accused who is indigent that he is entitled to obtain free legal services at the cost of the State. In *R.M. Wasawa* case, Justice Krishna Iyer not only pointed out that "indigence should never be a ground for denying fair trial or equal justice," but also dwelt on the quality of legal assistance to be made available to the accused. *Hussainara Khatoon v. Home Secretary, State of Bihar*, AIR 1979 SC 1360: 1979 Cr LJ 1036; *Ranjan Dwivedi v. Union of India*, 1983 Cr LJ 1052: AIR 1983 SC 624: (1983) 3 SCC 307; *Ranchod Mathur Wasawa v. State of Gujarat*, AIR 1974 SC 1143: (1974) 3 SCC 581. See **Ratanlal and Dhirajlal's The Code of Criminal Procedure,**' op. cit., p. 464; <http://www.ebc-india.com/lawyer/articles/97v8a3.htm>

[378] *Khatri v. State of Bihar*, (1981) 1 SCC 632: AIR 1981 SC 928: 1981 Cr LJ 470. See **Ratanlal and Dhirajlal's The Code of Criminal Procedure**, ibid.

[379] Opening lines of para 36 of the SC judgement in *D.K. Basu* case.

officer to explain in writing to the person making a confession about his self-incrimination right and also provides the procedural safeguard in accordance with s. 163 of the Code, respectively.[380]

The National Human Rights Commission (NHRC) in view of the reported attempts at suppressing or presenting a different picture of the custodial crimes, required that

> the District Magistrates and Supdt. of Police of every district should report to the Secretary General, NHRC, of the commission of such incidents within 24 hours of occurrence or of these officers having come to know about such incidents. It warned that failure to report promptly would give rise to presumption that there was an attempt to suppress the incident.[381]

In 1995, expressing concern over the post-mortem not been done properly in cases of custodial deaths and usually the casual attitude in drawing up the reports, the NHRC believed that a systematic attempt is made to suppress the truth and the report is merely the police version of the accounts as the local doctor succumbs to police pressure which leads to distortion of facts. Hence, it directed for video-filming of post-mortem examinations in respect of deaths in police custody and cassettes be sent to the Commission along with the report.[382]

The NHRC in its annual report 1995-96 asked the Government of India to act upon the following recommendations made by the Tenth Law Commission in its 113th Report (Injuries in Police Custody) in July 1985, in order to reduce and eliminate violence in custody:

a. To introduce a rebuttable presumption in Section 114B of the Indian Evidence Act, 1872, that injuries sustained by a person in police custody may be presumed to have been caused by a police officer, as it could have a restraining effect on officers engaging in torture;
b. Amend Section 197 of the Code of Criminal Procedure to obviate the necessity of governmental sanction for the prosecution of police officers where a *prima facie* case has been established, in an enquiry conducted by a sessions judge, of the commission of a custodial offence.[383]

The National Police Commission recommended certain remedial measures for treating the malady:

1. Surprise visits to police stations and similar units by the senior officers would help the immediate detention of persons held in unauthorised custody and subjected to ill-treatment. Malpractices, if any, noticed during such visits should be met by swift and deterrent punishment.
2. An arrested person in custody produced before the Magistrate or Judge be asked if he has any complaint of ill-treatment by the police, if he has any the Magistrate or Judge should get him medically examined and take appropriate further action.
3. Mandatory judicial inquiries into complaints of death or grievous hurt while in police custody.
4. Supervisory ranks to eschew statistical approach to evaluate police performance. Any administrative review of any kind that induces subordinate ranks to adopt short-cut methods be avoided.
5. Training institutions should pay attention to the development of interrogation techniques and imparting effective instructions to trainees in this regard.[384]

Despite all the judicial pronouncements, including those of the Supreme Court, and the codified and statutory provisions in place fettering exercise of arbitrary authority by the police and more so, the detailed instructions in the state police manual in regard to the conduct of specific functions related to effecting arrests, examining/interrogating the complainant/victim, accused/suspect, or witnesses during the investigation of the case, or the detention of the arrestee in custody, to prohibit any anomalies to that effect, the reality of functional independence of the police cannot be slighted.

---

[380] S. 32 of POTA 2002 provides for the production of the recorded confession and the author of such confession within 48 hours before CMM or CJM (cl. 4) and also an opportunity to such person to be examined if it has complaints of police torture (cl. 5).

[381] 'Letter to all Chief Secretaries of all States and Union Territories on the reporting of custodial deaths within 24 hours' by the Secretary General, NHRC, R.V. Pillai (Letter No. 66/SG/NHRC/93), Dated: 14 December, 1993, Sardar Patel Bhavan, New Delhi; <http://www.nhrc.nic.in/Documents/sec-1.pdf>

[382] 'Letter to Chief Ministers of all States, Pondicherry & the NCT of Delhi/Governors of those States under the President's Rule' by the Chairperson of NHRC, Justice Ranganath Misra, Dated: August 10, 1995, Sardar Patel Bhavan, New Delhi; <http://www.nhrc.nic.in/Documents/sec-1.pdf>

[383] *Report Tabled in Parliament: NHRC stress on police reforms*, **The Hindustan Times**, New Delhi, Wednesday, September 11, 1996, p. 5; S.R. Sankaran, op. cit.

[384] **National Police Commission**, Fourth Report, op. cit., para 27.26, p. 8.

The importance of the SC code governing arrest and detention lies in the recognition of the right to counsel during the period of interrogation, expressly aimed at preventing the possibility of torture in custody was touted to be the only foolproof mechanism against police human rights abuses which has been the bane of the Indian criminal justice system. These guidelines were pronounced in December 1996 with the specific directions to all the provincial Governments to strictly implement the same but its execution in real policework was such that the Supreme Court had to be moved again in August 1997 when it had to appoint a committee in each State consisting of some Judges of respective High Courts to oversee the implementation of its guidelines issued in *D.K. Basu* case. The report of this committee in one of the states, Uttar Pradesh, narrated the custodial torture and deaths that had taken place in year 2002 and how the police were hiding them. A Bench of the Supreme Court comprising of Justice R.C. Lahoti and Justice A.R. Lakshmanan, in February 2003, while taking a serious view of this, pulled up the State Home Secretary, the Inspector-General and the Additional Director-General (Human Rights) and told them:

> Don't forget that you all are human beings. Do you realise the consequence of letting loose your forces on human beings like this? Your children and relatives would also suffer and be dealt with in the same manner by the same force.

Expressing its anguish, the Bench directed the State Government to render all cooperation to the committee without interfering in any manner in its working. "Any hindrance to the working of the committee will be viewed seriously," it said.[385] The Code of Criminal Procedure (Amendment) Bill, 2005 which now lies in abeyance for reasons cited earlier, contains an amendment of s. 176 of the Cr.P.C. that [with the insertion of sub-s. (1A)] makes it mandatory, not only in case of any person that dies, but also who disappears, or where rape is alleged to have been committed on any woman, while such person or woman is in the custody of the police or in any other custody authorised by the Magistrate or the Court, for, in addition to the inquiry or investigation held by the police, an inquiry to be held by the Judicial Magistrate or Metropolitan Magistrate, as the case may be, within whose local jurisdiction the offence has been committed, and *vide* the insertion of sub-s. (5), such person holding an inquiry or investigation shall also within twenty-four hours of the death of a person forward the body for examination to the qualified medical person.[386]

The working conditions of the police remains to be the same, characterised by, what the National Police Commission identified as the causes for the commission of such abuses, (i) lack of understanding of human psychology, (ii) lack of patience, (iii) pressure of work, (iv) desire to get quick results, (v) inclination of the supervisory ranks to countenance the use of third degree, and (vi) belief that some pressure is necessary in all types of police interrogation.[387] The most critical factor is the lack of sensitisation among the operatives of law about the latest procedural requirements that must characterise their work processes, but the necessary conditions that would facilitate the adoption of such practice within the work culture of the police need to be developed. The proportion of the investigating officers of the quotidian level that expressed their unawareness of the court guidelines in the *D.K. Basu* case is alarming.[388]

It is interesting to note the observations of the Supreme Court in a number of cases which show that it does not overlook the role of the people in the higher echelons of the administration as also that of the judiciary in this context. Considering "custodial death as perhaps one of the worst

---

[385] *SC raps U.P. officials for custodial deaths*, **The Hindu**, Delhi, Tuesday, February 11, 2003, p. 5.
[386] **The Code of Criminal Procedure (Amendment) Bill, 2005**, op. cit., Clause 18 (i) to (iii), p. 6.
[387] **National Police Commission**, op. cit.
[388] Refer to fns. 242 and 243 and its relevant text.

crimes in a civilised society governed by the Rule of Law,"[389] the Apex Court believed that "the vulnerability of human rights assumes a traumatic torture when functionaries of the state, whose paramount duty is to protect the citizens and not to commit gruesome offences against them, in reality, perpetrate them."[390] The Bench wrote:

> ...it is bound to breed contempt for law and would encourage lawlessness and every man would have the tendency to become law unto himself thereby leading to anarchism. No civilised nation can permit that to happen. Does a citizen shed off his fundamental right to life, the moment a policeman arrests him? Can the right to life of a citizen be put in abeyance on his arrest? These questions touch the spinal cord of human rights jurisprudence. The answer, indeed, has to be an emphatic "No". The precious right guaranteed by Article 21 of the Constitution of India cannot be denied to convicts, undertrials, detenus and other prisoners in custody, except according to the procedures established by law by placing such reasonable restrictions as are permitted by law.[391]

The Supreme Court, finding fault with the present justice delivery system, contended that the exaggerated adherence to and insistence upon the establishment of proof beyond every reasonable doubt by the prosecution, at times even when the prosecuting agencies were themselves fixed in the dock, ignoring the ground realities, often resulted in miscarriage of justice. It added that

> torture in police custody receives encouragement by this type of an unrealistic approach at times of the courts as well because it reinforces the belief in the mind of the police that no harm would come to them once the prisoner dies in lock-up because there would hardly be any evidence available to the prosecution to directly implicate them with the torture.

The same Bench maintained that

> the dehumanising torture, assault and death in custody which have assumed alarming proportions raise serious questions about the credibility of the rule of law and administration of the criminal justice system. The community rightly gets disturbed. The cry for justice becomes louder and warrants immediate remedial measures.

It thus suggested that the government and the legislature must give serious thought to the recommendation of the Law Commission and bring about appropriate changes in law not only to curb custodial crime but also to see that such crime "does not go unpunished". To that effect, by way of caution to the trial and High Courts, the Bench said: "Courts must deal with such cases in a realistic manner and with the sensitivity which they deserve, otherwise, the common man may tend to gradually lose faith in the efficacy of the system." Recalling the words of Abraham Lincoln, the Bench said: "if you once forfeit the confidence of our fellow citizens you can never regain their respect and esteem."[392] Chevigny observes that in societies that had colonial rule or that has multiplicity of social groups, the revulsion against official violence has been weak and not been complete because of the lack of 'shared citizenship', that is, reliance on rights as an aspect of citizenship, as well as a strong sense of common humanity with other citizens irrespective of the differences.[393] Justice J.S. Verma, during his Chairpersonship of the National Human Rights Commission, considered the acts of torture as a challenge to civilisation itself and held that "such a situation must end, through the united efforts of the Government and all elements of civil society."[394]

---

[389] para 22 of the SC judgment in *D.K. Basu* case.
[390] *Supreme Court frowns on custodial deaths*, op. cit.
[391] para 22 of the SC judgment in *D.K. Basu* case.
[392] *Supreme Court frowns on custodial deaths*, op. cit.
[393] Paul Chevigny, op. cit., pp. 257-62.
[394] J. Venkatesan, *NHRC wants Convention against Torture ratified*, **The Hindu**, Delhi, Monday, June 26, 2000, p. 9.

SUBMISSION OF COMPLETION REPORT

As section 173(1) of the Code makes it obligatory, sub-ss. (5) and (6) have been introduced in s. 167 with a view to see that there is no unnecessary delay in investigation. The police manual too suggest for completion of the investigation without a break and with the least possible delay.[395] Intrinsic in the given legal procedures is the established interest justifying the cause of speedy investigation, a matter of right for the accused as also that for the defendant that are integral to the rule of law. The rationale behind the policy for a speedy investigation is that delay would not only cause for the opposite party to suborn evidence, influence witnesses and deflect the course of justice or that the disinterested witnesses may not only loose the interest and also fail to remember the details of the occurrence, but that "it may legitimately lead to the grievance of the accused that the work of the investigation is carried on unfairly or with an ulterior motive."[396] The delay in the completion or progress of the investigation is not permissible, *vide* 173(b) of the Manual, not even to secure the arrest of more of the accused or to take the order of the superior officers as part of any consultation in the course of investigation. Dilatory investigation that entails tardy administration of justice has been held by the Apex Court as violative of Article 21 of the Constitution.[397]

The examination of the Inspection Notes of the supervisory officers at all the *thanas* that were based on inspections conducted either towards the end of the third-quarter or at the end of the year 2002, showed poorly of the investigating officers' regard and commitment for the above mentioned provisions with distinct constitutional bearing. The average number of cases pending for investigation at each of the four *thanas* during the time of supervision was 54 percent of the total number of reported cognizable cases. The remarks of all the inspecting officers, Circle Inspector, Additional Superintendent of Police or Deputy Inspector General, irrespective of the *thanas* supervised, regarding the pendency of the cases were generally alike. It appeared as thus: "too high or heavy, which are kept pending unnecessarily. There is a scope to reduce the pendency further and keep it in check."

There are three different kinds of reports to be made by the police officers at three different stages of investigation.

1. Section 157 of the Code requires a preliminary report from the OIC of a police station to the Magistrate.
2. Section 168 requires reports from a subordinate police officer to the OIC of the station.
3. Section 173 requires a report of the police officer as soon as investigation is completed to the Magistrate competent to take cognizance of the case.

There are two kinds of "police reports"[398] that are made at the completion of the investigation of any case and the Code makes use of no specific expression to differentiate between them. The Police Manual distinguishes this "completion/police report" submitted u/ss. 169 and 170, Cr.P.C. as "final report" and "charge-sheet," respectively.

According to rule 174(a) of the Orissa Police Manual, "when the case is found to be true and accused persons are sent up, either in custody or on bail, a charge-sheet shall be submitted..." Whereas, "in all cases in which no arrest is made or in which there is insufficient evidence to send up the persons arrested for trial, or in which the charge is reported false, a non-cognizable or mistake of

---

[395] Rule 173(a), OPM.

[396] *R.P. Kapur v. State of Punjab*, (1960) 3 SCR 388: AIR 1960 SC 866: 1960 Cr LJ 1239. R. Deb, op. cit., p. 82.

[397] *Nimeon Sangma v. State of Meghalaya*, 1979 Cr LJ 941 (SC); *Hussainara Khatoon v. Home Secretary, State of Bihar*, AIR 1979 SC 1360: 1979 Cr LJ 1036, 1045, 1052. The SC, in these cases, directed some prisoners to be discharged, some cases to be withdrawn and some other cases to be finished within a fixed time limit. See R. Deb, ibid.

[398] According to section 2(r) of Cr.P.C., "police report" means a report forwarded by a police officer to a Magistrate under sub-section (2) of section 173 of the Code.

fact or mistake of law,"[399] or "in which investigation is refused" or because of lack of clue, "the final report contemplated in section 173(1), Cr.P.C. shall be written...," *vide* rule 181(a). The completion report is provided in the form prescribed by the State Government[400] that contains the particulars referred to in sub-clauses (a) to (g) of cl. (i) of s. 173(2) and s. 173(5) of the Code. The other documents that are required to accompany the report are provided in rules 175, 175A, and 176(a) and (b) of the Orissa Police Manual.

All reports are forwarded by the OIC of the police station and hence bear responsibility for the quality of the investigation. More so, it is required under the rule 174(b), and rules 181(c) and (d) of the Manual for the Circle Inspector and the Superintendent to go into the reports to note the defects therein, if any, and make such orders accordingly for the investigating officer to rectify the same. But in actual practice, it is seldom the District Chief who could ever go through all such reports. Hence, the burden gets concentrated on the Circle Inspector who likewise tries to pass the buck on to the respective OICs to ensure foolproof cases. On two occasions at two different *thanas*, the researcher was witness to the In-Charge of the *thanas* pointing out the defects in the reports while it perused the same before forwarding it to the Magistrate.

- In one case, a completion report that was submitted to the In-Charge of Sewaknagar *thana* by one of its subordinate officers to be forwarded to the Magistrate, had retained the same charges that the FIR of the case revealed about the commission of such offences, without giving adequate reasons therefor and without the requisite evidence to substantiate the charges. On being enquired by the OIC about the "defect," the concerned investigating officer's primary rationalisation was for the case having been registered under the same charges. It is notable that the case outcome has to be based merely on the evidence obtained during the course of the investigation and thus, it is not necessary that the charges made out of the offences as alleged in the FIR may in the report after the completion of the investigation had to be the same , rather charges are to be made afresh only in light of the evidence amassed by the IO in the case.
- Similarly, in another instance, the newly appointed OIC of Lekhpur *thana*[401] while disapproving the unnecessary search conducted by an IO to trouble the people related to a case also found the same IO trying to favour a party in an assault case related to a land dispute by being dilatory. Thus, on the complaint by the opposite party, the OIC directed the concerned IO to report by a certain time that all the necessary corrective action has been taken.

This study has dealt with such registered cases wherein subsequent to the compromise between the disputing parties that is usually concluded with the informed consent of the OIC, that 'final reports' were found to be made under reasons of "mistake of fact", and "insufficient evidence".[402] The Supreme Court's observation in *H.N. Rishbud v. State of Delhi*,[403]

> ...the formation of the opinion as to whether or not there is a case to place the accused on trial before a magistrate, is left to the Officer In-Charge of the police station,

---

[399] 'Mistake' is not mere forgetfulness, a slip "made, not by design, but by mischance." In both cases, the act inhere *bonafide* intention. *Mistake of Fact*: At common law, an honest and reasonable mistake is that when an alleged offender is deemed to have acted under that state of facts which he in good faith and on reasonable grounds believed to exist when he did the act alleged to be an offence. The accused while guarding his maize field shot an arrow at a moving object in the *bona fide* belief that it was a bear and in the process caused the death of a man who was hiding there. It was held that he could not be held liable for murder as u/ss. 79 and 80 IPC. *State of Orissa v. Khora Ghasi*, 1978 Cr LJ 1305 (Orissa). Mistake of Law: Mistake in the point of law in a criminal case is no defence. Mistake of law ordinarily means mistake as to the existence or otherwise of any law on a relevant subject as well as mistake as to what the law is. See **Ratanlal and Dhirajlal's The Code of Criminal Procedure**, op. cit., pp. 78-79.

[400] See Appendix O for a sample copy of the FINAL FORM.

[401] It needs to be noted that the Inspection Notes on this *thana* on the basis of the inspections held just before and after the appointment of this OIC revealed a notable difference in the review of the working of the *thana*. Whereas the earlier report criticised its predecessor for lack of coordination with its staff, and for not guiding its subordinates properly on matters of investigation of cases, the later report appreciated the improvement in the working of the *thana* attributing the same to the newly-appointed OIC.

[402] In Yeshodabad *thana*, even in a petition case where the aggrieved complainant had moved the court because of police inaction, compromise was seen to have been effected by the OIC and subsequently a final report was submitted, accordingly.

[403] *H.N. Rishbud v. State of Delhi*, AIR 1955 SC 196: 1955 Cr LJ 526. Also see *Abhinandan Jha v. Dinesh Mishra*, (1967) 3 SCR 668: AIR 1968 SC 117: 1968 Cr LJ 97. Syed H. Afzal Qadri, op. cit., pp. 73, 113-14.

confirms the definitive discretion conferred u/s. 173 whereby the OIC is empowered to exercise such powers. In addition, the court further provided that:

> ...it would appear to follow that in any case where the police officer has come to the conclusion that there is no case to place before the magistrate and has accordingly submitted a final report, a magistrate cannot call for a charge-sheet...

The opinion of the IOs of the four *thanas* to two questions put not in quick succession on the possibility of manipulation in order to alter the legitimate outcome of the investigation elicited constant responses. As nearly 30 percent of the convenient police sample agreed about the possible manipulation of a case in the course of investigation so as to change the legitimate outcome and thus issue a completion report as desired. It shows that there exists the possibility of changing the nature of the completion report from final report to a charge-sheet and *vice-versa*, but according to the respondents, such instances are rare and obviously based on powerful extraneous considerations than on the merit of the investigation. The rest of the sample expressly denied such possibleness.[404]

The submission of a report u/s. 173(2) does not exhaust the right of the police to make further investigation in a crime, *vide* sub-section (8), supplementary reports can also be submitted. The superior police officer may also, under sub-s. (3), direct further investigation pending the orders of the Magistrate. The Orissa High Court has held that further investigation by the police is not without jurisdiction or contrary to law.[405]

Thus, vested with considerable discretion, there is always the possibility of misuse of such powers. The cl. (ii) of sub-s. (2) of s. 173 of the Code makes it mandatory for the OIC to communicate to the complainant/informant of the case of the action taken by the police, that is, the result of the investigation. The Police Manual too, *vide* Rule 181(a) of the Police Manual, confer the same responsibility on the IO in all cases disposed of u/s. 173 and also u/s. 157(b) of the Code by serving notice on the complainant or informant.[406] In an alleged rape case registered at Yeshodabad *thana*, it was found that:

> the official result of the investigation was in contrary to the belief of the complainant's side that a "charge-sheet" may have been submitted as the compromise between both the parties for a certain compensation to be paid to the victim was later annulled as the victim side later preferred to take the legal course.

The Supreme Court in a case where five persons were alleged to be involved in an offence u/s. 307 IPC and a 'final report' was submitted without any cogent ground, made the following observations:

> It was neither clear to High Court and nor to us as to what was the basis, circumstances and material upon which the investigating agency usurped the role of the court and recorded the verdict of innocence in favour of two sons of Sampuran Singh.[407]

In cases where the investigation is refused, it was found that the notice to be served on the complainant/informant for information about the same, as referred to in the second para of rule 181(a), OPM, is seldom done. The reasons for the refusal are never tendered nor demanded as such enquiry is feared to be considered as an affront to the authority of the police. In a recent judgment, a Bench of the Supreme Court while expressing serious concern over the manner in which various High Courts passed orders giving no reason for their decision to either reject or accept the contentions, observed that "right to reason is an indispensable part of a sound judicial system." It

---

[404] Item nos. 102 and 109.

[405] *Zulfiqar Beg alias Baby v. State of U.P.*, 1992 Cr LJ 2067 (All.); *Hassan Khan v. State of Rajasthan*, 1996 Cr LJ 4303 (Raj.); *Ram Lal Narang v. State (Delhi Admn.)*, AIR 1979 SC 1791: 1979 Cr LJ 1346; *J. Alexander v. State of Karnataka*, 1996 Cr LJ 592 (Kant.); *Chandra Sekhar Mohanty v. State*, 1993 Cr LJ 3052 (Ori.). See **Ratanlal and Dhirajlal's The Code of Criminal Procedure**, op. cit., pp. 270-72.

[406] Item no. 11 in the 'Final Form' in which the completion report is prepared necessitates the mention of the "*Date on which the Complainant/Informant was informed of the result.*"

[407] *Gurdas Singh v. State of Rajasthan*, AIR 1975 SC 1411. See Syed H. Afzal Qadri, op. cit., p. 114.

held that failure to give reasons by courts in their judgments would amount to denial of justice.[408] Thus in the interest of the larger criminal justice process, the information that the police are required by law to communicate, as noted above, are essentially of consonantal import. There is also the provision, *vide* rule 182(a) of the OPM, that,

> When an investigating officer is satisfied that a case is deliberately or maliciously false, he shall make a special endeavour to... secure the conviction of the informant under section 182 or 211, I.P.C., and, if evidence be available, shall, along with the final report, submit to the Magistrate a formal complaint to enable him to take cognizance under section 190, Cr.P.C...

It is also required of the IO to furnish full reasons in support of its application made to the magistrate for prosecution.[409] In cases that are declared as false and either frivolous or vexatious, there is the provision for compensation to the aggrieved party.[410] The police manual makes it incumbent upon the Superintendents and the Circle Inspectors to take personal/special interest in such cases and see that the investigating officer as also the prosecuting officers realise their responsibilities as demanded by law.[411]

In the year 2002, the average percentage of the total reported cases of all the four *thanas* in which 'final report' was submitted on account of false case was 1.3 and in no such case did the police initiate proceedings for the prosecution of the complainant. The most common reason for it, according to the police respondents, was the 'lack of time' as action in such cases would mean as many cases in hand for investigation for the already burdened IOs. The triangular average of the cases in which 'final report' was submitted during 2000-2002, excluding those that were pending for investigation, varied from 9 percent to 16 percent in the rural *thanas* and 38 percent in the urban *thana*. The reasons cited, other than as 'false' were 'insufficient evidence', 'lack of clue', 'mistake of fact/law', etc. This could also be done to evade further processes as required under a case concluded as false. It thus appears that the police could also easily and conveniently foist false cases for its immediate ulterior motives and later conclude it under the above mentioned heads other than 'false'.

The Malimath Committee's suggestion for stringent punishment as a deterrent to prevent false registration of cases and false complaints for which it calls for suitable amendment of ss. 182/211 of IPC should, therefore, be directed to arrest such possibilities of abuse by the police themselves, as stated above.[412]

CONCLUSION: QUALITY OF INVESTIGATION

It takes a catastrophe like the Gujarat riots of 2002 in which the police themselves were found involved in deliberate manipulation and distortion of the cases of riot-affected victims in the course of the investigation, to enunciate the reality that plague the police process of the criminal justice system. Such practices are not occasional, they do not happen only against such backgrounds, but occur with certain regularity as is evident in this study. The empirical findings of irregularities in policework, albeit happen in remote, nondescript places of this country, it does not lessen the seriousness of the problem rather highlights the magnitude of it. More so, it raises serious questions concerning the justice process, with particular attention been directed towards the police and its ability to satisfy the dual mandate of investigating crime while protecting the interests, rights, and

---

[408] J. Venkatesan, *Failure to give reasons by courts a denial of justice*, The Hindu, Delhi, Wednesday, December 24, 2003, p. 11.

[409] Item no. 16 in the 'Final Form' necessitates filling up the particulars in reference to: "If FIR is false, indicate action taken or proposed to be taken u/s. 182/211, I.P.C."

[410] Rule 182(b), OPM.

[411] Rule 182(a) & (c), OPM.

[412] **Committee on Reforms of Criminal Justice System** (Chairman Dr. Justice V.S. Malimath), op. cit., Recommendation no. 17(k), p. 241.

freedoms of the 'publics'. It points out that the quality of the most notable aspect of police operations that has come under increasing scrutiny is the process of investigation.

Thus the foremost task ought to be that the word "investigation" has to be read and understood in the light of not only the powers conferred on police officers but mainly the restrictions placed on them in the use and exercise of such powers.[413] The legitimacy of policework thus centres on the standards of just and fair application of the proceedings as laid down under the Code, the case laws and the police manual. This chapter provides a critical analysis of the empirical findings of the determinative stages of police investigation based on the conceptual framework of 'what the police must do, the circumstances they encounter, and the susceptibility of the police to the series of existing social, legal, organisational and occupational norms that influence the expedients they feel obliged to adopt – all that bears a considerable impact on the case outcomes and eventually on principles of fairness and standards of processual work in actual practice.

The police methods of operation have long been suspect.[414] They have undermined and contradicted the most carefully devised blueprints, also that of the colonial state. The historical significance of the policework in India lies in the continuity in the nature of its functioning with ingenuity that makes up the mental process of the agent-operator from the days of its evolution over the years under both colonial and post-colonial state systems. The rhetoric of civil liberties and individual freedoms decorated the claims to legitimacy, alike in the post-colonial Indian State as during the British rule but, in reality, these considerations even though it formed a part of the codified laws and procedures, and later came to be enshrined in the Constitution as well has always occupied a lowly place in its order of priorities.

The observation of the National Police Commission as well as that of the Police Commissions of various Indian states, the experiences of the first Police Commission after the enactment of the laws that reorganised the police, the precursor of the contemporary police of post-colonial India, the independent official accounts, and the historical accounts of the eras before the British India provide substantial similarities on the nature of police operations.

The various State Police Commissions that published its reports in the early sixties of the twentieth century record that during the course of their tours and examination of witnesses, no complaint has been so universally made before them as that regarding the standard of investigation which has been very deficient or the general deterioration noticeable in it.[415] It was in reference to the similar findings that the National Police Commission in the very preamble of its first report, states that,

> ...a police force which is used to rough and tough methods has to change the style while dealing with...tact and fineness with due regard to the requirements of law.[416]

Information about the police practices of the past has been grossly deficient.[417] A.S. Gupta observes that the assessment made by the Police Commission of 1902-03 about the reputation of the police

---

[413] *Asst. Collector of C.E.C. Preventive v. V. Krishnamurthy & others*, 1983 Cr LJ 1880. See **Ratanlal and Dhirajlal's The Code of Criminal Procedure**, op. cit., p. 7.

[414] Quote from Jawaharlal Nehru's **Toward Freedom**, reproduced in David H. Bayley, op. cit., p. 141.

[415] Bihar Police Commission, West Bengal Police Commission, Maharashtra Police Commission, Delhi Police Commission, and Madhya Pradesh Commission. See David H. Bayley, ibid, p. 135; Joginder Singh, *Police Reforms: About Time*, **National Herald**, New Delhi, Wednesday, February 3, 1999.

[416] **National Police Commission**, First Report, February 1979, Chapter I, para 1.19, p. 11.

[417] Historical accounts on the Indian police work are scarce as the formulation of a proper and an unbiased approach to Indian police history is beset with a host of problems. It generally lacked scientific treatment and have not had the benefit of attracting the guiding principles of objectivity and accuracy. The fallacies or the shortcomings in the interpretation of the police history as chronicled by the colonial writers like Sir Percival Griffiths, J.C. Curry, Sir Edmond C. Cox, C.E. Gouldsbury, or S.M. Edwardes, some of which have been brought out by very few writers like David Arnold. See K.S. Dhillon, op. cit., pp. 68-73.

and the feelings of the people towards them was shockingly revealing and provided a valuable comparison with the conditions that prevailed prior to the 1861 reforms. The following recordings of the Commission reveal the poor quality of the police investigation:[418]

> Everywhere they went the Commission heard the most bitter complaints of the corruption of the police..., both European and Native...among station-house officers throughout the country[419]... It manifests itself in every stage of the work of the police station. The police officer may levy a fee or receive a present for every duty he performs... He has to give the investigating officer a present to secure his prompt and earnest attention to the case. More money is extorted as the investigation proceeds...People are harassed...sometimes by having to accompany him from place to place, sometimes by attendance at the police station...sometimes by threats of evil consequences to themselves or their friends (especially to the women of the family) if they do not fall in with his view of the case, sometimes by invasion of their houses by low-caste people on the plea of searching for property... From all this deliverance is often to be brought only by payment of fees or presents in cash. The station-house officer will sometimes hush up a case on payment of his terms; he will receive presents from parties and their witnesses; he will levy illicit fees from shopkeepers and others for services rendered; or to obviate vexatious espionage. He has a specially rich vein in cases concerning disputes about land, water or crops...
>
> The Commission have received endless narrations of the worries involved in police investigation. A body of police comes down to the village and is quartered on it for several days. The principal residents have to dance attendance on the police all day long and for days together. Sometimes all the villagers are compelled to be in attendance, and inquiries degrading in their character are conducted *coram populo*. Suspects and innocent persons are bullied and threatened into giving information they are supposed to possess. The police officer, owing to want of detective ability or to indolence, directs his efforts to procure confessions by improper inducement, by threats and by moral pressure... Sometimes suspects, whom the police officer does not desire to report as under arrest, are kept for days together under so-called "surveillance" which is nothing else than unauthorised confinement or restraint, a system which affords serious opportunity for malpractices. All this is done to secure evidence in support of the view which the police officer from time to time holds regarding the case. If in his opinion enough of evidence is not thus obtained to secure a conviction, he will not hesitate to bolster up his case with false evidence. Sometimes this leads to an innocent person being prosecuted through police mistakes. More often perhaps it leads to guilty persons escaping through the suspicion thrown on the police evidence. Many a good case has been ruined in this way; but the police officer is unduly impelled by the statistical test to try to make his investigation end in conviction. When an investigation fails, the complainant is sometimes finally bullied or threatened into acknowledging that a mistake has been made, and that the case is "false". When it is successful, the accused is often subjected to unnecessary annoyance; the law about bail is overlooked; the rules limiting the use of handcuffs are forgotten; and no serious effort is made to treat the accused with that consideration...to which...he is entitled...

The above account appears to be relevant to the post-colonial period of India's police history; reflected by the National Police Commission in its Third Report as thus:

> What the Police Commission said in 1903 would more or less fully apply even to the present situation. If any thing, the position has worsened.[420]

The extended continuity lies in the modicum of the growth and development of the police institution which at every stage in the long years of its history necessarily reflected in its philosophical make-up and value systems the accumulated historical experiences of their parent societies. Thus, the basic character did not change as the age-old structure of beliefs and commitments of this institution remained unaltered, inextricably linked to its evolutionary processes through which it progressed from its primeval origins to the present times of modern civilisation.

The Indian Police Act 1861 gave not only legal sanction to the historic legacy of the structural paraphernalia that had evolved in the medieval India and under the rule of the East India Company but the introduction of a formal-legal process modelled on the Western concepts of

---

[418] See A.S. Gupta, op. cit., pp. 203-05.

[419] The product of the reorganisation of the police administration in the Presidency of Bengal in the early nineties of the eighteenth century which was later also adopted in the Madras Presidency in 1802 was the infamous *Darogah* who acted as little despots in their areas, an image which was reflected in entirety by its new avatar, the Station House Officer of the 1861 Act, irrespective of the fact that subsequent reports of various Commissions instituted aftermath the introduction of the *Darogah* system including that of the Madras Torture Commission in 1854 and communiqués of several officials that had mirrored the same about the *Darogah* could have no effect through the new Police Act to make any dent on the functioning styles of this official who continued to follow the *Darogah's* traditional practices. K.S. Dhillon, op. cit., pp. 73-76, 79-93, 115.

[420] **National Police Commission**, Third Report, op. cit., p. 25.

jurisprudence which accompanied the reorganisation of the police under the 1861 Act could, therefore, make no corresponding change in the traditional modes of its attitude and operation as its traditional mandate would be couched in a refined and legalistic phraseology.

According to A.S. Gupta, the bad reputation of the police had led to the recommendation by the Second Law Commission in 1855 that they should not have any authority to record the confession of an accused person.[421] This recommendation was found to be "worse than the disease" as it instilled an elaborate distrust of the police in the Criminal Procedure Code and the Indian Evidence Act. These provisions despite conferring vast, unbridled scope for discretion created the vicious circle of the law itself not trusting its enforcement agent and the enforcement agent being compelled to take recourse to improper practices to discharge his trust. Consequently, it pushed the police to a position of such moral degradation that perpetuated the atmosphere of corruption, malpractices and abuses of authority in the police stations.[422] Gupta comments tellingly about the newly enacted laws brought about by the British with the reorganisation of the Police in 1861:

> ...made justice costly and subject to prolonged delays and...making the administration of criminal justice technical to an extent which was hardly conducive to an effective control of crime and criminals. And the new police was so shaped in personnel, powers and procedures as to be ever more a terror to the law-abiding citizen, but ineffective against the criminal, except by torture and malpractices.[423]

The new legal codes were meant to situate the police in a totally different perspective, instill a legalistic discipline to its investigation work, but the Western mode was alien to the majority of these operatives engaged in registration and investigation of crime who were unable to adjust to the new functional modes and styles for a long time to come. Thus their failure in criminal investigation "was inevitable", thought John Beames, a Bengal Civilian who held high offices in Bengal, NWP and the Punjab. In any case, a totally unfamiliar system could not completely replace the centuries-old moulds of thought and procedure. And failing 'ignominiously for years, the new police learnt to use the extra-legal methods of the old police without being found out'.[424] The new SHO picked up on the detective methods of the erstwhile *Darogah*, of which, Gouldsbury considers, confessions elicited by torture was one of the chief features and was not quite forgotten or abandoned in the remodelled and supposed purified police force.[425]

As they found some of the new provisions unnecessary and troublesome constraints on their methods of interrogation and inquiry, the emergence and consolidation of a refreshingly honest ethos and upright culture which should have marked the process of the reorganisation of the police under the newly enacted criminal justice system was badly affected. The assumptive function of interrogation that characterised the operational rationality of the police could be put as thus articulated by McConville and Baldwin:

> It is [interrogations] that, in the majority of cases, colour what happens at latter stages in the criminal process. Indeed, often they determine the outcome of cases at trial. Questioning provides information classifiable in legally defined ways, resolves doubts, is administratively efficient and fulfills certain psychological needs. Questioning has come to dominate police work and, as a result, police perceptions of reality have come to dominate the criminal process.[426]

---

[421] The new enactments to curb any specific offence, like the POTA gives no any responsibility to the police as far as recording of the confession is concerned. It strictly does not ascribe this role to the *thana*-level operatives.

[422] A.S. Gupta, op. cit., p. xv, 60; Arvind Verma, *Maintaining Law and Order in India: An Exercise in Police Discretion*, **International Criminal Justice Review**, Volume 7, 1997, pp. 68-69; K.S. Dhillon, op. cit., p. 124.

[423] A.S. Gupta, ibid, p. 74.

[424] K.S. Dhillon, op. cit., pp. 114-116.

[425] C.E. Gouldsbury, op. cit., pp. 280-81.

[426] Michael McConville and John Baldwin, *The Role of Interrogation in Crime Discovery and Conviction*, **British Journal of Criminology**, Vol. 22, 1982, p. 174.

Thus, the convenient relapse of the new SHO into the age-old methods of interrogation that has been existent as a means during the Kautilya's period as also during the Muslim rule, appears to be only for their novelty and efficacy from the police point of view despite the constant periodic scrutiny since 1874 of the working of the new Codes and corresponding amendments subsequent to it where necessary to remove the flaws.[427] Police torture of suspects as an investigative tool to extract confessions became integral to the process of investigation during the British rule. Some such stimulus as interrogative practices of the nineteenth century Indian police documented by C.E. Gouldsbury is as follows:

> For the first time, the services of a beetle were enlisted, preferably one of the burrowing kind, which being placed on the victim's stomach, was covered over with a glass or other conclave vessel. The insect, thus finding itself a prisoner, might wander about the prison for a while, but eventually, following its natural instincts, would proceed to burrow into the flesh, till the agony caused by this process elicited the information required. The second plan was even more ingenious besides possessing the additional merit of leaving no marks, but could only be made use of when two or more persons were "put to the question" at one time and provided they both had beards or moustaches, which, as the bulk of the population was Mohammedan, were generally available. The subjects to be treated were made to stand close together, facing each other, and their beards or moustaches being connected together with thin twine, the men were held firmly in this position by some of the operators, while another administered a pinch of snuff to each, continuing the excruciating process till the confession, or information wanted was extracted.[428]

The methods employed could be gory as appeared in the custodial death case dealt in this chapter, where the visible physical injury inflicted in the rectum of the victim go on to show the continued dependence on brutal and violent techniques from the days of colonial policing. During the discussions on the Indian Code of Criminal Procedure in 1872, Sir James F. Stephen, Member, Viceregal Council for India, an English legal luminary and the architect of the Indian Evidence Act, observed,

> There is a great deal of laziness in it. It is far pleasanter to sit comfortably in the shade rubbing red pepper into a poor devil's eye than to go about in the sun hunting up evidence.[429]

The police in post-colonial India continues to resort to torture more frequently and has added more innovative ways to their armoury.[430]

The registration, investigation and prosecution of crime was no more than a charade in the pre-British period and under the British, it assumed the most sinister form of calculated manipulation of the sections of the codified laws and marshalling false evidence to secure convictions because of the fact that the efficiency and effectiveness of a police officer was measured invariably in terms of the percentage of arrests to reported crime and that of convictions to arrests made as the performance appraisal indicators which remain to be the same in the present day documentary reflections, understandably to create an appreciable public image. Thus, from the stage of 'first information report' through writing of case diaries and recording of statements to the final act of submission of completion report, the police indulged in a series of falsehoods and frauds. All this was done most often in connivance with the supervisory officers, either with their implied knowledge or tacit approval but most of the times winking at such impropriety in criminal investigation, the subversion of legal provisions could as no surprise make the reorganised police a body of oppressors

---

[427] K.S. Dhillon, op. cit., pp. 37-52, 124.

[428] C.E. Gouldsbury, op. cit.

[429] Quoted by Ed Denson, Pepper Spray, Pain and Justice, The Civil Libertarian, 1998; <http://www.frontlineonnet.com/fl2016/stories/20030815002504800.htm>
In the condemnatory opinion of an experienced District Officer, the laziness of the police is recorded as one of the reasons along with their methods that caused victims of offences to abstain from reporting. A.S. Gupta, op. cit., p. 121.

[430] The NHRC has broadly listed the torture techniques in its instructions to be followed carefully during medical examination of any victim of police torture. See *Instructions to be Followed for Detention or Torture*, in <http://www.nhrc.nic.in/Documents/sec-1.pdf>

and tyrants not very different from their predecessors of an earlier age. Judge Khosla states in *The Murder of the Mahatma*, that the superior officers may not participate in it themselves but, being in the know and overlooking it makes them fully as culpable, as that of an ostrich. Occasionally the courts detected some anomalies and passed strictures but mostly they remained indifferent and mute participants in this game of organised hypocrisy.[431]

In what could be held as one of the most severest of the strictures on governance passed in recent times, the Supreme Court castigated the police and also the State government for their role in the justice process in the Gujarat riot cases of 2002, highlighting the vortex of corruption in the criminal justice system. The Supreme Court in its intervention in the 'Best Bakery case', in response to the trial court's acquittal of all the 21 accused on the ground that there was no evidence to prove the guilt and also its indictment of the prosecution that people had been falsely accused and totally false evidence had been created against the accused, pulled up the prosecution for "shoddy investigation". Chief Justice V.N. Khare, one of the members of the three-Judge Bench that went into this case, expressing total lost of faith in the prosecution and the Gujarat government suggested the Gujarat government to resign if it could not enforce the rule of law. The response of the Gujarat government that it has been popularly elected and hence cannot be dismissed, and moreover, the rationality extended through its counsel that in the many riots that have taken place in this country in the last 40 years the guilty have gone unpunished sounds more as meeting the court's admonition with rebuff. Justice Khare exhorted the Gujarat government that "You quit if you cannot prosecute the guilty. Democracy does not mean that you will not prosecute anyone...If you fail to act then we will have to step in. We are not sitting here as mere spectators." Such exchanges can well-nigh in the history of post-colonial India, be called the first of its kind between the two arms of the state on the standards of fairness and justice process and over the duties that the government must exercise.[432]

Later another Bench of the Supreme Court, consisting of Justice Doraiswamy Raju and Arijit Pasayat, described the acquittal of the 21 accused by the High Court that upheld the fast track court's judgement, as nothing but a travesty of truth and a fraud on the legal process. It also said that "no sanctity or credibility can be attached and given to the so-called findings." The Bench noted that "the investigation (in the case) appears to be perfunctory and anything but impartial, without any definite object of finding out the truth and bringing to book those who were responsible for the crime." While exuding confidence that "whether the accused persons were really assailants or not could have been established by a fair and impartial investigation," it directed for supervision of the Director General of Police and for retrial outside Gujarat, in Maharashtra.[433]

The direction of the Bench for re-investigation was hailed by the then incumbent Attorney-General of India, Soli Sorabjee (an appointee of the Union Government led by the same political party that ruled the State of Gujarat and defended its Chief Minister), as the judgement which "shows that the Supreme Court discharges its duties fearlessly to uphold the rule of law." In the final analysis, the direction for re-investigation and the transfer of the case for re-trial implied beyond any doubt the collapse of the entire criminal justice system in the State, especially, the subversion of the

---

[431] K.S. Dhillon, op. cit., pp. 15-16, 116-19, 124-25, David H. Bayley, op. cit., pp. 144-47, 178-79.

[432] J. Venkatesan, *SC Notice to Centre, Gujarat on NHRC plea*, **The Hindu**, Delhi, Saturday, August 9, 2003, p. 1; <http://www.businessworldindia.com/sep2903/bwopinion.asp> <http://news.bbc.co.uk/1/hi/world/south_asia/3102864.stm> <http://in.news.yahoo.com/030912/137/27qvj.html>

[433] J. Venkatesan, *Supreme Court orders re-trial in Best Bakery case*, **The Hindu**, Delhi, Tuesday, April 13, 2004, p. 1.

process of police investigation whose far-reaching implications on the later stages of the criminal justice process was thus distinctly visible.[434]

This indubitably suggests the precariousness of the justice-dispensing system when perfunctory reconnaissance by the IOs is compounded equally by perfunctory scrutiny of that work by the supervisory officers. The most stinging criticisms of such malpractices can be obtained in cases where Judge A.N. Mullah of the Lucknow Bench of the Allahabad High Court had chastised the guilty officers for indulging in the fabrication of evidence, once an investigating officer of the rank of a Sub-Inspector and on another occasion a supervisory officer of the rank of Deputy Superintendent of Police. In relation to the case of malpractice by the SI, the judge said:

> Criminal cases which are placed before the courts are in a large measure frame-ups and they are supported by fabricated evidence and extorting confessions through third-degree methods and by disregarding the prohibitions contained in the Constitution of India to safeguard the rights of citizens.

He went on to make the most incriminating charges against the police organisation as a whole:

> If I felt with my lone efforts I could have cleansed the Augean stables, which is the police force, I would not have hesitated to wage this war single-handed. There is not a single lawless group in the whole of the country, whose record of crime comes anywhere near the record of that organised unit, which is known as the Indian Police.[435]

On discovering the complicity of a DSP in *Ram Singh v. State of U.P.* [AIR 1959 Allahabad 518: 1959 Cr LJ 940], the same Judge made yet another censorious observation:

> On the conclusions we have reached, we have no doubt that Sri Mathura Singh [the deputy superintendent] has fabricated very bit of evidence in this case. Who will now conduct the inquiry against Sri Mathura Singh and if an officer is found to conduct an inquiry against Sri Mathura Singh, what is the guarantee that he will be an improvement even upon Sri Mathura Singh? The police force seems to consist of so many undependable officers that it is almost impossible to investigate their misdeeds. Where the twigs are found to be decayed one hopes that the branches are safe but where the branches have also become rotten one begins to doubt that even the trunk is sound. The rule of law cannot be maintained so long as the so-called guardians of 'law and order' are mostly composed of this class.[436]

One can comprehend the corrupt practices that pervade the investigation work of the police in the country from the verdict of Justice A.P. Thareja of the Delhi Sessions Court in the *Priyadarshini Mattoo* (rape-cum-murder) case (June 23, 1996). The Judge passed severe strictures against the country's premier investigating agency, the Central Bureau of Investigation (CBI), for fabricating the DNA report and withholding evidence because of the influence of the father of the accused who belonged to the same profession. In his 449-page order for the acquittal of the suspect, the Judge wrote in anguish and helplessness: "he [suspect] is a criminal but I cannot convict him for lack of evidence" that in fact was fudged and suppressed which could have secured the conviction of the suspect.[437]

The possible way by which such malpractices can be brought to the attention of the supervisory officers is by complaints. But again while it is not certain that everyone who has been wronged will complain; the very manner the supervision of the *thana* work take place, that could be obtained from the examination of the Inspection Notes, the exercise appears more like a ritual as it is always a scheduled programme, notified to the *thanas* in advance and held only during a specific

---

[434] Ibid; *Sorabjee hails SC verdict in Best Bakery case*, April 18, 2004, New Delhi; <http://www.webindia123.com/news/showdetails.asp?id=36116&cat=India>

[435] David H. Bayley, op. cit., fn. 61, p. 142.

[436] The involvement even of the Magistrate in this case go on to show the established triumvirate in the process of the justice process which has its lineage to an arrangement under the British where the trying magistrate were under the obligation not to let their conviction percentages slide downwards, as they were answerable in such matters to the DM who was vitally interested in conviction rates and as the judicial, executive and police functions were combined in his hands the manipulations in subversion of legalities brought forth no objections. David H. Bayley, op. cit., pp. 145-46; See K.S. Dhillon, op. cit., pp. 16, 118-19.

[437] Amar Jit, *Reforms in Police Force Need of Hour*, **National Herald**, New Delhi, December 25, 1999.

period of the year. The major shortcoming of this process is that there are no provision for giving an audience to the public or interacting with them on issues related to policework of their local thana. It was noted that during the year 2005, the focus of this study, only the nipen thana was found to be inspected by an officer of the IIP rank, and the perusal of the 'Inspection Notes' of all the four thanas distinctly revealed the perfunctory nature of supervision as they seem to be the reproduction of the earlier reports with minor embellishments at a few places. These notes were largely reflections on the administrative work of the thana. There was nothing in the report on the investigation work, apart from a small account on the dimension of the bengaroy.

FIGURE 2E

COMPLAINT AGAINST THE POLICE

Survey Question [3(xiv)]: Has it ever so happened that you really wanted to complain against certain acts of the police?

In the public opinion survey, one item dealt on the aspect of the complaint that the public ever felt to lodge against the acts of the police.[84] (See Figure 2E.) While nearly 48 percent of the total respondents who had an encounter with the police were aggrieved by the nature of their response relating mostly to the reporting and investigation stages of policework, a modest quarter of them resorted to complain against such treatment. Respondents had on most occasions approached the officer higher in rank to the one by whom they had been affected. Besides the Officer In-Charge of the thana, the Circle Inspector in the rural areas, and the Superintendent of Police, people had also sought the intervention of the local political representatives, and the Court, especially in cases of refusal to investigate or register the complaint. While it was found that an average of nearly 38 percent of the affected rural residents exercised the choice of seeking redress of their grievances against the police, there was greater reluctance amongst their urban counterparts as only 14 percent acted likewise although they were the most affected by police conduct.

The most dominant inhibiting factor behind public reticence for complaining against the police was the belief that such a measure would best no result, often accentuated by the general attitude of refrain from involvement with the police, and the apprehension of police reprisal. An overwhelming proportion of the respondents in both the rural and urban areas expressed their helplessness, their poor socio-economic status was primarily the restraining factor. The powerless and the voiceless find no support nor do they have the resources that would provide them the adequate strength to stand up to the injustices of the police. The Fourteenth Law Commission in one of its consultation paper had stated that, "...very often it is the poor and persons without official or

[84] Item no. 3(xiv) [a-b].

political clout who become the victims of police excesses."[439] Most of them expressed ignorance about the existence of any possible redressal mechanism. In the majority of the cases, complaints made no difference to their cause; there were few instances where the complainant was instead victimised.[440] Wherever a complaint resulted in any intervention by the superior police officer, it was at an informal level and no punitive action was taken against the erring personnel. This reflects on the lack of structurally organised and meaningful supervisory mechanism.

The cause for the inadequate supervision of criminal investigation is not solely what Bayley points out as the lack of sufficient time for this critical task, which in effect has apparently shifted to the courts.[441] A former officer of Sewaknagar *thana* said that the present-day Superintendents are primarily on the lookout to intervene only in such cases that are either critical with political significance or that could incur pecuniary gains. As a result of the time constrains, the entire responsibility of supervision of the *thana* work has devolved on to the lowest rung of the supervisory officers. But as they constitute the non-IPS officers and have risen from the ranks of the same quotidian level officers whose work they are now supposed to supervise, their affinity with the occupational culture of that level may in all likelihood generate sympathy for their working conditions and as a result also have the tendency to rationalise their style of functioning. It is also because the frame of reference with which the work of the quotidian level operatives are evaluated are different between the IPS and the non-IPS supervisory officers. The latter's frame of reference encompasses a more comprehensive consideration of the obligations that a police personnel at the *thana* level has than that of the former's. It is also because of the latter's greater understanding of the *thana* work which is located in the similarity between its frame of reference about the process of a certain function, and the functionary's.[442] Thus the standard of supervision between the two is not likely to be the same. Such a state of affairs gives tremendous uninhibited space to the police in the *thanas* to act arbitrarily.

As the cutting edge of the rule of law that wields so great a power, there was the only one thing in the police that affected the people and the government the most and according to Sir John Woodburn, Lieutenant-Governor of Bengal, "the evil is essentially in the investigating staff. It is dishonest and it is tyrannical..."[443] The venality could be gauged from the views of a Deputy Commissioner, who from his work experience adduced two kinds of policemen, the honest and the dishonest. According to him, "The honest policeman rigs the evidence to convict the man he knows is guilty. Perhaps it is the only way he can get a conviction. The dishonest policeman rigs the evidence to convict a man he knows is innocent."[444]

The views of the police and that of the public on investigations could provide some among a host of reasons to know how did the historical practices creep into the reorganised post-1861 police and, moreover, continue to prevail as integral to the daily operations of the police in modern India?

The public opinion survey showed that people have serious doubts about the honesty and impartiality of the police in its investigation work. When respondents were asked about whether

---

[439] *Meet to discuss 'law of arrest'*, op. cit.

[440] In a case of kidnapping of a minor reported by her father at the Birjodi *thana*, discussed earlier in this study, it was seen that on the complain to the SP against the inaction of the *thana* police, the latter abused and threatened to implicate him in a false case and the complain made no difference. The police still did nothing to rescue the girl.

[441] See West Bengal and Maharashtra Police Commissions for some authoritative comments on the lack of supervision in investigations by superior officers. David H. Bayley, op. cit., pp. 146-67, 178.

[442] See Jerome H. Skolnick, op. cit., pp. 225-26.

[443] Letter No. 5453-J, dated 12-12-1901, reproduced from A.S. Gupta, op. cit., pp. 183-84.

[444] K.S. Dhillon, op. cit., p. 144.

they think the police do an honest job in investigation and place proper evidence in the court [item no. 3(xxiii)], taking into consideration the average public opinion, it was hard to come across one among ten people who replied that the police did. Of all the four *thanas*, the people of Lekhpur had a relatively better impression about its police whereas the largest proportion of the respondents that were highly critical of the police investigation were the urban residents. While it was 23 percent in Lekhpur, a negligible three percent of the respondents of Sewaknagar sample trusted the police investigation as honest. It is interesting to note that from amongst the youth population (the age-group of 17-34 years) of the entire sample that constitute nearly 41 percent and 16 percent that have a relative in the police profession, none believed in the fairness in police investigation. It may also be noted that a considerable 31 percent of the total respondents had no idea about the investigation work of the police, but they were aware that the police generally show favouritism in their work. It can thus be said that nearly 90 percent of the total respondents considered the police as prejudiced, differential and discriminatory. It was observed that the few who regarded the police to be free of any bias in their functioning belonged to the socially and economically dominant class. In the late 1920s, the chief spokesperson of the Government of British India's Information Department had conceded that it was "indeed unquestionable" that "political considerations" did in practice "lie very largely at the root of the unpopularity of the Police in India."[445]

Though one may not expect a convergence of opinion between the public and the police, the survey could elicit from even the most conservatives of the police respondents to have a near-total of the sample that agreed to the proposition [item no. 99] that an honest investigation will lead to no where in the later stages of the justice process.[446] This is corroborated by the evidence from responses to item nos. 86, 87 and 110. When provided with quantifiers to reflect the intensity and frequency of the actions involved, that is, 'whether all procedural norms are followed and investigations are done objectively, without influence and intervention', the respondents appeared not only reluctant but also found it difficult to make an exact judgement of its work process in actual practice which is at variance with that in-the-books. While the responses varied between 'most of the times' and 'sometimes', it showed that the IO did not strictly follow the norms of investigation. This was brought about more emphatically in responses to a later question [item no. 110], to which a senior police officer of Yeshodabad *thana* quipped rather annoyingly that, "strict observance of procedural requirements is not humanly possible on the part of anyone in the job." It, therefore, speaks of the circumstances that determine the processes of policework that cannot be mechanical in legalistic terms.

Even though the exact nature and extent of the deviations may not have been known, it is evident as the police by its own submission revealed that standards of criminal investigation leave a great deal to be desired. From amongst the shortcomings that plague police investigation, some can be attributed to their failure in detective ability and indolence which has its implications on the later stages of the justice process. But the attitudinal anomalies in the process of investigation, as noticed in the discussion of the various determinative stages of investigation in this chapter and illustrated below are certain incidence of police discrimination, has a wider and deeper pernicious effect, most importantly, on the image of the police and on the public welfare and confidence. The cases dealt here relate specifically to 'Man Missing Report' (MMR) to ascertain the varying police responses to the same problem.

---

[445] K.S. Dhillon, ibid, p. 208.

[446] Here honesty is understood as strict by-the-book functioning of the police.

The standard response of the police in a MMR case is exactly the same as detailed in the sample of the SD entry reproduced below.

> At this hour one Sri....., s/o Lt. Sri..... of..... (place), P.O. ....., P.S. Birjodi arrived at the P.S. and reported that on..... (date), at..... (time), his wife,..... missing from his house. He suspected that one person of nearby locality had taken her away. But still yet she did not return to his house. The DRs of the missing person is as follows: Age: 27yrs; Complexion: Fair Complexion; Height: Short (5 ft.), Medium Health, Wearing Black colour saree with red colour blouse. Noted the fact in the SD and entered the matter in the Man Missing Register. Circulated the message among the staff and sent V.H.F. message to the district branch.

If the missing person was found by the aggrieved relatives and information to that regard given to the *thana*, the following entry was thus made in the SD:

> One....., s/o Lt. ..... of..... P.S..... reported that his wife..... who was missing since .....(date) returned to her house. This entry is in response to SD entry no. ....., dated..... Noted this fact in SD and in the Man Missing Register.

It was observed that the police makes no effort to locate the missing person other than fulfilling the above mentioned administrative formalities. One of the complainants of such reports, whose mentally challenged brother had gone missing, complained that the police did nothing and on enquiry about the progress of the case, they were instead asked by the police to collect and furnish them the information about the whereabouts of the missing person.

It was interesting to find that the process followed in case of MMR is the same as that in cattle-missing reports. An entry found in the SD of Yeshodabad *thana* made against such a report is as follows:

> One....., s/o....., vill....., P.S. Yeshodabad reported that on.....(date) at.....(time) his cow having following DRs has been missing. DRs: white colour, female calf, 4 ft. height and 5 ft. long, tiny horns. Noted it in SD and Cattle-Missing Register. Circulated the message among the staff and *gram rakhis*.

In a case discussed earlier in this chapter about the complaint filed by a poor farmer at Birjodi *thana* regarding the kidnapping of her minor daughter that was instead treated as an incident of MMR, the complainant's all out efforts, even reaching out to the SP's office with his problem, did not bear any change in the police attitude.

In another case of kidnapping of a minor girl, reported at Sewaknagar *thana*, also discussed earlier in this chapter, it was observed that the case was registered after much reluctance but still no action was taken by the police. On much pursuance by the indigent mother of the victim, a resident of the low caste colony, the OIC demanded 30-40 litres of fuel to travel the long distance as per the information about the whereabouts of the victim to rescue her. As the complainant could not afford it, the detection work did not take off and the hapless mother never got back her minor daughter.

Yet the same police were found to be at their best in a reported case of missing of a girl just out of her adolescence. It was actually a case of elopement and a issue of honour for the family that on the request of the girl's father, no formal registration of MMR was done as evident from the SD entry which stated that "a prestigious man" informed the Diary Charge Officer (DCO) of his "daughter missing from his house...her whereabouts not known to him and his family" and "requested for enquiry and to trace out the girl and not to scandalise it." The police employed all its internal resources to respond in the most effective and efficient manner possible. The DCO mentioned further in the same entry that he along with his staff immediately left for the task. The SD entries also reflect the seriousness with which the case was pursued as the police could gather necessary information about the location of the missing girl "from its own reliable sources". Other logistical support for the successful rescue of the girl was provided by the complainant. The guardians of both the girl and her boy-companion resolved the issue as the girl was repatriated to her father on the spot and the boy was allowed to be taken away by his guardian. The SD entry in

conclusion mentioned that, "both are warned by us for future not to do such type of incident hence forward. Noted this fact for future reference."

The two distinct factors that differentiate this from other cases in regard to the favourable and prompt police action were: (i) the complainant was "a prestigious man" and (ii) he could financially afford the operation that the indigent, socially marginalised complainant failed to do. It thus appears that the police is all capable and competent to deal with any problem, even without the existence of any procedural guidelines to that effect, effectively and efficiently to secure the welfare of the public that seeks its assistance. But such capabilities are offset by improper demands made by it upon the client-public as conditional to the exercise of their legitimate responsibilities.

In all the above reported cases of kidnapping or missing persons, the constraint of resources has demonstrably been a serious impediment for the police to carry out its investigation work. But the police by making the illicit demands from its client-public to meet its requirements for investigation, creates a breach of equity in its functioning.

This colonial practice of demanding and accepting private funds for detection or investigation work was criticised by the Supreme Court in its ruling in October 2000.[447] It held that, 'a statutory investigating agency cannot be directed to obtain financial assistance from private parties for meeting the expenses required for conducting the investigation'. The police points at the paucity of resources in defense of such practice to bolster their functioning capacity. It is comprehensible that with the sanctioned quota of 100 litres of diesel per month, the police cannot by any possible means support its gargantuan scale and volume of activities like routine patrolling, investigation work, execution of warrantees, attending to calls for assistance, law and order duties, etc. These operations to take place within the jurisdictional area of 200 sq. kms. approx. in case of rural *thanas* compounds the problem. Even with relatively far smaller jurisdictions, the conditions are no better for the urban *thanas*. It was observed that the police vehicle was also put at the disposal of various prominent figures as demanded by them like the local representatives and other state officials, for instance, the lower court judges in rural areas.

But more than the police themselves, who have traditionally been a convenient buffer - the fallguys for all and sundry, as also observed by the Supreme Court, it is the State represented by the government of the day, which is responsible for the deficiencies in policework. The extraction of funds from the affected parties for the investigation work continues despite the Apex Court's direction to the States for making necessary corrections to the existing processes of policework to that effect. In delivering the verdict, Justice K.T. Thomas of a three-Judge Bench, set aside the Guwahati High Court orders which had directed the Shillong police to collect funds from a private party to conduct investigation into a case lodged by the said party, and made the following observation:

> Financial crunch of any State treasury is no justification for allowing a private party to supply funds to the police for conducting such investigation. Augmentation of the fiscal resources of the state for meeting the expenses needed for such investigations is the lookout of the executive. Failure to do it is no premise for directing a complainant to supply funds to the investigating officers...such funding by interested private parties would vitiate the investigation (and its fairness and impartiality) contemplated in the code. A vitiated investigation is the precursor for miscarriage of justice...hence any attempt to create a precedent...should be nipped in the bud itself, no such precedent can secure judicial imprimaturs. In our constitutional scheme, the police and other statutory investigating agency cannot be allowed to be hackneyed by those who can afford

[447] T. Padmanabha Rao, *Police Investigation Cannot be Privately Funded: SC*, **The Hindu**, Delhi, Wednesday, October 18, 2000, p. 8.

> it...all complaints shall be investigated with equal alacrity and with equal fairness irrespective of the financial capacity of the person lodging the complaint.[448]

According to the empirical evidence, the general demand of the police for funds from the complainant for preliminary enquiry, or investigation or for a spot visit even in cases that do not necessitate registration are very much a rural phenomenon. In almost all cases, the immediate need of those seeking police assistance is to obtain relief from the distress situation they find themselves in, but such attitude of the police makes a mockery of the justice process. The complainant of a rape case filed at Birjodi *thana*, in which the accused was arrested and forwarded to the court, the victim's father had to bear most of the expenses of the investigation work, like that incurred toward hiring a private vehicle for the medical examination of the victim and the accused at the district hospital.[449]

The major shortcomings of the police, its financial and numerical weakness seriously hinder their daily operations. Another crucial element that posits a challenge to the police, according to the police respondents, is the undue and illegitimate interventions in its work [item no. 7]. They agreed that there exists interference in all aspects of its investigation work, political and departmental; the latter mostly at the instance of the former.[450] The public was obviously aware of political interventions in policework as it is from amongst them that while one seeks it to protect its own interests, it is at the peril of that of another's. Nearly nine out of every ten respondents thought that such interference existed in investigation work and 76 percent felt that decision on arrests were largely influenced [item no. 3(liii)]. Despite the fact that such prejudices in policework are primarily induced, the police are to be faulted squarely because there is no resistance to such interventions from them. The police make no bones of the fact, as they 'strongly agreed', that pressures and influences certainly change the course of the investigation work in a case. While they were loud and forthcoming in considering the interference by politicians as illegitimate and unethical that hampered its investigation work, a majority of the respondents did not regard it as the same when it comes from their departmental superiors. A senior SI of Yeshodabad *thana* interpreted it as routine "instructions" for better functioning of the police.[451] Thus the corollary of it is that any resistance to such intervention would most likely be considered as 'dissent' or 'disobedience' and thus would follow adverse consequences.

As the process of patronizing influence, involving those at the top and the cutting-edge level operatives who honour their "instructions" and the one who is patronized, operates on the basis of exchange of favours, it makes the arrangement of police operations a collaborative enterprise. The police claim that pressures and influences come from all directions that has virtually paralysed normal police functions. It has instilled a sense of inhibition and shaken their conviction toward impartial enforcement of the law as they fear any decision or action of theirs may antagonise any powerful individual or group and thus run the risk of jeopardising its career. Historically, the police has been a veritable instrument of power and control in the hands of the political executive.[452] The most potent threat that hangs like a Damocles sword on the police that has compelled its submission

---

[448] Ibid.

[449] See Arvind Verma, *Cultural roots of police corruption in India*, **Policing: An International Journal of Police Strategies and Management**, Vol. 22, No. 3, 1999, p. 268.

[450] Item nos. 38, 72 & 73, Police Opinion Schedule.

[451] Item nos. 95, 117 & 111.

[452] K.S. Dhillon, op. cit., p. 71.

to the pressures is the possibility of being subject to 'arbitrary and instant transfer' which has generated a sense of instability of tenure and thus impaired police efficiency. [453]

The deficiencies in the 'detection of crime' work of the police has been the feature of all enquiries, and scrutiny reports prior to and since the reorganisation of the police in 1860. The Police Commission of 1902-03 after a thorough investigation came to the same conclusion, as many other authorities had on earlier occasions that the reorganised post-1861 police is "inefficient, corrupt and oppressive."[454] In a despatch of 24 September, 1856, the Court of Directors of the East India Company while provided detailed guidelines for the reorganisation of the police all over the country said:

> That the police in India has lamentably failed in accomplishing the ends for which it was established is a notorious fact; that it is all but...sadly inefficient for the detection of crime, is generally admitted...unscrupulous as to its mode of wielding the authority with which it is armed for the functions which it fails to fulfil, and has a general character for corruption and oppression.[455]

The Law Commission of post-colonial India in its Fourteenth Report, 1960-61, observed not only, what the Police Commission 1902-03 had proclaimed, that the investigation was defective, but the drawback common to police investigation in most of the states in India is that the evidence was deliberately distorted and often a dishonest record of the evidence was prepared by the police.[456] Nearly two decades later, the report of a five-member Study Group of the National Police Commission accounted a whole body of police malpractices like fudging of case-diaries, padding evidence, third-degree methods, non-registration and selective registration of crime, etc.[457]

The role of the police has never been on the lines as laid down by the law-makers. Police power, discretion and functional independence, was often used to circumvent the law or supplement the legal process because, according to David Arnold, the latter was too dilatory to satisfy the need for prompt retribution and punishment.[458] This continues to impede the availability of willing testimony and if available, it is difficult to sustain their conviction to stand through the entire prolonged legal process. The witnesses turn hostile for reasons, most often, either they are threatened and intimidated or their silence is purchased.[459] The Supreme Court in the *Best Bakery* case, wherein Ms. Zahira, a witness, had complained of having turned hostile as her life and the lives of her other family members were threatened, said nothing new:

> It is alleged that (the) conviction rate in criminal cases in the country has gone down. Most of the sessions trial in sensitive cases do not start until all the witnesses are won over.

It, therefore, directed the state government to "provide protection to the witnesses and their families and inform the court of the steps taken to that effect as also the action taken against those who had allegedly threatened the witnesses."[460] It turned out to be an irony that the same Court that had earlier, on August 8, 2003, through its instruction reminded the lawful duty of the Gujarat police to *protect* the witnesses, later in a less than a couple of months, on finding the same police to be the

---

[453] The Joint Committee of the British Parliament on the proposals of the White Paper on Indian Constitutional Reforms published on 23 November 1933 had conceived of the necessity that the "Force should be protected" against the risks of undermining the confidence and impartiality of the police that emanate from "political influence or pressure exercised from above" that would have "disastrous" consequences and hence made "recommendations designed to secure this protection." See A.S. Gupta, op. cit., pp. 482-83; Syed H. Afzal Qadri, op. cit., pp. 170-72.

[454] Syed H. Afzal Qadri, ibid, p. 201; Also see David H. Bayley, op. cit., fn. 57, p. 173.

[455] A.S. Gupta, op. cit., p. vii.

[456] Joginder Singh, op. cit.

[457] **Report of the Committee of the National Police Commission on Police Structure and Performance**, op. cit., Chapter 2: The Present Policing System, para 2.4, p. 5.

[458] K.S. Dhillon, op. cit., pp. 68-69.

[459] Geeta Ramaseshan, *A Travesty of Justice*, **The Hindu** (Sunday Magazine), Delhi, June 10, 2001, p. IV.

[460] J. Venkatesan, op. cit.

aggressors had to then ask them to "*keep off*" from Bilkis Yakub Rasool, who was allegedly one of the women gangraped by a mob during the Gujarat riots. This directive of September 25, 2003, comes in the wake of a complaint by Bilkis that immediately after the Apex Court issued notice to the Gujarat Government and the State police officials on September 8, 2003, on her petition (filed with the legal assistance from the National Human Rights Commission pointing out to the Apex Court that despite her medical examination clearly establishing that she was sexually assaulted by a mob immediately after the Godhra train carnage in February 27 2002, the state police had closed the rape case against the alleged perpetrators of the crime) that she has been harassed and terrorised by the police and been receiving threats and pressures against pursuing the case in the Apex Court and hence wanted a direction from the same Court to the State police to stay any further investigation in the matter and to transfer the probe into the sexual assault case to the Central Bureau of Investigation (CBI) after the Gujarat government had initially closed it citing "lack of evidence".[461]

The investigating official of the CBI were also threatened by the accused[462] and the Supreme Court was totally dejected at the Gujarat government's deliberate disregard of its directives to provide protection to the witnesses and accordingly ordered the Union government to provide the same through the paramilitary forces at its disposal.[463] While another Bench headed by the Chief Justice of India issued notice to all the States and Union Territories on the question of witness protection, and also asked the Union to come out with a draft scheme for providing protection to witnesses, who often turned hostile when threatened or coerced, resulting in miscarriage of justice.[464] In sum, no executive arm of the state has come in for greater obloquy than the Indian police system. The Supreme Court's paradoxical remarks that "the only misfortune of the citizens of this country is that they have to live under police protection" speaks of the unspeakable and despicable rot in the police which in fact has become a potent source of insecurity for the society.[465]

The judiciary as a component of the justice process has been responsible to ensure the standards of fairness in the police investigation work as it shapes the later stages of the justice

---

[461] J. Venkatesan, *Keep off 'rape' victim, SC tells Gujarat police*, **The Hindu**, Delhi, Friday, September 26, 2003, p. 12; *Keep off rape victim: SC to police*, **The Times of India**, New Delhi, Friday, September 26, 2003, p. 9.

[462] The CBI had filed a chargesheet in the Bilkis gangrape-cum-murder case in post-Godhra riots before a Special Fast Track Court in Ahmedabad, which in return had granted permission to photograph the four accused who were in judicial custody in Sabarmati Central Jail. When the officials had gone to the Jail to photograph them, according to the affidavit filed by the investigating official of the CBI, K.N. Sinha, 'some of the fourteen accused had threatened them for probing the case as they had gone to the jail to photograph them'. *CBI official says Bilkis case accused threatened him*, **The Hindustan Times**, Wednesday, April 28, 2004, Delhi, p. 1; *Bilkis case accused threatened him, says CBI official*, **The Tribune**, Wednesday, April 28, 2004, Chandigarh, p. 1. Also see *Best Case: SC slams Gujarat*, **The Times of India**, Friday, May 7, 2004, New Delhi, p. 13.

[463] A Bench of the Supreme Court comprising of Chief Justice V.N. Khare, Justices S.B. Sinha and S.H. Kapadia on March 15, 2004, passed an order (following a petition filed by Citizen for Justice and Peace) which recounted the fear of insecurity among the witnesses) asking the Centre to identify key witnesses in the nine Gujarat riot cases for the purpose of making arrangements for their security by Central police forces like the CRPF (Central Reserve Police Forces). According to the Solicitor General Kirit Raval, there were 1499 witnesses in those nine riot cases.
See *Identify riot witnesses for Central Protection: SC*, **The Times of India**, Tuesday, March 16, 2004, New Delhi; <http://www.timesofindia.indiatimes.com/articleshow/562427.cms>;
'Protect key witnesses in Gujarat riots', **The Indian Express**, Tuesday, March 16, 2004, New Delhi; <http: //www.indianexpress.com/full_story.php?content_id=43064>.

[464] J. Venkatesan, *Best Bakery Case: Gujarat seeks 'modification'*, **The Hindu**, Thursday, April 22, 2004, p. 12.
In the context of the Supreme Court's recent emphasis on the importance of introducing a witness protection programme, the Law Commission has suggested the enactment of a comprehensive legislation for the protection of witnesses and to ensure that their evidence collected at the stage of investigation is not allowed to be destroyed later. The Commission has prepared a consultation paper on "Witness Identity Protection and Witness Protection Programmes" and released it on its website on August 19, 2004 for public debate before drafting a legislation. See J. Venkatesan, *Consultation paper on witness protection*, **The Hindu**, Sunday, August 22, 2004, Delhi, p. 10; *Protecting Witnesses*, **The Hindu**, Tuesday, November 9, 2004, Delhi, p. 10.

[465] Ved Marwah, *Crime and Punishment*, **The Sunday Times of India**, April 3, 1994, New Delhi.

process, but, evidently, with the passage of time the courts have come to perform a more expansive role in that regard to such an extent that it is assumed to have decidedly carried almost the entire supervisory burden on itself as the in-house, departmental supervision by the superior police officers has either failed or appear to be far from adequate. The public opinion survey as well as the examination of the policework in reference to the FIRs show that people have rarely petitioned the court on their grievances about the police misconduct. Instead the preference for making complaints to the supervisory police officers were found to bear no results. This has discouraged people from even ever approaching the superiors against the erring and as the survey showed that only one respondent from the entire sample expressed its desire to approach the court in the event of any misdoings by the police, the justice process at the quotidian level appears to be in a crisis as the critical departmental supervisory arrangement has become ineffectual because of the overbearing influence of political or pecuniary considerations in the functioning of the policework. Historically, administrative importance to supervision has been slight as it is evident from the report of the Police Commission of 1902-03 that states:

> Supervision has been doubly defective. It has been inefficient as regards...Inspectors, and it has been weak and inadequate as regards the Superintendents. As to the Inspectors...the public do not regard them as honest...the Superintendents are not accessible or even courteous...too burdened... to exercise effective supervision and control over the police...These officers also are too often inclined to support their subordinates in an unreasonable manner, and to receive complaints or strictures on police work in a hostile spirit.[466]

The vigil of the court on the quality of police investigation can be discerned from the episode of bail of Manu Sharma, the prime accused in the *Jessica Lal* murder case. The High Court of Delhi after having granted interim bail to the accused for over a year extending it seven times, citing the same ground over and over again that "the trial may be prolonged as the two important public witnesses are not available," ultimately cancelled the interim bail as also denied regular bail on the ground that "circumstantial evidence" was "consistent with his guilt", and expressed its realisation that the "possibility of the prime witness having disappeared on account of release of the petitioner on interim bail cannot be ruled out." Thus, while it pointed out that "the non-production of this witness in a case of horrendous nature shows not only the inefficiency of the police but its indifferent and cavalier attitude also," it further held that "now the excuse of the non-availability of the witness on account of the accused being at large is no more available to the police."[467]

Such an impression of work atmospherics of the police breeds a vicious cycle of suspicion and distrust between the police, on the one hand, and public and judiciary, on the other. The implication of both entities turning skeptics of policework are the absence of ready public cooperation and the courts extreme caution and perpetual search for evidence of impropriety in policework. The result is exactly what was faced by the police of British India, articulated by the Commissioner of Lucknow in 1888 as thus:

> The police are a disreputable body, and they know it; they are, therefore, mistrusted and hampered even when they wish to work openly and fairly.[468]

The police opinion survey showed that the entire convenient sample of investigating officers strongly felt that "investigation is hampered by a vicious circle of suspicion on the police" who is then compelled to take recourse to improper practices to discharge his trust [item no. 116]. Bayley supposes that if the supervision by qualified staff were greater, the courts would not continue to feel

---

[466] A.S. Gupta, op. cit., p. 205.

[467] *Court denies bail to Manu Sharma*, **The Hindu**, Delhi, Wednesday, November 12, 2003, p. 4; *Manu Sharma sent to Tihar*, **The Hindu**, Delhi, Friday, November 14, 2003, p. 3; *Supreme Court dismisses Manu Sharma's bail plea*, **The Hindu**, Delhi, Wednesday, December 3, 2003, p. 11.

[468] A.S. Gupta, op. cit., p. 120.

compelled to lay down so many procedural rules concerning the conduct of police investigations. They might also been to feel less hostile toward police evidence, once assured of the fact that responsible officers of superior attainments are intimately involved in policework.[469] But that not likely to be happening, the courts continue to issue guidelines for policework. This is often viewed by the police as irrational and obstacles to effective and efficient functioning. It has also caused to breed in them a sense of hostility towards the judiciary and a feeling of victimisation.

The survey also elicited a mixed response regarding the responsibleness of the police when the guilty go unpunished by the courts. While nearly half of the respondents attributed it to perfunctory reconnaissance, almost all of them valorized the apathetic attitude of the public for the shortcomings in the policework [item no. 80]. The compound of distrust and discretion offers a maze within which the police is then required to function. So in a conscientious desire to do their duty and as efficiency is largely assessed by the rate of conviction, their pursuit to provide the missing evidence impels them to, as was perceived by a District Officer in the late nineteenth century, "work at fabricated evidence, at torture of various sorts and degrees, etc. and must look to a conviction as his sole and chief aim in life."[470] The signification of the police milieu was realised by a member of the very profession that scrutinised the reliability of the confession, Sir Cecil Walsh, who was the Chief Justice of the Allahabad High Court in British India. From his own experience, he asserted that "an elaborate and detailed confession by an innocent man is against nature and...rare and not difficult to discover," and added that it is "an undoubted fact that an enormous amount of crime would go unpunished in India and hundreds of desperate criminals would remain at large, if there were no confessions..."[471] What is implicit is that confessions were never volunteered and if the primacy was of solving a criminal case, confessions had to be extracted.

Sir Edmond Cox laments at the precarious position of the police in terms similar to that of Sir Walsh, who in his legal experience saw "very few confessions by men about whose guilt he felt any doubt." Though both the police and the courts act on the basis of presumption of regularity, the most predominant and quintessential ingredient in the criminal justice process, it is the police conduct with such presumption over which the latter sits on judgement because such police operation is most often seen to be in subversion of the procedures that are enacted with the intent to safeguard the citizens from possible violation of their rights, liberty and dignity. In brief, it involves the question of unfair handling of the 'publics'. Sir Cox illustrates that precariousness,

> If for a hundred years no police officer in the mildest way, even by persuasion, induced an accused person to confess, the mere fact that confessions volunteered and subsequently retracted from part of the record, would leave the case against the police just as strong as it is now. It is of the utmost importance to get rid of the taint once and for all.[472]

Bayley too believes that the suspicious methods of the police, once discovered, set off the cycle of suspicion, recrimination, and obduracy between the police, on the one hand, and the public and the judiciary on the other. Such attitudinal relations, contend many officers, is responsible for the nature of its prevalent practices as the whole purpose of their labours is to achieve conviction.[473]

The police has an exhaustive list of difficulties that hinders their smooth and effective conduct of operations. Bayley provides a comprehensive assortment of such problems that includes: lack of adequate investigating staff, overburdened supervisory staff, jurisdictional area of individual

[469] David H. Bayley, op. cit., p. 178.
[470] A.S. Gupta, op. cit., p. 121.
[471] Ibid, pp. 60-62; K.S. Dhillon, op. cit., pp. 124-25.
[472] A.S. Gupta, ibid, pp. 60-61.
[473] It is seen that even without sufficient evidence, cases are sent up for trial to enhance the police clearance rates. David H. Bayley, op. cit., pp. 143-44, 178. See Arvind Verma, op. cit., p. 269.

rural police stations are not rational, lack of proper and modern infrastructural facilities, reluctance of the general public to cooperate in police investigations, public's almost pathological attitude to serve as a witness, the easy repudiation and retraction of testimony, the prevalence of pulls and pressures on the determinative stages of the investigation process, the existence of "cooked" testimony among witnesses, the ingrained habit of distrust and suspicion of the police evidence shown by the courts, the popular malice against the police, and finally, the onerous of accusatorial criminal justice process with their interminable delays, multitudinous forms, and accompanying gaggle of unscrupulous lawyers.[474]

The most important police-specific concerns are the issue of workload, lack of trained and enough investigating staff, and lack of adequate supervision. The National Police Commission had shown concern in regard to the strength of the IOs as it observed the per capita crime work as very high.[475] The various State Police Commissions had suggested different caseloads as a standard quantum, ranging from 60 to 100. But even with the average workload per IO (of the four *thanas*) being 33 cases a year,[476] there still persists the problem of high pendency of cases as noted in the Inspection Notes of all the four *thanas*. Thus the exact quantum of per capita caseload that could be held as appropriate for effective and successful investigation seems difficult to assume. What seems reasonably clear, therefore, is the burden of work owing to the multiplicity of functions, that is, the other tasks that it is required to perform besides investigation such as routine patrol work; attending to day-to-day problems of order and complaints as received by the *thana*; interposing in conflicts or disputes; enforcement of various social and prohibitive legislations; paperwork like writing of reports, maintaining registers and files; processing of persons charged under non-FIR cases; law and order duties like providing escort, crowd control, directing traffic, etc. Thus, the weight of noninvestigative duties is very heavy but it is still difficult to state whether the investigations suffer when an officer has to break off to take up some other momentary pressing business. It has been held that IOs cannot focus in a desired and requisite fashion to detective work because of the distractions of other responsibilities. This has therefore led to the practice of restricting the volume of investigation work by methods such as burking and minimisation of crimes.[477] In this regard, there has been two oft-repeated suggestions that is urged to be implemented on a trial basis which also attains conceptualisation in the report of the Malimath Committee as thus:

> A prompt and quality investigation is therefore the foundation of the effective criminal justice system. Police are employed to perform multifarious duties and quite often the important work of expeditious investigations gets relegated in priority. A separate wing of investigation with clear mandate that it is accountable only to Rule of Law is the need of the day. ...Investigating agency is understaffed, ill equipped and therefore the gross inadequacies...need attention on priority.[478]

---

[474] David H. Bayley, ibid, pp. 135-36.

[475] **National Police Commission**, Fourth Report, op, cit., Chapter XXVII, para 27.7, p. 3.

[476] The figure is the grand triangular average of the four *thanas*' triangular average of cases a year per IO during the period 2000-2002.

[477] The quality of investigation work may be affected by the clearance rate being held as a measure of police efficiency but it also influences the reporting and registration stage of policework. One can draw the historicity of the dynamics between registration and conviction of cases from the Home Department's despatch to the Bengal Government in March 1901 on Police Programmes wherein it wanted the "investigation of reported offences should be restricted to those which it was really necessary to investigate, because it appeared to them that the percentage of investigation was unnecessarily high and was reflected in the low percentage of convictions after trials..." David H. Bayley, op. cit., pp. 136-39, 177; A.S. Gupta, op. cit., pp. 173-74.

[478] Malimath Committee on Reforms of Criminal Justice System, op. cit., See recommendations 15-18, pp. 239-242. The Law Commission of India in its Fourteenth Report: Reform of Judicial Administration, 1961-62, as well as various provincial police commissions had recommended for the separation of the investigating and enforcement staff at the station-house level. This was reiterated by later reports, 154th and the recent 177th report. The National Police Commission in its Fourth Report made a suggestion for an increase in the cadre of investigating officers. See David H. Bayley, ibid, pp. 139-41; R. Deb, op. cit., p. 83; <http://pib.nic.in/archieve/Ireleng/Iyr2002/rdec2002/31122002/r311220022.html>

It is pertinent to mention here that the Delhi High Court while disposing of the 1998 PIL on November 14, 2003, had issued direction to separate crime investigation from law and order duty at the police-station level in the National Capital, a recommendation made by the BPR&D that was accepted by the Union Government. It was supposed to have been complied with by March 2004. On May 18, 2005, the Court asked the Union Home Ministry and the Delhi Police to explain why action should not be taken for the failure to implement its order. On August 4, 2005, while observing that the Centre appeared to have no political will to take a decision on the issue, the Court expressed strong displeasure over inordinate delay in the implementation of its order and gave a final opportunity to the Centre to implement it within two weeks.[479]

The poor quality of investigation is also due to the defective and insufficient training of the IOs and lack of adequate supervision, as has been emphatically pointed out by the West Bengal Police Commission, as stated earlier.[480] The Malimath Committee also lays down a structural scheme for involving the supervisory level officers in the investigation processes "to improve the quality of investigation" that has been generally admitted as defective, even by policemen themselves, since the days of yore.[481]

J.C. Curry provides a graphic description of the conditions of policework of the early twentieth century that appears not so different from the contemporary state of policing.

> Even the every day work of the police is often far from being humdrum. The ordinary police station officer is no Sherlock Holmes, and indeed scientific methods are often not only not needed, but impossible. What he does need is a good fund of mother wit, tireless energy, much local knowledge and sound judgement of human nature. He has to work with inadequate staff, among a public which is often apathetic and sometimes hostile to the success of an investigation... The criminals perhaps have influential friends or relations or they may be such desperate characters that the fear of their vengeance seals men's mouths. The complainant in a case will often try to mislead the police, either from a desire to implicate and ruin an enemy whom he suspects, or because his own motives in the tangled skein of things are mixed. So the Sub-Inspector usually finds the dice loaded against him at the outset.[482]

The police opinion survey showed little enthusiasm for the scientific method of investigation to obtain the necessary information from the publics involved in a criminal case. They were also ambiguous to state whether scientific methods were ever applied during investigation [item no. 88]. Manning asserts that "science plays a small role in criminal investigation."[483] In appreciation of the reasons that impede police investigation, the Police Commission of 1902-03 observed that

> much may be said in excuse for the misconduct of the police in the generally indifferent attitude of the people in respect of crime, in the encouragement of corruption by the readiness with which the people offer illegal gratifications...But honourable exceptions and mitigating circumstances cannot efface the general impression created by the evidence recorded. ...a police investigation always entail some measure of worry and annoyance, that the prosecution of cases involves interruption of village work...and often also very considerable trouble and expense, and that those inducements to silence and neutrality have been strengthened by the defective character of police work.[484]

---

[479] *High Court warns Centre on non-compliance with order*, **The Hindu**, Delhi, Friday, August 5, 2005, p. 4; *Separation of investigation from law: Govt Faces HC ire*, **The Tribune**, New Delhi, Friday, August 5, 2005. <http://www.tribuneindia.com/2005/20050805/delhi.htm#1>

[480] See David H. Bayley, op. cit., p. 139.

[481] A comprehensive resolution that accompanied the Police Commission's report that was published on 21 March 1905 (nearly two years after the report was submitted to the Government of British India) concluded that "Of all the branches of the public service in India, the police, by its history and traditions, is the most backward in its character." Similar understandings about the police can be found in the expressions of Commissioner of Allahabad in the late nineteenth century as also in the police commission reports of various provinces and of the Union of India. See A.S. Gupta, op. cit., p. 120.

[482] K.S. Dhillon, op. cit., p. 120.

[483] Peter K. Manning and Mahendra P. Singh, *Violence and Hyperviolence: The Rhetoric and Practice of Community Policing*, **Sociological Spectrum**, July-September, Vol. 17, Issue 3, 1997, pp. 339-61 (Source: EBSCO Database: Academic Search Elite).

[484] A.S. Gupta, op. cit., pp. 206-07.

It also observed that

> "there can be no doubt that the police force throughout the country is in a most unsatisfactory condition, that abuses are common everywhere, that this involves great injury to the people and discredit to the Government..."[485]

But the Commission makes a pertinent suggestion in the admonition as it calls for urgent radical reforms in the police:

> Let the police gain by their character and methods the confidence of the community; and their difficulties in gaining information will largely pass away. It must be realised that their success depends on the general support of the community.[486]

Thus, the reform in the police methods of operation is necessary in order to receive express cooperation of the public, a role that is obligatory and critical to the process of any police investigation that in itself does not merely assume the liability of the police only. This was reiterated recently by a two-Judge Bench of the Supreme Court while replying to the argument of the legal counsel for the accused's entitlement to bail on the ground that the prosecution was in no position to prove the guilt of the accused in the murder case as none of the witnesses supported the police case. It stated that "in this society it is a big problem. There are people watching the incident and yet nobody comes forward to support the prosecution."[487]

Criminal investigation is one of the most important occasions for bringing both the police and the public into contact. This process consists of many stages and thus provides as many opportunities of contact between the two entities. Thus, it beckons on the police to be conscious at every such encounter about its attitude so as to ensure a steady cooperative behaviour from the public all the way till the completion of the trial. One of the most critical assistive role that the police can play to facilitate willing testimony lies well within the comprehension of the police. The Maharashtra Police Commission four decades back asserted that the police can break through the cordon of silence around them by not only demonstrating that they can but need to provide protection to those who testify.[488] This also entails that the public can count on the reliability of the police that his security will be preserved by not disclosing its identity and that the trust will not be breached by being gained over by the opposite party or that he is not falsely implicated in any case. But when three-fourths of the entire public sample think that the police have, either often or sometimes, a nexus with the criminals, it seems that the existing conditions do not augur ready cooperation of the public in policework [item no. 3(xlviii)].[489] It requires a great deal for the police to cultivate a character as a part of the subculture that could help in encouraging public support for its work.

Under ss. 151 and 152 of the Indian Evidence Act, 1872, victims and witnesses are protected from being asked indecent, scandalous, offensive questions, and questions intended to

---

[485] Ibid, p. 206.

[486] David H. Bayley, op. cit., p. 158.

[487] *Supreme Court dismisses Manu Sharma's bail plea*, op. cit.

[488] The Maharashtra Police Commission suggested certain measures for protection, for e.g. witnesses should be allowed to remain anonymous as long as possible, being permitted to slip out of police stations unnoticed after filing their statements. See David H. Bayley, op. cit., p. 162.

[489] A member of the public sample of Sewaknagar who had been the complainant of a series of thefts that occurred at her house and in the neighbourhood was warned by her spouse who was intimidated by some unknown persons to restrain his wife from pursuing the case.

The Telgi scam on fake stamps emphatically showcases the nexus between the politicians, criminals and the police that was revealed by the N.N. Vohra Committee more than a decade back. The Malimath Committee, *vide* recommendations 128 and 129, suggests changes in the laws "to deal with the dangerous nexus between politicians, bureaucrats and criminals" and 'a special mechanism to deal with those Central/State Minister, and members of the federal or state legislatures involved in criminal cases.' It would have been preferable to make an outright mention of the term 'police' over or along with the category "bureaucrats" as contained in the recommendation no. 128. See **Committee on Reforms of Criminal Justice System** (Chairman Dr. Justice V.S. Malimath), op. cit., p. 260.

annoy or insult them. Otherwise, there is no substantial legal provision for protection of the welfare of the witnesses, as against threats, intimidation or inducements whereby they are prevented from speaking the truth. Generally, the Court while enlarging the accused on bail, serve a condition that the accused shall neither tamper with the evidence nor approach the witnesses.[490] But this does not ensure protection of the witnesses. In view of the high rate of crime and low rate of conviction, especially in that of communal riot cases or for combatting organised crime, the urgent need is for an effective witness protection programme, involving the police, government and the judiciary. The key of this programme should be to ensure the safety and security of the witnesses and its family before, during and after trial.

The Government of India had decided to amend the Criminal Procedure Code in terms of the recommendation of the 154th Report of the Law Commission to provide necessary facilities and protection to witnesses in criminal cases resulting in such cases sustaining on the touchstone of law and justice.[491] It had reportedly also begun processing the matter in consultation with the States during the middle of the year 2000, but the proposed changes are yet to be implemented. It is pertinent to note that the decision to amend the Cr.P.C. was in the context of the Apex Court's observation regarding the adversities that discourage a person from becoming a witness.[492] It is equally significant to realise that after three long years, it had to be the Supreme Court again that, in relation to a Gujarat riot case of 2002, goaded the Centre and the States on 'whether any scheme had been formulated by it pursuant to the recommendations of the Justice Malimath Committee'.[493] Recently, the Delhi High Court issued guidelines to the police on providing protection to witnesses to curb the menace of their turning hostile leading to acquittal in heinous crimes.[494] The Unlawful Activities (Prevention) Amendment Act, 2004, that replaced the POTA, *vide* s. 44(2), provides for the court, in any case where it is satisfied that the life of the witness is in danger, to take such measures as it deems fit for keeping the identity and address of such witness secret.[495] Such

---

[490] The Code of Criminal Procedure (Amendment) Bill, 2005, makes it a statutory provision by amending s. 437(3), Cr.P.C., namely:- the Court shall impose "that such person shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer or tamper with the evidence." See **The Code of Criminal Procedure (Amendment) Bill, 2005**, op. cit., Clause 37(ii)(c), p. 10.

[491] The recommendations of the Law Commission in its 154th Report (Vol. 1, 1996) related to allowances and facilities to be made available for the witnesses as had been suggested earlier by the Commission in its 14th Report (1958) and by the NPC (1980). The 154th Report merely stated that "Witnesses should be protected from the wrath of the accused in any eventuality." It did not suggest any concrete measures for the safety and security of the witnesses. The 178th Report of the Law Commission (2001) has referred only to the fact of witness turning hostile, and the recommendations (to insert s. 164A to the Cr.P.C.) were thus only to prevent witnesses from turning hostile.

[492] *Changes in Cr.P.C to ensure safety of witnesses*, **The Hindu**, Delhi, Tuesday, July 11, 2000, p. 7.

[493] J. Venkatesan, *SC Notice to Centre, Gujarat on NHRC plea*, op. cit. The UPA Government proposes to introduce 'The Criminal Law (Amendment) Bill to only prevent witnesses from turning hostile' in the monsoon session of the Parliament (2005). See K.V. Prasad, *NDA focus on issues of public concern*, **The Hindu**, Delhi, Monday, July 25, 2005, p. 12. There are still no signs of the Government of India to frame any witness protection scheme.

[494] The High Court in reference to a petition filed by Neelam Katra, whose son Nitish was allegedly kidnapped and killed, provided the guidelines to the police and also observed that it shall operate till the enactment of a suitable legislation. It identified Member Secretary, Delhi Legal Services Authority as the competent authority to decide on the requirement, extent and duration, of the protection for the witnesses in cases punishable with death sentence or life imprisonment. It will be the duty of the Police Commissioner to provide the protection as decided by the concerned authority.

[495] The principal Act *vide* sub-s. (3) of the same section lays down the following measures which a court may take under the sub-s. (2): (a) the holding of the proceedings at a place to be decided by the court; (b) the avoiding of the mention of the name and address of the witness in its orders or judgments or in any records of the case accessible to public; (c) the issuing of any directions for securing that the identity and address of the witness are not disclosed; (d) a decision that it is in the public interest to order that all or any of the proceedings pending before such a court shall not be published in any manner. The Act provides for punitive action in the event of any contravention of any decision or direction issued under sub-s. (3), *vide* sub-s. (4). Section 22 of the Act also provides equally stricter provisions as punishment for threatening witness.

provisions should form a part of the Cr.P.C. in general, applicable to cognizable cases under the IPC as well as SLL.

The Malimath Committee expresses serious concern for the oral evidence of witnesses that the prosecution mainly relies on for proving the case and thus recommends necessary effective measures to[496]

a. prevent witnesses turning hostile because of inducements or threats to them and their family members,[497] for e.g. enact a law for giving protection to the witnesses and their family members on the lines of the laws in USA and other countries;
b. prevent the harassment, annoyance and indignity that the witnesses face on account of repeated visits to the courts, wait for long periods, unreasonable and rude cross-examination, and TA/DA not given promptly;
c. prevent shabby treatment due to absence of facilities for the convenience of witnesses in the court premises; and
d. curb the menace of witnesses knowingly or willfully giving or fabricating false evidence and also of perjury.[498]

In the recent past, there has been an increasing focus, also made by the Malimath Committee, on the shortcomings of the common law system bequeathed to independent India, for instance, that is concerned with the individual case at hand. The Judges have to deal only with the guilt or innocence of the accused before them. However, since there is extreme abuse of power in the present adversarial system, common law falls short in effective implementation of justice. In comparison, under the inquisitorial system followed in Europe, courts are not merely concerned with the case before them but are bound to try to arrive at the truth. Judges can question the witnesses on their own during the course of the trial. The historical contention of police interrogation as a process that involves questionable methods can be mitigated by the provision of the right to silence guaranteed by Article 20(3) of the Constitution. But the Committee felt that such an instrument could in all probability be illegitimately exploited as a privilege by the accused who is in most cases the best source of information. It suggests that while respecting the right of the accused a way must be found to tap this critical source of information. The Committee thus feels that

> without subjecting the accused to any duress, the court should have the freedom to question the accused to elicit the relevant information and if refuses to answer, to draw adverse inference against the accused.[499]

The Committee considered the inquisitorial system as "certainly efficient in the sense that the investigation is supervised by the judicial magistrate which results in a high rate of conviction." At the same time, it also felt that "a fair trial and in particular, fairness to the accused, are better protected in the adversarial system." However, the Committee felt that

> some of the good features of the Inquisitorial System can be adopted to strengthen the Adversarial System and to make it more effective. This includes the duty of the Court to search for truth, to assign a proactive role to the judges, to give directions to the investigating officers and prosecution agencies in the matter of investigation and leading evidence with the object of seeking the truth and focusing on justice to victims.[500]

---

[496] **Committee on Reforms of Criminal Justice System** (Chairman Dr. Justice V.S. Malimath), op. cit., Section 11: Witnesses and Perjury, Recommendations nos. 79-89, pp. 250-52.

[497] Witnesses turn hostile as a result of they either being gained over by money or subdued by intimidation or that the matter being resolved out of court between the contending parties which may involve exchange of money as compensation for the loss or one party coerced by the other for a settlement and hence the witness would act likewise to see the case do not stand at the trial stage.

[498] The judiciary seldom initiate punitive action against false testimonies or perjury, a rarity but whenever it does it contributes to strengthen the operation of the legal system. It is progressive functioning when judges make a holistic evaluation of a case and not conventionally confine themselves to the outcome of any case, that is, conviction or acquittal or in the quantum of sentence but also deal critically on the role of all the actors, police, public and prosecution, related to the case. For instance, in the 'tandoor murder case', the Delhi Sessions Court Judge A.P. Thareja while delivering the judgement also took cognizance of a hostile witness, D.K. Rao, an Indian Administrative Service (IAS) officer of the Gujarat cadre, and hence directed the Chief Metropolitan Magistrate to prosecute him for perjury for recanting his statement recorded before a Metropolitan Magistrate during trial of a case u/s. 164 Cr.P.C. See *Sushil Sharma held guilty in tandoor murder case*, **The Hindu**, Delhi, Tuesday, November 4, 2003, p. 1.

[499] **Committee on Reforms of Criminal Justice System** (Chairman Dr. Justice V.S. Malimath), op. cit., Section 3: Right to Silence - Article 20(3), 1st para, p. 234.

[500] Ibid, Section 2: Adversarial System, 1st para, p. 232.

In the area of suspect rights, the principles that characterise the American, British, and Canadian jurisprudence are in the context of the Miranda decision, the Police and Criminal Evidence Act (PACE), and the Canadian Charter of Rights and Freedoms, respectively, to ensure that the suspects are unambiguously informed of their rights prior to questioning. In tune with such principles, it is for the first time that such a noteworthy conception is reflected in the suggestion made by the Malimath Committee. With regard to the rights of the accused as enshrined in the Constitution and other relevant safeguards as extended by judicial decisions, the Committee makes the following observation suggesting for a statutory protection of such rights.

> The accused has the right to know about all the rights he has, how to enforce them and whom to approach when there is a denial of those rights. The Committee therefore felt that all the rights of the accused flowing from the laws and judicial decisions should be collected and put in a Schedule to the Code. The Committee also felt that they should be translated by each State in the respective regional language and published in a form of a pamphlet for free distribution to the accused and the general public.[501]

Such a proposition reflect an intent with regard to safeguard the rights of the accused in the critical pretrial phase of criminal procedure whereby during the processes executed by the police to collect evidence and dispose of case, it engages itself with the 'publics', accused, victim, complainant, and witnesses. But considering the subtle functions of the interrogative practices that makes it controversial because of its proclivity to posit a threat to standards of fairness and the procedural regularity, it is apparent that the above suggestions of the Committee cannot succeed in protecting the rights of the accused unless it incorporates along with what is manifest in the "exclusionary rule" of evidence, the celebrated device for enforcing police lawfulness. It is because the common law knows no notion of excluding probative evidence to accomplish the goal of deterring police illegality. The Indian legal jurisprudence is yet to incorporate such measures to empower the judiciary in ensuring fair police practices.

This remedial measure unique to American jurisprudence is a creation of the judiciary to ensure that constitutional limitations on law enforcement are safeguarded. The assumption behind this rule as a control device is that it will certainly discourage adoption of illegal methods of operation as it prohibits the use of evidence or testimony obtained by government officials through means that violates the Fifth and Sixth Amendment.[502] Investigating officers as they are primarily interested in securing conviction will find it prudent to gather evidence based on fair means as otherwise would under the exclusionary rule be held nugatory.[503] Under such rule, the police assumes a partial role that of a legal advisor to the accused or suspect. Thus, the pretrial police methods of operation can be cleansed only when the spirit as expressed in the ruling in *Chapman v. California* [386 U.S. 18 (1967)],[504] where it was held that forced confessions were such a basic form of constitutional error that they could never be used and automatically invalidated any conviction to which they related, is incorporated in the criminal justice process. The philosophy of such a measure is to introduce a movement toward a social order perspective, a transcendental progression from individual rights.

The origin of such a discourse lies in the Fourth Amendment exclusionary rule, a doctrine in the America's constitutionalised criminal procedure, which forces a suppression hearing anytime someone claims the confession is invalid. Actually, this branch of Fourth Amendment exclusionary

---

[501] Ibid, Section 4: Rights of the Accused, Recommendation nos. 11 & 12, p. 236.

[502] Yue Ma, *Comparative Analysis of Exclusionary Rule in the United States, England, France, Germany and Italy*, **Policing: An International Journal of Police Strategies and Management**, Vol. 22, No. 3, 1999, pp. 280-81; Roy R. Roberg and Jack Kuykendall, **Police and Society**, Wadsworth Publishing Company, Belmont, 1993, p. 10.

[503] See Chapter 3, the section, "Legal Controls: Impediment or Necessity in Policework".

[504] Frank Schmalleger, op. cit., pp. 156-59; Jerome H. Skolnick, op. cit., p. 211.

rule is known as 'the fruit of the poisonous tree' doctrine and is drawn from the case of *Wong Sun v. U.S.A* [371 U.S. 471 (1963)]. Confessions, no matter how voluntary, are automatically fruit of the poisonous tree, if a suspect's Fourth Amendment rights were violated. The issue therein is about what the U.S. Supreme Court pointed out as early as in 1962 the correlation between the standards of criminal law enforcement and level of civilization as thus:

> The methods we employ in the enforcement of our criminal law have aptly been called the measures by which the quality of our civilization may be judged.[505]

The existing provision for the arrestee to have advocate "during interrogation though not throughout the interrogation" process, *vide* clause 10 of the measures as laid down by the Supreme Court of India in *D.K. Basu* case that has been acclaimed as the only foolproof method to prevent human rights abuses which has been the bane of Indian investigation, has proved to be ineffectual.[506] What is worthy in accounting for such failure is that they are formulated with a negative perspective of ensuring the protection of the accused from police illegalities. It is not based on the need for developing a police practice which would enable willing participation of the public in policework. If the need is to enforce police lawfulness, effectively, the focus should primarily be on means that could rationalise police discretion. That is, providing the police with clear guidelines on the acceptable manner of its operations, for e.g. the "exclusionary rule" that exists in the American jurisprudence. On the balance, it is also required that stringent laws against perjury must be formulated to discourage false testimonies and refusal to aid the police must also be seriously viewed.

The Malimath Committee recommends for the setting up of fair and transparent mechanisms in places where they do not exist and strengthened where they exist, at the District Police Range and State level for redressal of public grievances.[507] It is pertinent to point out that it does not specify the process and the structures that would deal with the problems of the public. The Committee also expresses similarly lofty abstractions:

> Rights and duties of the complainant/informant, the victim, the accused, the witnesses and the authorities to whom they can approach with their grievances should be incorporated in separate Schedules to the Code. That should be translated in the respective regional languages and made available free of cost to the citizens in the form of easily understandable pamphlets.[508]

This comes without the realisation that even after fifty-five years since '"We" gave to ourselves this Constitution,' large mass of India's burgeoning population are not only aware of their fundamental rights but those who are they have failed to assert it. Moreover, the Committee's conception of obtaining easy witnesses suggests expediency as it attempts to discard effective procedural safeguards and to legalise current police practices. The irrefutable reality is that witnesses are recruited, tutored, and led in their testimony. For instance, the recommendation that 'those provisions of the existing laws that require the presence of witnesses of the locality or other locality or neighbourhood be deleted' and substituted by the words "the police should secure the presence of two independent witnesses," would encourage as well as legitimise the prevalent malpractices as the police would have considerable latitude to undercut the rhetoric of independent witnesses.[509] A similar situation led McBarnet to observe that "deviation from legality is institutionalized in the law itself." It appears

---

[505] *Coppedge v. U.S.*, 369 U.S. 438 (1962).

[506] The 14th Law Commission of India in its 177th Report on "Law Relating to Arrest" has recommended for the accountability of the police, insertion of new Section 41A to 41D, that would include the right of the accused to have advocate during interrogation, an enlargement of the current provision. <http://pib.nic.in/archieve/Ireleng/Iyr2002/rdec2002/31122002/r311220022.html>

[507] **Committee on Reforms of Criminal Justice System** (Chairman Dr. Justice V.S. Malimath), op. cit., Recommendation no. 17(f), p. 241.

[508] Ibid, Recommendation no. 50, p. 245.

[509] Ibid, Recommendation no. 51.

that the Committee is driven by the view to maximise output and minimise restrictions on the police that would lessen the consequent resistance.[510]

To substantiate this argument, it is imperative not to ignore the critical role of the judiciary in appreciating the evidence collected by the police to determine its relevance and validity to the case. Though the police may perceive this task of the judiciary as obstructionist to its efficient functioning, it does not appear to be credible in the context of the observations of the Supreme Court in a case[511] that needs to be discussed. The SC set aside the Delhi High Court judgement of acquitting two "sex maniacs" on the ground that the High Court had grossly erred in interfering with the correct conclusion made by the trial court and the reasons that was adopted by the High Court for such interference were very tenuous. In reference to those reasons that constituted the findings of the High Court that the version of the police could not be true, the Bench observed,

> we feel that it is an archaic notion that actions of the police officer should be approached with initial distrust. We are aware that such a notion was lavishly entertained during the British period and policemen also knew about it. Its hang-over persisted during post-Independent years, but it is time now to start placing at least initial trust on the actions and documents made by the police.

The Bench was of the view that

> it is not legally approvable procedure to presume the police action as unreliable to start with, nor to jettison such action merely for the reason that the police did not collect signatures of independent persons in the documents made contemporaneous with such actions.

Such understanding of the policework as demonstrated by the Apex Court is against the general unfavourable opinion of the police about the role of the judiciary in its work process, a result of misrepresentation of the latter's strict scrutiny to ensure fairness in policework. The extent of refrain and contempt for judicial interventions in policework was seen in *Bijay Kumar Mohanty v. Jadu alias Ram Chandra Sahoo* [AIR 2003 SC 657: 1993 Cr LJ 3311], discussed earlier in this chapter. It could also be observed in a recent incident of police defiance of court orders that snowballed into a major public confrontation between the police and the judiciary.

> When the District and Sessions Judge of Sasaram in Bihar ordered the detention of the OIC of Bikramgani *thana* for failing to comply with the directive to present the case diary relating to a woman prisoner who had petitioned for bail, the policemen regarded the ruling as unjustified and raised slogans in the court, while the aggrieved OIC filed an FIR alleging the Judge of wrongfully confining him in the court and targeting him as he belonged to the Scheduled Castes. He thus charged the Judge under the SCs and STs (Prevention) Act, a non-bailable provision. The Chief Justice of the High Court and the Director General of Police were forced to intervene in order to stop investigation into the case and not to arrest the District Judge, restore order and prevent the police from taking matters into their hands and maintain the dignity of the judiciary. Two Sub-Inspectors were suspended for unruly behaviour and contempt proceedings were initiated by the High Court against the area SP and other police officials for not responding appropriately to the Judge's request for intervention into the disorder in the court by policemen, hence were accused of being behind the ruckus in the court.[512]

Keeping in view the significance of police interviews specifically in relation to the issues and problems surrounding interrogation, which in itself is a critical site of police illegalities, the general reform measures like 'right to silence' and 'right to seek counsel during interrogation', and to mandate the use of techniques such as audio and video recording of the interrogation itself seek to safeguard the rights of the 'publics' when questioned or interrogated by the police and to enhance the visibility and accountability of police practices.

The Malimath Committee recommendations for audio/video recording of the statements of the witnesses, dying declarations and confessions that could be made admissible in evidence subject

---

[510] Mike Brogden, et al, op. cit., p. 147.

[511] The Delhi High Court had acquitted two respondents who were held by the trial court of having raped and killed a four-year old female child. *SC strikes down HC order in rape case*, **The Hindu**, Saturday, December 2, 2000, Delhi, p. 4.

[512] K. Balchand, *Police defy judge in court*, **The Hindu**, Thursday, January 24, 2002, Delhi, p. 10.

to the condition that the accused was informed of his right to consult a lawyer, setting up and strengthening of interrogation centres at the district headquarters, and amendment of section 25 of the Evidence Act on the lines of Section 32 of POTA 2002,[513] are aimed at putting a stop to the systemic neglect of the constitutional rights of suspects, and thus, the principles of procedures established by law. While in theory such reform measures are considered as vital instruments for the protection of the rights of the 'publics', in actual practice as the experiences of Anglo-American contexts show, its well-meaning purpose is belied.

The evidentiary value of police interviews, questioning or interrogation, is expressed in the felt necessity for a provision of such exchange points between the police and the 'publics' to be either audio- or video-taped. The rationale is to ensure an independent, objective and impersonal record of the statement taking process that would serve as a critical means of eliminating the reasonable doubt or diffusing unfounded challenges to the legality of police actions and most importantly to ensure the protection of the 'publics' rights during that process. Despite its widespread endorsement by civil rights groups and the courts, the probability of the above stated objective being breached remains as serious criticisms have been levelled against the recording methodology which potentially threatens its viability as a mechanism for police accountability.

It is argued that taping is not necessarily representative of the entire history and contexts of exchanges between the 'publics' and the police. As a result, it provides only a limited, and highly decontextualised, view of the processes of detention and questioning. Baldwin asserts that, they can never reveal everything that has happened to the 'publics' in relation to the case, since only the 'formal' interview is recorded, and, as similar concerns are also made by McConville, and Moston and Stephenson in regard to the formal distinction between the on- and off-camera behaviours of the police, this divergence sacrifices the viability of taping as an accountability mechanism as "they offer no way of examining the social context (or social construction) of interrogation."[514]

In a pilot study conducted in Halton Region near Toronto in Canada, a number of police officers admitted to having conducted several "dry run" interviews prior to the official tapings - this despite the existence of strict departmental guidelines prohibiting such behaviour.[515] The conception of the taping technique thus neglects the prevalence of interviewing and questioning prior to the official interview itself and again of the fundamental existence of the working rules of the police that involve the predisposition to overcome and circumvent legally mandated proscriptions, the investigator's belief that strategies of intimidation, manipulation, and deception are a necessary component of effective policework results in the innovative application of informal exchanges to influence the 'publics' actions and choices in the official interrogation. Despite the fact that such attitude lead the officer to act in violation of constitutional safeguards, in all likelihood, they are condoned by superior officers with matching beliefs who are more concerned with securing of the case outcome as to their initial hypothesis. Hagan and Morden aptly characterise such violations and subversions as a form of "structured police deviance".[516]

The failure to bring about significant changes in police practices is attributable to a number of different factors. Firstly, 'publics' interviewed by the police do not appreciate the nature and

[513] Malimath Committee on Reforms of Criminal Justice System, op. cit., Recommendations nos. 20, 21, 34, & 37, pp. 242-43.
[514] John Baldwin, op. cit., p. 328.
[515] According to some defense attorneys or counsels, "the video-statement is nothing but a final performance of a well-rehearsed interview," "with videotape you have the statement but no equivalent evidence about the pre-statement circumstances."
[516] James W. Williams, op. cit.

significance of their rights given the inadequacy of their communication and the disempowered status of the marginalised groups that interfere with their ability to both understand and clearly assert their rights, more so, when pitted against an agency that enjoys the monopoly to use force. Secondly, the lack of clarity in the law as it applies to police functions and the recognition of the degree of latitude that it requires to successfully fulfill their social responsibilities, serves as a barrier to develop a particular standard for police conduct. Thirdly, the problem is due to the lack of adequate police training to inculcate a character for appreciation of the values of procedural safeguards.

In fact, the formal provisions provide a fairly myopic and misleading view of the justice process as it operates in practice. This is due to the reality that both police interviews, especially interrogations, and the general dynamics of case disposition are typically, as has been experienced, organised according to informal processes, practices, and relationships which bear little relation to formal-legal proscriptions. Thus the major impediment to the efficacy of such rights-oriented procedures is that it is undermined by the "working rules" that constitute and govern the policework in actual practice. Thus, when applied in accordance with the nature of the problem and the context they deal with, their actions are guided by the 'commonsense' (or 'recipe rules') of the police subculture, "that's the angle that the practical copper sees the rules from." It is these cultural understandings which are the immediate determinants of law-abidingness or deviation.[517]

In precise, the "working rules" comprise of that that are often applied in innovative ways to circumvent formal rules, in other words, "inhibitory rules" in policy and conduct. This study has provided substantial empirical evidence of intimidatory and impelling tactics, and other strategies employed by the police that characterise their "working rules". The attempt between disputing parties to mobilise resources in order to influence police action in their favour and to inflict loss and trouble on the other also undermines the commitment of the police for the procedural requirements. Such subversive actions by investigators are justified through appeals to police "working rules". At the same time, "working rules" also refer to incidents of departure from legal regulations that in their consideration is both appropriate and situationally justified, for e.g. where there is a genuine belief in the suspect's guilt or where there is a constant pressure to produce.[518] This type of manipulation and subversion stands as a clear illustration of what Ericson refers to as the excessive costs of invoking the law. For Ericson, it is these implicit costs which are responsible for the practical limitations of the procedural requirements.[519] According to Skolnick, the importance of administrative and craft values get reinforced by the constraints that assume the form of impediments despite the fact that they emphasize legality as a means to the end of efficiency. Thus, efficiency as the goal rather than legality invokes the sense of craftsmanship within the police that enables it to have the expertise to determine the guilt of an accused and act accordingly, that is viewed as matters of operational necessity to protect the public interest and maintain the social order. Such an attitude that emphasizes *factual* guilt over *legal* guilt interpret procedural requirements as frustrating the efficient administration of criminal justice.

The success of the reforms has also been seriously hampered by the failure of the managers of the policework to take into account the presence, strength and effectiveness of police working rules and subcultural norms that shape investigative practices and also in aid in the circumvention of

[517] Mike Brogden et al, op. cit., p. 32-33; James W. Williams, op. cit.
[518] See Chapter 3 for the discussion on the operational dynamics of the police.
[519] James W. Williams, op. cit.

legal process which is possible because of the high degree of autonomy and discretion allowed to police investigators. These work processes are indicative of a fundamental absence of mechanisms designed to bring policework in public view. Thus, operating under a "visibility cover," the intended legal changes has made police malpractices less overt and less visible to judicial scrutiny. While operating with the aim to legitimise the evidence pertaining to the case, bearing in mind the obligation to fulfill the procedural requirements, the compliance take the form of *post hoc* manipulation of the facts rather than before-the-fact behaviour to provide an appearance or impression that everything proceeded with procedural regularity.

One of the key structural aspect that support the informal processes of work is the practice of "plea-bargaining" or "mutually satisfactory disposition" that is incorporated as one of the reforms proposed in the 2003 Bill introduced in the Parliament with the aim to dispose of cases through a process of settlement without trial. This study in the previous chapter has dealt in detail on the issues and problems of the informal tribunal mechanism in police operations wherein problems reported to the police are settled informally without the necessity of invoking the legal process. Plea-bargaining is dependent upon the police construction of cases, complicit and often conciliatory but profane relationships between police, defense attorneys, and prosecutors, organisational demands of efficiency, and expeditiousness, and an assumption of guilt on the part of all parties involved. Thus, the systemic restrictions on police visibility and accountability will get reinforced within the formal justice system through both the practice of plea bargaining which normally ensures that police practices are not questioned in open court, and the evident failure to prosecute instances of police misconduct when they do arise, for e.g. that of the Gujarat police in the *Best Bakery* case as well as *Bilkis Yakub Rasool* rape case. The informal exchanges, and the willingness of the judiciary to accept the expedited case dispositions, ensures that these processes of plea-bargaining remain largely unaffected by the formal rules of evidence and adjudication. More than what it purports to achieve, such informal processes ironically brought into force by a formal enactment that would not be in tune with conventional notions of morality and standards of public behaviour, cast grave doubts on the fairness, justness and reasonableness of the case outcomes considering the complexities of the Indian social structure ridden with multiple disparities.[520] Thus, the idea of plea-bargaining appears to be a dangerous proposition to the justice delivery system of this country.

Williams suggests that interventions aimed through mere modification in procedural rules, the organisation of the criminal justice process, and the organisational structure and practices of the police are most likely to be ineffective in bringing about the desired changes in the nature of policework for the problems are far more systemic in nature. The explanation for the inadequacy of the changes made in the procedures and the incertitude about the suggested reform measures to realise the desired objectives is:

First, they are formulated within the context of a legal system which is not only ambiguous and inconsistent with respect to procedural rules and guidelines, but also largely facilitative of police activities that take place in the absence of accountability mechanisms and under the prevalent tendency of hesitation on part of the courts to prosecute errant officers.

Secondly, the low visibility and high autonomy of the investigating officers creates conditions of work that are difficult to police. Moreover, when the structural features of policing legitimate the elevation of "working rules" over the formal rules, deviating from their enjoined duty to act lawfully and at the same time such practices are given an appearance of official compliance

[520] Ibid; See N.R. Madhava Menon, *Plea Bargaining*, **The Hindu**, Delhi, Saturday, January 24, 2004, p. 10.

with embellishment of legality, then problems of visibility makes it almost impossible to sight the deviation or ensure that guidelines are actually observed in practice..

Finally, the very new measures in policing policy have been unsuccessful because of the policy formulators failing to take into account the power of the informal dimensions of policework, that is, the resistance offered by police working rules, the ability of the investigator to innovate, and hence, circumvent formal rules. Thus it needs to be recognised that the police functions through its "own rule frameworks and sense of reality".[521]

Based on the identification of barriers to these reforms, and hence limitations to their effectiveness in practice, any possibilities for reform of the police practices, especially interrogation, should take into account the reality that police practices are grounded within, and motivated by, a wider organisational and societal context than is commonly accorded them. It should explore precisely the relationship between formal rules of law and procedure and the sub-cultural rules which are the guiding principles of police conduct in practice. The serious discrepancy between law-in-the-books and law-in-practice can be minimised, at the least, by the realisation that the task of reform is to know what policy changes could achieve their desired objectives, bearing in mind the refracting effects of the rank-and-file sub-culture. It should also be learnt that the idea of creating a police image approximating to that of a "plastic policeman" (cop that goes by the book) is an utopia and moreover, it is held that such a cop does not know what the job is all about.[522]

Various other suggestions available for controlling police misconduct are criminal prosecution, civil actions, police internal discipline, and the raising of police professionalism. In sum, finding ways to prevent and control police misconduct posits a daunting task for all civilised nations.

It is thus seen that the process of investigation characterises the nature of policing to a great extent and constitutes as one of the most important occasions for bringing the police and 'publics' into contact. The process is not an indivisible whole, but involves many interactional stages assuming different forms of contact appropriate to each. There prevails a serious crisis of confidence that afflicts public opinion toward the police. Bayley enumerates the blame for this situation that it thinks must be shared by many people and rightly so, as police practices are embedded within a broader organisational and societal context:

> by the politicians who apply spasmodic pressure for results while failing to support reform with enthusiasm or resources; by civilian administrative officers who construe the police role minimally, considering them effective if general order is preserved and public criticism does not become too bitter; by superior police officers who follow a policy of doing what was done in the past rather than reform an entire institution and who pass downward statistical norms for measuring police achievement that are imposed by secretariat and legislature; by the investigating officers themselves who acquiesce in what they know is wrong; and by the public that often respects results in terms of convictions more than adherence to the highest principles of enforcement procedure.[523]

While it has been reiterated by many scholars that reforms in isolation of the broader context would merely represent band-aid solutions for problems which are more systemic in nature, it is thus imperative that rules governing investigation, the selection, training, pay of the investigating officers, the amount of manpower to be devoted to the task, and the supervision required must all be considered. The most critical factor of this process is to ensure that the police not only shed its medieval functional modes under which reliance is on the use of force rather than on public support

---

[521] James W. Williams, ibid.

[522] Ibid; Robert Reiner, **The Politics of the Police**, Wheatsheaf Books, Brighton, 1985, pp. 174, 176; Mike Brogden, et al, op. cit., p. 33.

[523] David H. Bayley, op. cit., pp. 147-48.

and cooperation which in fact is of much significance in modern policework, but also realise that the latter constitutes in itself a most sensitive determinant of the nature of police operations. Thus, to minimise the improprieties in the process of criminal investigation, it requires a holistic approach that studies the issues and problems of policework in its wider organisational and societal contexts to formulate meaningful schemes in significantly altering the contemporary practice of police investigation.