CHAPTER 3

CRIMINAL JUSTICE SYSTEM AND WRONGFUL CONVICTION - AN INSTITUTIONAL PERSPECTIVE.

An in-depth analysis of the institutions of criminal justice system can throw some light on the reasons and genesis of wrongful convictions. In Indian legal system, the role of law enforcement authorities, investigative authorities and prosecutors is equally important and indispensable as is the responsibility of judiciary in conviction or acquittal of an accused. An institutional perspective on criminal justice system and criminal proceeding can be carried out through diverse approaches and methods.

A critical analysis of the functions and roles performed by police department, the investigative authorities and prosecutors through the lens of judicial analysis and judgment has been made in this chapter. This chapter intends to highlight some of the crucial and pressing predicaments that plagued our law enforcement agencies and investigative system. Further an attempt has been made to provoke critical reflections on the role of the prosecutor, in terms of evidence and proof, in criminal justice system.

Before we analyse the functions and responsibilities of various law enforcement agencies, it becomes critical to comprehend the meaning and implications of criminal procedure code.

3.1 A general overview of the criminal procedural law

“Criminal procedure” is conventionally conceptualized as the adjectival counterpart to substantive criminal law. It delineates the functions and defines legal regulation of criminal law’s application and enforcement. Criminal procedure law is regarded as the operational and institutional aspect of criminal law, which proposes how the criminal justice system should be made effective and viable. This functional aspect of criminal

213 R.A. DUFF AND STUART P. GREEN, PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW, ED., PG. 381
law operates in every country, since it is indispensable for preserving the rule of law by administering the constitutional promises.

Criminal procedural law is instrumentally valuable, since it is responsible for bringing the criminal justice ideals and objectives into reality. The normative considerations outlined in the procedural law serve as guidelines at every step of criminal adjudication. They describe the functions, define the powers and prescribe the procedural standards that are to be followed at every stage of pre-trial and trial.

As has been mentioned by Paul Roberts and Adrian Zuckerman, in their book *Criminal Evidence*, “acquitting the innocent and convicting the guilty, dealing with the prosecution and defence fairly, recognizing human rights (especially the right to a fair trial), respecting the interests of witnesses, victims and jurors, ensuring that the court has the information it needs to make properly informed decisions, and dealing with cases efficiently, expeditiously and proportionately in the light of their gravity and complexity is as serviceable a list of primary criteria of justice in criminal adjudication as one is likely to find in any philosophical treatise on the subject”.214

Invariably, the objective of Criminal Procedural Code is to ensure that justice is delivered on time to the victims of crime. Justice can only be rendered effectively when the actual offender is arrested and charged with offense he committed. This can be ensured by obligating the police, investigating agencies, the prosecutors and the judges to fulfill their responsibilities and duties efficiently as per the laws devoid of any intended error. For establishing faith in the people of any country towards the legal institutions, the veracity and ethos of the criminal justice system need to be safeguarded. This endeavour can only be realized when the guilty are condemned and the innocents are exonerated from punishment. The impartiality principle of the criminal procedure is an established universal norm. The entire criminal justice system would collapse and become meaningless if an innocent person is convicted intentionally or unintentionally resulting from the dodges of the system’s instruments. The dignity of human beings ought to be treated with high reverence. For this reason, the state shall sanction only legitimate arrest, which should be based on factually

214 Roberts and Zuckerman, Criminal Evidence, 1.3, (Five Foundational Principles)
ingenuous opinion of the investigating officer supported by impartial arguments by the prosecutor for proving the guilt.

3.2 The Criminal Procedure Code of India- 1973

The administration of criminal justice procedure in India is governed primarily by two Acts- Indian Penal Code and the Code of Criminal Procedure. Indian Penal Code, 1860 is the substantive law which defines various offenses and prescribes punishment for those offenses. On the other hand, the Criminal Procedural Code, 1973 is the procedural law. It establishes the procedure for investigation and inquiry of various offenses. It lays down the procedure of trial and provides machinery for punishment under the substantive criminal laws.

3.2.1 Objectives of the Code:

The Criminal Procedure Code of India has been constructed in such a manner so as to provide guidance and direction for securing justice in criminal process. In an important landmark case, it has been held that “The principal object of the Code is to ensure that an accused gets full and fair trial in accordance with the well-established principles of law that accord with our notions of natural justice”. The criminal procedure law is intended to be complementary to the substantive criminal law and has been designed to look after the process of its administration. In view of this objective, “the Criminal Procedure Code creates necessary machinery for the detection of crime, arrest and suspected criminals, collection of evidences, determination of guilt or innocence of the suspected person and imposition of proper punishment for the guilty person”.

The Criminal Procedure Code also aims at providing due safeguards against possible harassments to the innocent persons in its process of shifting of burden of proof from criminals to non-criminals. It further attempts to strike a just balance between the need to give wide powers to the functionaries under the criminal procedure code to

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215 RANI KUSUM VS KANCHAN DEVI, AIR 2005 SC 3304
216 SHIV KUMAR DOGRA “CRIMINAL JUSTICE ADMINISTRATION IN INDIA”, PG 72
make the adjudicatory and investigative processes strong and effective, and the need to control the probable misuse or abuse of these powers.²¹⁷

Apart from defining and standardising the elements, there are some perceptible features in the Criminal Procedure Law, which are vital in its establishment and emerged because of the judicial exercise initiated by the apex court of India on the existing laws and jurisprudence during delivering some landmark judgments.

### 3.3 The Instruments of Criminal Justice System in India

The criminal justice system consists of three major institutions- law enforcement agencies, courts and corrections. Each one of these components of the system are responsible collectively to safeguard the society, maintain law and order and avert the rising incidence of crime. The police as law enforcement agency are responsible for controlling crime and maintaining order. They also play the pivotal role as investigative authorities. The courts are responsible for judging the suspected offender by determining innocence or guilt. The prosecution and defence are integral part of this sub-system.

### 3.3.1 Critical Perspectives on The Institutions of Criminal Justice System

The Supreme Court has evolved certain dynamic and conclusive form of criminal procedures, by applying its judicial mind, in order to establish an effective mechanism to control the abuse of natural justice principles. Rule of law, being an indispensable part of natural justice principles, must be incorporated in the adjudication of criminal justice. Rule of law is the core element that ropes and defends the efficacy of natural justice principles. It further promotes the notion that the harmony and unity of a nation rest on the faith of its citizens in the criminal justice system.

The objectives of criminal justice system are accomplished through that the laws delineated under Criminal Procedure Code to help the nation and its people meet justice. The Hon’ble Supreme Court has replicated the same view in several judgements. Reprimanding that no innocent person shall be charged with the crime of

²¹⁷ R.V. Kelkar, Lectures On Criminal Procedure, (190), PG. 1
others, it warned that conviction of innocent people will gradually lead towards the failure of the criminal justice system.

The misuse of powers and functions under the criminal procedural law and its grave repercussions have been observed by various judicial bodies in landmark cases such as the *Mathura case* and *D.K. Basu* case. Through these cases the apex court, in particular, had the opportunity to expose instances where abuse and manipulation of laws have been done to meet the selfish interest of the investigating agencies, prosecution and the political parties. It also had the opportunity to throw light on the uncontrolled criminalization of certain acts and omission committed by the citizen of our country, that can easily be averted and managed through alternate civil remedies.

### 3.3.2 Due Process of Law

Being a part of the British system of administration in the past India inherited most of the English principles, practices and institutions in the matter of administering justice to the people. One such principle introduced by the British here was the theory of “Due Process of law”.

The phrase ‘due process of law” extends to two concepts- “procedural due process” and “substantive due process”. Procedural due process refers to the presence of procedural fairness in the curtailment of life and liberty of persons. This acts as a restraint on the power of police, investigative authority, judiciary and other law enforcing bodies of the government. This implies that the decisions abridging rights of persons must be fairly and reasonably made.

Although the Constitution and the laws do not in so many words declare Due Process theory, but the implications of the, inter-alia, principle of “Rule of Law”, the “principle of Equality” and the “principle of Natural Justice” are, that the principle of Due Process of Law impliedly operates in our country regarding several aspects of the State Administration.

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218 TUKARAM & OTHRS. V. STATE OF MAHARASHTRA, 1979 SCR (1) 810, 15TH DECEMBER 1978
219 D.K. BASU V. STATE OF WEST BENGAL, 1997 SC 610, 18TH DECEMBER 1996
The Constitution of India, 1950 does not explicitly mention the expression of ‘due process of law’ although it is expressly mentioned in the constitution of the United States of America. The makers of the Indian constitution deliberately omitted using the term ‘due process of law’, and instead incorporated the term “procedure established by law” in Article 21 of the constitution. However, despite this omission, the Supreme Court of India has always tried to interpret Article 14 and Article 21 in light of due process. Thereby “Indian judiciary acquired vast power to supervise and invalidate any union or state action, whether legislative or executive or of any public authority perceived by the court to be arbitrary or unreasonable”. The process of realization of justice over the period has transited savage and crude procedure of law into refined and civilized procedure. Further due process concept has “strengthened procedure of law by integrating all its components and by addressing each of them with the principle of equality and fairness”.

The case of Punjab and Haryana High Court reveals the case of wrongful prosecution which shows the biasness. The young woman at 17 (Kewasi Hedme) was arrested for Naxal offence, kept in jail (2008-2015), finally acquitted in April 2015. Her name was not in FIR. The incident of the Maruti factory, where one manager died, 148 workers was prosecuted for fire and riots in the factory. 117 were acquitted. The witnesses were not able to identify any of the workers.

The nature of the state is also very important. The case of the Arushi Talwar is very important in this regard. Malicious prosecution was first defined in (WB electricity board v Kumar) in 2007. Section-211, IPC which subject to Sec-195 of CRPC, deals with wrongful prosecution. Sec-18, NHRC also deals the same. (Girija V Uma Shankar), deals with the reasonable and the probable cause to deal the prosecution. In England, there are two tests which suppress the cases of wrongful prosecution.

220 AMENDMENT 5 - TRIAL AND PUNISHMENT, COMPENSATION FOR TAKINGS. RATIFIED 12/15/1791.
221 T.R. ANDHYARUJINA, THE EVOLUTION OF DUE PROCESS OF LAW BY SUPREME COURT IN SUPREME COURT NOT INFAILLIBLE 193 (B.N. KRIPAL ET AL. EDs., NEW DELHI: OXFORD UNIVERSITY PRESS 2011)
222 P. ISHWARA BHAT, FUNDAMENTAL RIGHTS 90 (KOLKATA: EASTERN LAW HOUSE PRIVATE LTD. 2004).
(i) Compensation is not sufficient this law. There is the time to revisit the system and the code.

(ii) The investigating agency must be put to question.

3.3.3 Judicial Interpretation of “The Due Process of Law” Under the Shadow of “Procedure Established by Law”

The evolution of the concept of due process in India has developed mainly by two principal spheres: “First, the concept of ‘procedure established by law’ under Article 21 is required to be just, fair and reasonable because of the interaction between Article, 14, 19 and 21; secondly, inter relationships among Article 20, 21 and 22, as corollary of development under Article 21, has furthered this phenomenon to a considerable extent”\(^{223}\). Article 21 of the Constitution provides that: “No person shall be deprived of his life and personal liberty except according to procedure established by law”. The rationalization behind effective criminal justice system can be located in Article 21 as it provides the cardinal postulate of compelling need to recognize and adhere to the protection human rights and human dignity. Its meaning and implications become more pertinent when read with Article 14, 19, 20 and 22 of the constitution.

Supreme Court has actively developed and evolved this concept of due process. It has meticulously incorporated the notion of ‘due process’ at every stage of the justice administration. The due process theory prescribes that the fundamental rights of individuals ought to be protected even if he a suspicious offender. Right from the initial stage of arrest till the last stage of judicial pronouncement the basic rights of the ever person are to be respected. While pointing on the role of advocates, Supreme Court has repeatedly drawn an analogy between the prosecutor and the defender. The court has suggested that the manner in which prosecutor is determined to prove the arrested individual guilty of an offense and to give the harshest punishment for his offense, the defender advocates are not enthusiastic or interested in protecting the rights of the accused. They are often hesitant in providing free legal aid to accused.

\(^{223}\) P. Ishwara Bhat, Fundamental Rights 90 (Kolkata: Eastern Law House Private Ltd. 2004)
Through this faulty process of trials, the accused are often denied the right to fair trial by not being able to defend themselves.

Thus, it becomes highly critical to ensure that all judges adhere to the principle of due process during the trial, irrespective of the charge framed against the accused. The judges should act objectively and should verify that all the guidelines prescribed in the Criminal Procedure Code have been followed diligently.

The judicial discourse of the adaptation of due process can be depicted through the following judgements. For the first time, the task of interpretation of Article 21, was done by Supreme Court in case of A.K.Gopalan vs. State of Madras\(^{224}\). In this case, the validity of Preventive Detention Act, 1950 was challenged. The petitioner challenged the provisions of the Act, in light of Article 19(1) of the constitution, demanding that the provisions of the Act have imposed unreasonable restrictions on the exercise of those rights mentioned in Article 19.

The apex court held, held that “the word ‘law’ in Article 21 could not be equated to the principles of natural justice because it considered these principles as vague, indefinite and abstract. Incorporation of such vague principles in law leads to confusion and uncertainty, therefore the word ‘law is used in sense of lex (state-made) and not jus. Article 19 of the Constitution has no application to a law which relates directly to preventive detention even though because of an order of detention the rights referred to in sub-cls. (a) to (e) and(g) in general, and sub-cl. (d) of cl. (1) of Art. 19 may be restricted or abridged; and the constitutional validity of a law relating to such detention cannot therefore, be judged in the light of the test prescribed in clause (5) of the said Article.”\(^{225}\)

Thus, in this case an attempt was made to read the ‘due process’ into ‘procedure established by law’ under Article 21. However, the apex court rejected all the arguments in support of the above claim.

\(^{224}\) 1950 AIR 27, 1950 SCR 88
\(^{225}\) M.P. JAIN, INDIAN CONSTITUTIONAL LAW 1183 (NAGPUR: LEXIS NEXIS BUTTERWORTHS WADHWA, 6TH ED. 2010)
In *Kharak Singh vs. State of UP* 226, the Supreme Court struck down an administrative direction authorizing ‘domiciliary visits’ of police authorities into the house of habitual offenders as violative of Article 21. The majority, by following the Gopalan approach, refused to examine the issue under Article 19(1)(d).

Taking a radical step, the Supreme Court in *Satwant Singh Sawhney vs. D. Ramarathnam*227, quashed the Governments’ act of impounding Sawhney’s passport because such action violated Article 14 and 21. The beginning of this new trend was further strengthened by judgments like *R.C Cooper vs Union of India*228, *Jagmohan Singh vs. State of U.P.*229 and *Maneka Gandhi vs. Union of India*230.

The turning point came with the judgment pronounced by the Supreme Court in Maneka Gandhi case. It is a landmark judgment, which established the norms for any kind of restrain on the personal liberty of an individual. Any arrest made by the police must be within the counters of justness, fairness and reasonableness prescribed by law in Article 21. The Supreme Court took a strong hold on the arbitrary misuse of powers by the government officials. The apex court also held Article 21 ought to be perused considering article 14 and 19 of the Constitution.

The strong and dynamic approach of Supreme Court in respect of procedural law under Article 21 has led liberalization of bail procedures, restricting the solitary confinement, speedy disposal of criminal trials, strict procedure for arrest of person, liberalizing the rule of locus standi, ensured legal assistance to needy people and awarding death sentence in rarest of rare case.

In another landmark judgment, the Supreme Court condemned the arbitrary use of executive power of the government. This was the case of *Nandini Sundar & Othrs. vs. State of Chhattisgarh*231, where the Supreme Court quashed the appointment of ‘special police officer’ under the Chhattisgarh Police Act, 2007 and held it

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226 1963 AIR 1295, 1964 SCR (1) 332  
227 1967 AIR 1836, 1967 SCR (2) 525  
228 1970 AIR 564, 1970 SCR (3) 530  
229 1973 AIR 947, 1973 SCR (2) 541  
230 1978 AIR 597, 1978 SCR (2) 621  
231 *NANDINI SUNDAR & OTHRS. V. STATE OF CHHATTISGARH, 2011(CIVIL APPEAL) 250, 5TH JULY 2013*
unconstitutional. Taking a stringent stand on the misuse of power by the officials the court condemned the unlawful and arbitrary actions taken by State of Chhattisgarh. It held that the state should abstain from permitting these types of actions in the future. Further, the court withdrew and recalled the supply of the firearms and suspended the operation of Salwa Judum\textsuperscript{232} and other private armed groups. The Supreme Court hence played a pivotal role in revisiting the criminal administration procedures and process and eventually improvised the criminal justice system by reinforcing the spirit of the rule of law principles in it.

Supreme Court of India has made noteworthy jurisprudential advancement in relation to the procedural law by criticizing the existing application of laws and procedures. From the time when the procedures were enacted the Court has established and created several procedural guidelines, which were to direct various government agencies from the district to the centre level regarding the administration of justice. These guidelines provided the leitmotif on which the criminal justice system should function without any miscarriage in justice and in this manner, safeguard the notion of equality and equal protection for all in the eyes of law and justice.

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Another landmark judgment that had a compelling influence on criminal procedural laws was the case of Nandini Satpathy v. P. L. Dani\textsuperscript{233}. This case is more often called the Right Against Self-Incrimination case. The case was filed by Nandini Satpathy – former Chief Minister of Orissa who was compelled to answer question

\textsuperscript{232} Since June 2005, the government of Chhattisgarh, with the support of the home ministry has been waging a counter-insurgency operation against the naxalites in the guise of a ‘spontaneous’, ‘self-initiated’, ‘peaceful’, ‘people’s movement’ named the salwa judum in Dantewada district of Chhattisgarh. The district administration claims that upset with the maoist strike call on collecting tendu leaves and opposition to development works like road construction and grain levies, people in some 200 villages began mobilizing against the maoists, going on processions and holding meetings.

\textsuperscript{233} NANDINI SATPATHY V. DANIEL (P.L.) & ANR , 1978 (SCR) 608, 7\textsuperscript{TH} APRIL,1978
during interrogation in police station. A case was register against her under the Prevention of Corruption Act. She was asked to appear for questioning in police station regarding the same. However, she chose to remain silent and refused to answer any question because it was a violation of her fundamental right against self-incrimination. The police then framed charges against her under Section 179 of the Indian Penal Code, 1860, which prescribes punishment for not answering any question asked by a public servant authorized to do the same. Aggrieved by the charges framed against her, Nandini Satpathy filed a petition in Supreme Court to challenge the action of the Police. The important and critical issue before the apex court was to decide the scope of the right to remain silent during investigation that would point towards their guilt. In broader terms the Court had the opportunity to revisit the concept of ‘right to silence’.

Supreme Court Observations:

The court ruled in favour of the petitioner and condemned the act of police authorities. Pronouncing that the basic right to remain silent during interrogation to the question that would lead to him/her to be guilty is a constitutional right enshrined under Article 20(3)- “no person shall be compelled to be a witness against her/himself”. Further this right is strengthened by Section 161 (2) of the Code of Criminal Procedure, 1973, which mentions no person is bound to answer question in any manner which can expose him to criminal offense or point towards his guilt.

The Supreme Court acknowledged that there is a never-ending conflict between societal need of crime prevention and the constitutional protection and privileges of an accused person. The Court conceded that the police had a strenuous and demanding responsibility to perform particularly when crimes were uncontrollably increasing and the lawbreakers were outmanoeuvring the law-enforcers. Regardless of this, the assurance of major rights cherished in our Constitution is of most extreme significance, the Court said. In light of a legitimate concern for securing these rights, we can't bear to discount dread of police torment prompting constrained self-implication.
The Court further observed that while any statement given unreservedly and intentionally by an accused is permissible and even critical to an interrogation, however use of any influence by the police whether harsh or polite, mental or physical, direct or indirect which is adequately significant by the police to get any information isn't allowed as it abuses the established rights of just and fair process. The Court held that the individual who is charged for any offense has a constitutional right to be quiet amid investigation if the appropriate response uncovers her/him into conceding blame in either the case under scrutiny or in some other offense.

The Court called attention to the undeniable truth that the investigating officer is a commanding and influential figure and thus has authoritative impact over the accused which is not easy to escape.

3.4 Supreme Court Directives

“1. An accused person cannot be forced or influenced in any manner, compelling him/her to give any statement which exposes him/her to admit the blame for the crime.

2. The accused person ought to be informed of her/his right to remain silent and of the right against self-incrimination.

3. The person being interrogated has the right to have a lawyer by her/his side if she/he so wishes.

4. An accused person must be informed of the right to consult a lawyer at the time of questioning, irrespective of the fact whether s/he is under arrest or in detention.

5. Women should not be summoned to the police station for questioning in breach of Section 160 (1) CrPC.”

A basic component of a reasonable trial is that the person charged with any offense can't be compelled to give proof against her/himself. Constraining suspects to sign

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234 NANDINI SATPATHY V. DANi (P.L.) & ANR, 1978 (SCR) 608,
proclamations conceding their blame abuses the against self-implication constitutional guarantee against self-incrimination. This in turn collapses the basis ideology of the Code of Criminal Procedure, 1973 (CrPC). The Court held that any such statement is not admissible in any court of law. In addition, causing physical injury to get a confession is punishable by imprisonment up to seven years.

The concept of ‘due process’ has been evolved by the judiciary through its various landmark judgements in Hussainara Khatoon v. State of Bihar235, Khatri v. State of Bihar236, Sukhadas v. Union Territory of Andhra Pradesh237, Zahira Sheikh v. State of Gujarat & Others238, Lalita Kumari v. Govt. of U.P. & Other’s and many more where it has encouraged the subordinate courts and investigating agencies to abide by the principle of due process of law. The procedures like registering of FIR, informing the nearest relatives about the arrest of the accused, procedures that need to be followed during the course of investigation, maintaining a diary of record at the place where the accused has been arrested and presented to the court, the mandate that the accused shall be presented before the nearest magistrate within 24 hours of his arrest, provision for providing free legal aid to the accused, are some of the few outcomes of the judgements in the said cases. These rulings, if adapted and implemented in its true essence, will for sure, benefit the society and state and ensure the prevalence of rule of law principle in criminal adjudicating system. It can also help in keeping an accountable relation between the various adjudicating agencies of the Union.239

Though, in the past few decades judiciary has played an active role in correcting the arbitrary decisions and actions of various state authorities including the police and investigative authorities, but failure to comply with the principle of due process still exists on the part of the investigating team and the law enforcement bodies. This has created a decline in the progress of the criminal justice system. Due to some of the

235 Hussainara Khatoon v. State Of Bihar, 1979 SCR (3) 532, 9TH MARCH 1979
237 Sukhadas v. Union Territory Of Arunanchal Pradesh, 1986 SCR (1) 590, 10TH MARCH 1986
heinous and disturbing actions taken by the police, Supreme Court of India had the opportunity to evolve certain guidelines in few landmark judgments.

3.5 Critical Perspective on Police

Before we begin with the critical analysis of the role played by the police department, it is indispensable to understand the constitutional genesis of the Indian Police organization and the statutes that govern its regulation.

As indicated by Article 246 and the 7th schedule of the Indian Constitution, 'Police' falls in the State administration and is along these rules managed and directed by separate State Governments to make laws to represent the police in their State. Despite the fact that there is a strong federal character to police laws, India is to a great extent a quasi-federal country thus the Central Government is additionally engaged with the control of police powers. For instance, All-India Services, a centralized procedure for the appointment of senior police officers of the Indian Police Service (IPS), is directed by the central government. A few paramilitary powers, for example, Central Reserve Police Force or the Border Security Force additionally fall under the control of Central Government. The Indian Police Act, 1861 is the central statute representing the police in India. A large portion of the States have either followed this law or have law that are based on it.

As per the latest report of Bureau of Police Research and Development, total sanctioned strength of State Police Forces as on 01.01.2016 is 22,80 lakhs. Out of total police force in the entire country 18,30 lakhs was Civil Police including District Armed Police and the remaining 4,50 lakhs was State Armed Police.240

This huge pool of trained and skilled police officers can turn into an essential impetus of positive change in the society eye given they are made to serve the nation through legitimate and approved activities. There should be a consistent check and supervision on these laws enforcing authorities. They ought to be considered responsible for their

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240 BUREAU OF POLICE RESEARCH & DEVELOPMENT, MINISTRY OF HOME AFFAIRS, GOVERNMENT OF INDIA: DATA ON POLICE ORGANISATION IN INDIA, 2016

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errors of actions and omissions, assuming any. The issue of considering them responsible is firmly connected to the kind of control and superintendence practiced over them.

In many parts of the world, mental and physical abuse amid police examination and concealment of illegal and unauthorized activities are still prevalent. The approach of scientific, logical and reasonable investigation by the police is yet to be established. There has been ample evidence to prove that third degree strategies are used by police to extract admissions of the crime they never committed. Sexual assault of not only women but of young boys and men in police custody are accounted often from many parts of the world.

There is significant proof of expanding abuse of power through unauthorized acts of police in India. The police officers and investigative authorities have plagued the Indian justice system through indulging in acts like rape, sexual assault, blackmail, mental abuse and torture resulting many times in the death of the victim. These instances are reported almost every day in the print and electronic media. India is no exception to this menace. Illegal arrest and detention without following the right procedure prescribed in law, custodial torture, rape, framed evidence, abuse of the authority and power given by the law are injuring and degrading the trust of the citizens in rule of law. The infringement of the basic human rights, that even the accused is undoubtedly entitled to, have led to custodial deaths in many cases.

National Human Rights Commission (NHRC) report has stated large portion of the complaints they receive are related to misconduct by police officials. Even the perceived insights demonstrate that the measure of public grievances relating to the police officials is enormously high. The absence of rule of law in performing the duties and functions by the police, like search and seizure, filling F.I.R. and carrying out investigation, can be clearly established in Indian police department. It appears to be a simple task for the police authorities to carry out any unlawful act that abuses the fundamental rights of the accused as well as the plaintiff. The National Human Rights
Commission’s data shows that “the number of complaints relating to ‘deaths in police custody’ were reported to be 74 and 894 in ‘judicial custody’ in the year 2017.”

The letter, signed by the joint registrar (Law) of the National Human Rights Commission, stated that Uttar Pradesh leads the chart of deaths in judicial custody by a significant margin, with 204 deaths recorded in the period between 1 January 2017 and 2 August 2017. The state was followed by Punjab with 76 deaths and Bihar with 64 deaths.

3.5.1 Abuse of Police Power

India has witnessed a collapse in its criminal justice system through the unchecked abuse of power and arbitrariness of police in performing its investigative functions. To understand and comprehend the misuse of power at the hands of police and the disturbing state of affairs, it is important to study some landmark cases wherein the police officials have been held guilty for their illegal behavior and abuse of power.

It becomes imperative to cite an important case which demonstrates the torture and abuse of power at the hands of police. It is a case of custodial death, and the victim succumbed to the injuries which were inflicted on him intentionally while he was in Police Station after he was arrested. This is the case of Nilabati Behera v. State of Orissa, where the applicant, Nilabati Behera, a troubled mother, wrote a letter to the Apex Court which was dealt with as a writ petition under Article 32 of the Constitution. The applicant stated in her letter that “that her son died because of the multiple injuries inflicted to him while he was in police custody and thereafter his dead body was thrown on the railway track. She stated that her boy, Suman Behera was taken to a police station after being detained about the investigation of an offence of theft.” In this manner, it was an instance of custodial death. It was supplicated in the appeal to that honor of remuneration be made to her, for the violation of the fundamental human right to life ensured under Article 21 of the Constitution.

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241 NATIONAL HUMAN RIGHTS COMMISSION REPORTS, INDIA
242 NILABATI BEHERA V. STATE OF ORISSA, 1993 (SC) 1996, 24TH MARCH 1993
The Apex Court after hearing the appeal promptly accepted her writ application. The Court dismissed the clarification version of the police authorities, that the running train killed the victim after he ran away from the police station. The Court accepted the post-mortem report which clearly demonstrated that he succumbed to the injuries on being brutally beaten. The issue that was brought up in the courtroom was whether State can be held obligated for infringement of the of the fundamental right to life under Article 21 and whether State should give compensation on such violation.

The Supreme Court held in this judgment held that convicts, detainees or under trials aren't deprived of their basic rights under Article 21-" right to life and personal liberty" guaranteed by the Constitution of India. Thus, there's a compelling duty that is incorporated in the morals of the police and jail authorities to verify that people in care aren't denied of the Right to Life. The State has a formal obligation to guarantee that the rights and privileges enshrined with Article 21 are not denied to anyone. The state should assume liability for such unlawful act by paying the compensation to the family of the victim, who might be denied of her/his life through the wrongful and unauthorized activities of the police examination. Further, the Court also asserted how the state has the right to recuperate the genuine compensation sum from the lawbreakers.

The Supreme Court further held that “Award of compensation in a proceeding under Article 32 by this Court or by the High Court under Article 226 of the Constitution is a remedy available in public law, based on strict liability for contravention of fundamental rights to which the principle of sovereign immunity does not apply, even though it may be available as a defence in private law in an action based on tort. This is a distinction between the two remedies to be borne in mind which also indicates the basis on which compensation is awarded in such proceedings.’’ It further asserted that “Enforcement of the constitutional right and grant of redress embraces award of compensation as part of the legal consequences of its contravention”.

244 ARTICLE 21, CONSTITUTION OF INDIA
245 PARA 596 G
246 PARA 602 A
The Supreme Court quoted that “the Article 9 (5) from the International Covenant Civil and Politics Rights, 1966 lays down that those who have been the target of unlawful police arrest or detention shall come with an enforceable right to compensation. This covenant may be ratified by Indian law, which means how the state has undertaken to follow its terms”\textsuperscript{247}.

“The court further held that the rationale behind law isn't simply to edify public power but also to maintain law and order in the country. In addition to it, the objective of criminal procedural law is to make and build up the trust of the citizens of the state and its power, which secure their own particular advantages and keeps up their rights. Thus, the High Courts and furthermore the Supreme Court play the pivotal role as defenders of fundamental freedoms not on the grounds that they have the ability to do that however they additionally have the lawful obligation to correct the harm expedited by officers of their state to central benefits of citizens. Here the Supreme Court decided that the concerned state has a commitment to give adequate compensation to a casualty or to the beneficiaries of the casualty whose basic rights happen to be abused. The state can recupe rate the paid sum from the liable authorities following proper procedures.”

\textbf{3.5.2 Incompetent Investigation}

In \textit{Adambhai Sulemanbhai v. State of Gujarat}\textsuperscript{248}, the Supreme Court acquitted all the appellants who were convicted by the lower courts under the Prevention of Terrorism Act, 2002. They were erroneously convicted due to wrong evidence.

Recently, the principle of rule of law during investigation by the police was strengthened by the Supreme Court in the Akshardham temple attack case. The Apex court ordered the exoneration of the innocent people who were wrongfully convicted by the lower courts. Six people were acquitted in the case, including four exonerees who were released after spending 11 years in jail. Out of the total six, three accused

\textsuperscript{247} PARA 17, \textsc{Nilabati Behera V. State Of Orissa}, 1993 (SC) 1996, \\
\textsuperscript{248} \textsc{Adambhai Sulemanbhai Desai V. State Of Gujarat}, 2004 (GLR) 906, 26 \textsc{June} 2003
including – “Adambhai Ajmeri, Abdul Qaiyum Muftisaab Mohmed Bhai and Chand Khan were given death sentence. The fourth, Mohammad Salim Hanif Sheikh, was serving a life imprisonment. The fifth, Abdullamiya Yasinmiya, was on bail after having been in prison for seven years of the 10-year sentence imposed on him by the trial court. The sixth, Altaf Malek, was out after having served his five-year sentence.”

The apex court condemned such careless and incompetent investigation by the police in such grave and serious crime. The Supreme Court held that “Before parting with the judgment, we intend to express our anguish about the incompetence with which the investigating agencies conducted the investigation of the case of such a grievous nature, involving the integrity and security of the Nation. Instead of booking the real culprits responsible for taking so many precious lives, the police caught innocent people and got imposed the grievous charges against them which resulted in their conviction and subsequent sentencing.”

It further declared, “Here, we intend to take note of the perversity in conducting this case at various stages, right from the investigation level to the granting of sanction by the state government to prosecute the accused persons under POTA, the conviction and awarding of sentence to the accused persons by the Special Court (POTA) and confirmation of the same by the High Court. We, being the apex court cannot afford to sit with folded hands when such gross violation of fundamental rights and basic human rights of the citizens of this country were presented before us.”

3.5.3 Illegal Arrest

The Constitution of India does not envisage in any part of it about restrictions on the power of the police in making an arrest. Moreover, the statutory prerequisite that the police could make arrest without warrant only based on reasonable doubt is hardly of any purpose as the reasonableness of arrest is generally evaluated from the perspective of the police, even when the question is decided by the magistrate. In this
way, one might say that the law of arrest is more open to the necessities of the police than in ensuring the protection of the citizens of the country.

A sound justification raised in favour of this situation is that, the authority and discretion to arrest is highly essential for the prevention and detection of crime. However, arrest when made without proper and genuine information and on mere apprehension, in relation to criminal investigation destroys an individual’s reputation irreparably, bring disgrace to his family, deprives them a decent living and jeopardises his occupation or livelihood. The shame that accompanies arrest subsists even after the person is released from the custody. Furthermore, all those who are arrested cannot be criminals, in that way the law of arrest is putting unreasonable torture on the innocent.\(^{251}\)

The criminal law should be the last resort. Here arrest means the efficiency of the criminal system. (i) *This wrongful prosecution causes the secondary victimisation.* (ii) *Invasion of criminal law must have some limits.* (iii) *Class character in the operation of the criminal justice system.*

*Looking for the following:*

(A) Identification of the people, likely to be acquitted.

(B) No modes to find out those people.

(C) Find out the liabilities of the person.

(D) Protection of those people.

(E) Compensation for those people.

(F) Identify the rights of those people.

Chapter 5 of the Code of Criminal Procedure of India lays down the procedure for arrest and the rights of the arrested person have been prescribed. Section 41 to 60 of the Act discus various provisions for arrest and detention including, inter-alia, when

Police may arrest without warrant (Section 41), arrest by private person and procedure of such arrest (Section 43), arrest how made (Section 46), person arrested to be informed of Grounds of arrest and right to bail (section 50) and search of arrested person (section 51). The Supreme Court has constantly made a stride further to constrain the act of the police to direct an unlawful capture by the propounding some important judgments.

The sub clause (2) of Article 22 of Indian Constitution obliges that every person arrested and detained in the police custody shall be presented before the nearest magistrate within 24 hrs. The notable difference between sub clause (2) of Article 22 and provisions 56 and 57 of the code is that, the former is more general in nature and does not expressly discuss about arrests without warrant. However, in *Ajaib Singh* the Hon’ble Supreme Court has stated that Article 22(2) covers only arrests made other than under a warrant issued by court. The court observed that the Article is designed to give protection against the acts of executive and other non-judicial bodies, therefore the production of the accused, arrested on the warrant issued by a magistrate before the magistrate is unnecessary.

Article 21 of the Constitution of Indian law down that "no person shall be deprived of his life or personal liberty except in accordance with the procedure established by law". The "Procedure established by law," mentioned here stands for the practises adopted in administering the law, which is prescribed in the legislation. Thus, the provision demands that a person cannot be deprived of his personal liberty unless and until the procedures are not followed properly, as prescribed in the law. It can also be stated that those actions which affords the deprivation of liberty is unconstitutional. However, the prohibition under Article 20 of the Constitution of India is extended only to convictions and not actually on trial. An individual accused of an offence has no fundamental right to get tried by a specific court or with a procedure, unless any constitutional right has been violated by way of discrimination or any other serious reason are involved.

252 STATE OF PUNJAB V. AJAIB SINGH, 1953 (SCR) 254, 10 NOVEMBER 1952.
253 M.P. JAIN, INDIAN CONSTITUTIONAL LAW, 1153- 1158, LEXIS NEXIS, 2008, 6TH ED.
The Criminal Procedure Code of 1973 not only gives mechanism for punishment, but also purports to prevent crimes. It also articulates the responsibilities of the police while inspecting an offence and prescribes the way an arrest can be made.

Further, it authorizes the magistrate or the investigating officer to seek the help of public in averting the escape of a criminal during preventing the breach of tranquility. Predominantly, the code serve as an adjectival law or procedural law, as it contains to a substantial extent, rules of procedures or practice according to which the substantial law administered in the court is put in place when dealing with offenders.

**The Case of D.K. Basu**

Article 14\(^{254}\) of the constitution of India ensures right to equality to all, the Criminal Procedure code also guarantees the right of the accused to avail free legal aid. If these promises are not adhered to, it may lead to serious injustice. That is the reason why in 1997, the Hon’ble Supreme Court has developed a set of guidelines in *D.K. Basu* case to protect the dignity and fundamental rights of accused.

In *D.K. Basu*\(^{255}\), the Hon’ble Supreme Court of India came up with some paramount principles that created an alertness in the criminal justice system about the adeptness of natural justice principles. They were encompassed in eleven guidelines, which must be followed by a police official when an arrest of an accused person is made. Hon’ble Supreme Court observed that these guidelines will protect the interest of the accused since it will reduce unnecessary arrest and detention. The court additionally expressed that since the number of judges is not sufficient in our nation, the error of investigation group and the police office to play out their obligation with due steadiness will twofold the issues in the nation. It is because of this timely interference of the Hon’ble Supreme Court in many instances, there have been several constructive changes happened in the behavior of the police officials and government officials in conducting inquiry and in the administration of justice.

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\(^{254}\) Right to Equality, including equality before law, prohibition of discrimination on grounds of religion, race, caste, gender or place of birth, and equality of opportunity in matters of employment, abolition of untouchability and abolition of titles.

\(^{255}\) *D.K. Basu v. State of West Bengal*, 1997 SC 610, 18\textsuperscript{TH} December 1996
The Supreme Court observed that the problem of "Custodial violence" and misuse of police control isn't just prevalent in India, however it is a major problem that has collapsed most of the criminal justice system in the world. Since the predicament is global and widespread in every country, hence it can be regarded a compelling concern on international platform. The Universal Declaration of Human Rights 1984, which assures security and protection of certain fundamental human rights, stipulates in Article 5 that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment". Notwithstanding the devout statement, the wrongdoing proceeds unabated, however every humanized country demonstrates its worry and makes strides for its removal.

The court pointed towards the disturbing concern quoting “torture is actually more prevalent now than ever before”. It expressed, 'custodial torture' as an extremely naked infringement related with human safety and security and humiliation, which harm, to a huge degree, the individual's identity. It is extremely an immediate attack upon human pride where the confidence and pride of the victim is shattered.

In response to the problem of illegal arrest and custodial violence, the court thought that is of utmost importance to issue some substantiating guidelines to be followed in all instances of arrest or detainment till proper laws are made for the same as preventive measures:

(1) The police officers performing the arrest and taking care of the investigation of the detainee should have precise, clearly noticeable identification proof and name tags with designation written on them. A register must be maintained with names, designation and signature of the police officials carrying out the investigation.

(2) At the time of arrest, a “memo of arrest” should be prepared by the concerned police personnel. The memo should specifically mention the time of arrest, date of arrest and should bear the signature of the person arrested. At least one witness should sign and attest the memo. This witness can be a relative of the detainee or any reputable member of the neighbourhood where such arrest takes place.
(3) After a person is detained or confined by the police official and is taken into their official custody like police station, investigation department of any other centre, he/she shall have the basic right to inform any of his/her friend, family member or relative, as soon as possible, about his/her arrest and the place where such person has been kept.

(4) The police official shall inform the relatives, family member or friend of the detainee, within a time span of 8 to 12 hours subsequent to the arrest if such relative or friend don’t reside in the same district or locality. The time of arrest, the place of arrest and the place where the detainee has been kept in custody of police shall be conveyed to them by the police or the Legal Aid Organisation in the District.

(5) The right to inform his friend, relative or family member shall be clearly notified to the person arrested as soon as he is taken into custody by the officials.

(6) A journal shall be maintained at the place of custody, where ever arrest made should be noted down, including particulars like the name of the person who has been informed about the arrest of the detainee and the name along with designation of the police personnel who has the responsibility of the custody of the arrestee.

(7) On request by the arrestee, an examination of the body of the person arrested should be made in order to ascertain if there is any wound or bruise on him. If any such injury is found then it should be noted in a register. Such ‘Inspection Memo’ shall be signed by the police official making the arrest and the person who has been arrested.

(8) During the time of his imprisonment in the police custody, the person arrested has the right to get himself/herself medically examined by a proper doctor after every 48 hours. Such doctor shall be on the panel prepared by the Director, Health Services of the concerned State or Union Territory for every district.

(9) All the documents and memos referred to above shall be signed by all the police officials concerned regarding a particular arrest and a copy of the same shall be given to the magistrate so that he can keep it in his record.
(10) During investigation, the person arrested has the right to be provided with a lawyer and to meet the lawyer at the time of investigation, but not throughout such investigation.

(11) Every district and state headquarters should have a police control room. After every arrest, the concerned police official shall inform the police control room about the place of arrest and place of detention. Such information should be communicated with 12 hours of the arrest and shall be made visible on a conspicuous notice board of the police control room.

If the prerequisites mentioned hereinabove, are not adhered to, it shall make the concerned police officer liable to departmental inquiry and strict action would be taken against him. Further, he shall be punished on the ground of contempt of court. The proceeding for such action shall be instituted in any High Court of the Nation, having the territorial jurisdiction over the issue.

The Court stated that “No arrest can be made because it is lawful for the police officer to do so. The existence of the power to arrest is one thing. The justification for the exercise of it is quite another. The police officer must be able to justify the arrest apart from his power to do so. Arrest and detention in police lock-up of a person can cause incalculable harm to the reputation and self-esteem of a person. No arrest can be made in a routine manner on a mere allegation of commission of an offence made against a person. It would be prudent for a police officer in the interest of protection of the constitutional rights of a citizen and perhaps in his own interest that no arrest should be made without a reasonable satisfaction reached after some investigation as to the genuineness and bona fides of a complaint and a reasonable belief both as to the person's complicity and even to the need to effect arrest. Denying a person of his liberty is a serious matter.”

The Apex court further noted that “The recommendations of the Police Commission merely reflect the constitutional concomitants of the fundamental right to personal liberty and freedom. A person is not liable to arrest merely on the suspicion of complicity in an offence. There must be some reasonable justification in the opinion of the officer effecting the arrest that such arrest is necessary and justified. Except in
heinous offences, an arrest must be avoided if a police officer issues notice to person to attend the Station House and not to leave the Station without permission would do.”

The essential pre-requisites for protection of these fundamental rights, stated by Supreme Court, can be summarised below:

1. A detained individual being held in custody has the right, to have one companion, relative or any other individual who is known to him, to be informed about the fact that he has been detained by police and the place where he is being kept.

2. The police personnel shall convey the person about this right, as soon as he is brought to the police station.

3. A registered shall be maintained where information regarding the person who has been intimated regarding the arrest, is recorded accurately.

All these rights and protection given to the person arrested shall be followed strictly since they are derived from Articles 21 and 22(1). The enforcement and applicability of these constitutional rights shall be ensured by the Magistrate, before whom the detained person is brought.

It is a result of this judgment, the privileges of the accused were legitimately thought and strengthened, by guiding the interrogating organizations to carry out the arrest of the accused as per the rules determined in this case. The eleven pre-requisites were meticulously articulated by the Apex Court in view of the perception it made in numerous cases before, where the accused was not treated as per the rules and laws indicated in the criminal procedural code and no arrangement for free legal aid was embraced by the trial courts in giving legal representation to needy and uneducated blamed individual before starting trial against them.

Characteristic of Human dignity is very delicate and fragile and therefore it should be respected and handled with caution. The judgement of D.K. Basu depict the importance of human dignity and the importance of providing security and justice to
the accused by rendering eleven guiding procedures that to be followed when a person is arrested.

The Apex Court held that unless the individual who is charged isn't proved as the genuine offender he should be assumed as innocent and each person who is guiltless has a basic human right to inform his family with respect to the reason of his capture and place of his detainment and every single other guideline identified with his arrest by rule set down in the judgment.

The judgment has created a strong impact on the police and other law enforcement agencies in upholding the ethical and uniform code at the time of arresting a person and maintaining the official diary for recoding the arrest, for ensuring the protection of rights of the person arrested as per the procedure established.

Another occasion of unlawful detention, arrest and custodial murder was highlighted in Prithipal Singh v. State of Punjab256 where the accused, who died, was arrested on false grounds and afterward was killed by the police authorities for their own advantage. The high Court held that the police authorities who were responsible for the arrest were guilty for and unlawful detention. An appeal of revision was filed in the Supreme Court. Subsequent to comprehending the circumstances of the case and the judgment of the high court, the Court upheld the High court judgment and declined to accept the review petition. The Court further expressed that this manner of brutality done by the police officials has degraded the faith of the citizens on police department. Thus the harm done was ordered to be immediately redressed in terms of compensation to the family of the deceased and punishment to the guilty officers.

Arnesh Kumar vs. State of Bihar and Ors.257 is yet another case where the Supreme Court Court framed certain regulations for making arrest and detainment under the Code of Criminal Procedure, 1973. The Court, in its decision, has framed certain guidelines and regulation to be observed by the police officers and the Magistrate during arrest. This was a case of matrimonial dispute, where the petitioner had filed a Special Leave Petition before the Supreme Court, because the petitioner

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256 PRITHIPAL SINGH ETC V. STATE OF PUNJAB & ANR., 2009 (SC) 523-527, 4 NOVEMBER 2011
257 (2014) 8 SCC 273
could not get an anticipatory bail from Session judge and High Court. The petitioner was charged under Section 498 A of I.P.C and Section 4 of Dowry Prohibition Act, 1961, on the ground of making illegal dowry demand.

The Court stressed on the want of alertness while performing the responsibility of arrest, which has for quite a long time, been dealt with as a device of torture and humiliation, abuse by the hands of the police officials and has furthered to a great extent to police misconduct in our country. The court observed that before the drastic decision to arrest someone, the police officials shall apply certain objective criteria. The above observations were supported by statistics to show how the power of arrest is being misused. The Court further held that arrest made solely on the reason that said offence is non-bailable and cognizable is inappropriate and such decision ought not to be made. Arrest made in casual, routine and careless manner, without any thinking and investigation is wrong. An arrest made on ‘mere allegation of commission of an offence made against a person’ is also unacceptable. Arrest should just be made after sensible fulfillment reached by thorough examination with regards to the validity of the charge. The Supreme Court pointed towards Section 41(1) of Cr.P.C. which delineates the conditions to be fulfilled by the police before making any arrest, which are as follows:

“Arrest is necessary:

- To prevent such person from committing any further offence; or
- For proper investigation of the case; or
- To prevent destruction of tampering with evidence by the accused; or
- To prevent such person from influencing the witnesses; or
- To ensure presence of the accused in the court.

Police must, in any case, record reasons for making, or not making the arrest in a particular case.”

258 ARNESH KUMAR VS. STATE OF BIHAR AND ORS, PARA 8
259 SECTION 41(1)(B), CR.P.C
The court also set out the circumstances in which the Magistrate may approve arrest of the accused. According to Article 22(2) of the Constitution of India substantiated by Section 57 of the Cr.P.C, should be brought before the Magistrate in reasonable time and in no conditions beyond 24 hours, barring the time vital for the journey. Only when expressly authorized by a Magistrate, the accused might be detained in custody past 24 hours of his capture. The Court restated that it is the duty of the Magistrate to ensure that the police officer who carried out the arrest, provides to the magistrate the grounds, circumstances and the reasons for decision of arrest. After being satisfied by the information furnished by the police as per the requirements of section 41 of Cr.P.C., the magistrate may decide to authorize the arrest of the person.

The Court, explained that, “in all cases where the arrest of a person is not required under Section 41(1) of Cr.P.C the police officer is required to issue notice directing the accused to appear before him at a specified place and time. Law obliges such an accused to appear before the police officer and it further mandates that if such an accused complies with the terms of notice he shall not be arrested, unless for reasons to be recorded, the police office believes the arrest is necessary. At this stage also, the condition precedent for arrest as envisaged under Section 41 Cr.PC has to be complied and shall be subject to the same scrutiny by the Magistrate as aforesaid.”

After taking cognizance of the above issues, Supreme Court has given the following guidelines to all the State Governments-

- The police officers shall be directed not to ‘mechanically arrest’ any person as per the laws laid down in Section 498 A of I.P.C. They should first see to it that all the pre-requisites are full filled before making the arrest.
- The police officers shall be directed to prepare a check-list of the requirements to be fulfilled before making an arrest as per section 41 of Cr.P.C. Such check-list shall be duly filed and should be given to the Magistrate, when the accused is produced before him, for getting permission of further custody.

260 PARA 12, ARNESH KUMAR VS. STATE OF BIHAR AND ORS
• After receiving the report, the Magistrate shall ensure that all the requirements are 
legitimately fulfilled. Only after recording this in writing, shall the magistrate 
permit detention.

• If a decision is made by the Police of not arresting the accused, then the same 
shall be notified to the Magistrate in writing within a period of two weeks after the 
date of filling of the case.

• As per the requirements of section 41 A of Cr.P.C., the notice for appearance of 
the accused in police station should be served on the accused within a period of 
two weeks from the date of filling the case. The Superintendent of police can 
extend such period by mentioning the reasons in writing.

• If the concerned Police Officers/Magistrate do not follow the above-mentioned 
requirements then, they can be held liable for departmental inquiry and 
proceedings for contempt of court that can be initiated in the High Court having 
territorial jurisdiction.

Abuse of power at the hands of police in the country has been a problematic issue of 
debate and discussion. In light of the ideals enshrined under Article 21 of our 
constitution, any form of torture, abuse or ill-treatment is prohibited. During any stage 
of the case, abuse of power by the police is prohibited. If any such case of torture and 
abuse at the hands of the police department is notified, then the wrong-doer is 
responsible and it shall be the liability on the State to redress the wrong done. When 
any such issue goes to the court, the court has the responsibility to balance the 
assurance of fundamental rights of the accused and obligations of the police 
department. The Judiciary has always upheld the principle of “the welfare of an 
individual must yield to that of the community”.

The respect and confidence of an innocent individual can be damaged irreparably, if 
he is arrested and held in custody on any ground. The police officers, while 
conducting the operation of arrest shall always keep in mind the dire consequence of 
arrest on an individual and his family. Thus, arrest shall be taken to be the last resort 
with the police in order to prevent or stop the occurrence of a particular crime by a
particular individual. Arrest made on mere allegations received by police, without any investigation on the matter, shall be avoided at any cost. In response to the issue of illegal arrest and detention, the judiciary has pronounced several guidelines to be kept in mind while making an arrest. The judiciary through these judgements has made it very clear that any police officer, investigative officer, or even Magistrate involved in an illegal and wrongful arrest will not be spared from the departmental inquiry and actions, if the allegations made against them are proved to be true.

The State must ensure protection to the victims of torment, abuse and the human rights protector battling for the of the victims, giving the issue genuine thought since victims of abuse endure tremendous consequences mentally. The issues of intense worry and also a post-horrrendous anxiety issue and numerous other mental outcomes must be comprehended in correct viewpoint. In this manner, the State must guarantee preclusion of torment, barbarous, cruel and debasing treatment to any individual, especially on account of any State office/police department.

In a case named Joginder Kumar v State of UP\(^{261}\) the brothers of the petitioners had filed a writ of habeas corpus for their brother had been taken to an undisclosed location for more than 24 and he had not been allowed to contact anyone of his family members or his friends and was wrongfully detained for more than the prescribed time and hence his fundamental human rights were violated which often is a result in cases of wrongful conviction.

The Supreme Court bought in the concept of human rights and commented upon the Criminal Justice Administration in the following words: “The horizon of human rights is expanding. At the same time, the crime rate is also increasing. Of late, this court has been receiving complaints about violation of human rights because of indiscriminate arrests. How are we to strike a balance between the two? A realistic approach should be made in this direction. The law of arrest is one of balancing individual rights, liberties and privileges, on the one hand, and individual duties, obligations and responsibilities on the other; of weighing and balancing the rights, liberties and privileges of the single individual and those of individuals collectively; of simply

\(^{261}\) AIR 1994 SC 1349
deciding what is wanted and where to put the weight and the emphasis; of deciding which comes first – the criminal or society, the law violator or the law abider; of meeting the challenge which Mr. Justice Cardozo so forthrightly met when he wrestled with a similar task of balancing individual rights against society’s rights and wisely held that the exclusion rule was bad law, that society came first, and that the criminal should not go free because the constable blundered. The quality of a nation’s civilization can be largely measured by the methods it uses in the enforcement of criminal law.”

Thus, after analysing all the cases above, it can be suggestively concluded that innocent individual can be damaged irreparably, if he is arrested and held in custody on any ground. The police officers, while conducting the operation of arrest shall always keep in mind the dire consequence of arrest on an individual and his family. Thus, arrest shall be taken to be the last resort with the police in order to prevent or stop the occurrence of a particular crime by a particular individual. Arrest made on mere allegations received by police, without any investigation on the matter, shall be avoided at any cost. In response to the issue of illegal arrest and detention, the judiciary has pronounced several guidelines to be kept in mind while making an arrest. The judiciary through these judgements has made it very clear that any police officer, investigative officer, or even Magistrate involved in an illegal and wrongful arrest will not be spared from the departmental inquiry and actions, if the allegations made against them are proved to be true.

3.5.4 Non-Registration of FIR

Section 154 of The Code of Criminal Procedure, 1973 prescribes the requirements that should be adhered to while registering a First Information Report (FIR). Section 154 of CrPC reads as follows-

“Section 154: Information in cognizable cases.

(1) Every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction, and be read Over to the informant; and every such information,
whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf.

(2) A copy of the information as recorded under sub-section (1) shall be given forthwith, free of cost, to the informant.

(3) Any person aggrieved by a refusal on the part of an officer in charge of a police station to record the information referred to in subsection (1) may send the substance of such information, in writing and by post, to the Superintendent of Police concerned who, if satisfied that such information discloses the commission of a cognizable offence, shall either investigate the case himself or direct an investigation to be made by any police officer subordinate to him, in the manner provided by this Code, and such officer shall have all the powers of an officer in charge of the police station in relation to that offence.”

However, in many cases, it has been discovered that the police officials have neglected the goals of criminal procedural law in regard to the process of the registering FIR. The Supreme Court had the opportunity through the medium of various important judgments, that emphasized the loop holes of the police organization and pronounced some compelling standards to correct those inadequacies.

The process of registering an FIR, which always was a dilemma for the citizens, was resolved by the Supreme Court of India when it delivered the judgement in Lalita Kumari v. Govt. of U.P. & Othrs263. In this landmark judgement, a writ petition, was instituted by Lalita Kumari (minor) through her father under Article 32 of the Constitution. The petition was filed for the issuance of a writ of Habeas Corpus against the police officers who refused to register an F.I.R regarding the kidnapping of his minor child. The petitioner submitted a report to the concerned officer in-charge of the police station who did not pursue the same. He took no action on it. After much pressurizing, the officer recorded the FIR. As indicated by the petitioner no steps were taken.

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262 SECTION 154, CR.P.C.
263 LALITA KUMARI V. GOVT. OF U.P. & OTHRS, 2008 (CRL. APPEAL) 68, 12TH APRIL 2013
taken either to catch the accused or for the recuperation for the minor girl. The question before the Supreme Court was “whether the immediate non-registration of FIR leads to scope for manipulation by the police which affects the right of the victim/complaint to have a complaint immediately investigated upon allegations being made.”

The next issue before the Court was that in cases where the offense is a non-cognizable one, whether registration of F.I.R still mandatory. The Court answered this question in affirmation stating that even if the information received by the police officers is related to non-cognizable offense but the offense also suggests the necessity of investigation, then a preliminary investigation shall be conducted to confirm whether the offense is disclosed as cognizable or not.

In this case, the Hon’ble Supreme Court introduced certain fundamental principles in registering the FIR and about the importance of carrying out proper procedural responsibilities before commencing the process of investigation and about maintaining a proper report of investigation. It was directed by the court that the applicant must be given a copy of the investigation report even if there are no findings are made with a statement of reason calling for such an investigation. Justice P. Sathasivam proposed a set of procedures that must be observed by the police officials for registering the FIR, when a victim seeks their assistance in filing a complaint. The procedure insisted that the victim must be given a photo copy of the FIR and entrusted the officials to send regular updates regarding the improvement in the matters related to the case. These are some of the major measures taken by the Supreme Court for putting accountability on the police officers for reducing the abuse of power by them.

In another significant case of **Rupan Deol Bajaj** the court observed the importance of registering an FIR immediately in cases falling under cognizable offences. Thus the Supreme Court has constantly strived to end the abuse of power by government authorities.

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264 PARA 3 LALITA KUMARI V. GOVT. OF U.P. & OTHERS, 2008 (CRL. APPEAL) 68, 12TH APRIL 2013

265 MRS. RUPAN DEOL BAJAJ & ANR VS KANWAR PAL SINGH GILL & ANR, 1995 SCC (6) 194
The Supreme Court reiterated in *Nandini Satpaty case* the importance of following the procedure at the time of lodging FIR. The Court has congealed certain guidelines which should be followed when the victim approaches the police station for filing an FIR, however it is pertinent to note here that on one hand the court has affirmed the fundamental rights of the aggrieved in filing the FIR, but on the other hand it has also proclaimed the rule that once the FIR is recorded it can be subdued just by the High Court, so as to ensure that the people don’t misuse their right.

In the event that the investigation uncovered the commission of a cognizable offense, at that point the FIR must be filed. In situations where preliminary inquiry concluded with closure of the complaint, a copy of the record of such conclusion must be provided to the first informant within a period of one week. The grounds for the type of cases that would be dealt with for the purpose of preliminary investigation will depend upon the details and context in a particular case. The classification of cases in which preparatory investigation might be initiated are marital dispute, medicinal carelessness cases, business and financial offenses, corruption cases, situations where there was unreasonable postponement, laches in starting criminal prosecution.

To conclude, the Hon’ble Supreme Court has elucidated about the registration of FIR in a way to establish a unified system for each police station so that there will be an openness in receiving complaints and in filing FIR without any disavowal of this responsibility by the concerned authority.

### 3.5.5 Custodial Rape and Torture

Most of the cases regarding police abuse and is conduct are related to custodial violence which may be assault, rape or mental torture. These cases are filed against the police officer under whose custody the arrested person was kept. Disturbingly, custodial rape and torture are the most common form of atrocities done by police officials. The key to avert such atrocities by the police is laid down in Section 101 to 114 of the Indian Evidence Act, 1872 which assert that it’s for the criminal prosecution to demonstrate that the crucial components of the offense charged and when those fundamental requirements are proved, it’s for the individual who has been

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266 NANDINI SATPATHY VS DANI (P.L.) & ANR, 1978 (SCR) 608, 26TH APRIL, 1978
charged for the offense to show how the case falls inside the general or one of a kind exemptions to criminal culpability recognized by the criminal law. There are a lot of instances where the judiciary had the opportunity to condemn the working of the police organization in such manner.

In **Khatri v. State of Bihar** 267, the atrocities done by police officials, on the accused in their custody, was brought to light. The case demonstrated the careless attitude of police officers and the degradation of the ethics prescribed in Criminal Procedure Code. In this case, numerous writ petitions were filed by the petitioners alleging that police blinded them while they were in detention. Thus, petitions were filed under article 32 268 for the implementation of the Fundamental Rights enshrined in Article 21. 269 During the trial, it was questioned that whether the court can give order for the production of specific reports given by the CID to the State Government and some correspondence between the government and certain authorities. This example of custodial abuse gave a set back and wrecked the faith on the Indian criminal justice system for the police detention.

The writ of habeas corpus proceeded in this case to free an individual from unlawful detainment. In this case, the Court also criticized the State Governments on their inability provide free legal service to the poor accused on the ground that the State does not have sufficient funds for the same. The Court highlighted that is their fundamental duty to provide free legal aid to poor people. Giving free legal support to the needy and destitute is a basic part to any sensible, reasonable and just system. The court likewise asked that the established necessity to bring a detained individual

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268 Article 32- Remedies For Enforcement Of Rights Conferrer By This Part
   (1) The right to move the supreme court by appropriate proceedings for the enforcement of the rights conferred by this part is guaranteed
   (2) The supreme court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this part
   (3) Without prejudice to the powers conferred on the supreme court by clause (1) and (2), parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the supreme court under clause (2)
   (4) The right guaranteed by this article shall not be suspended except as otherwise provided for by this constitution
269 Article -21 protection Of Life And Personal Liberty No Person Shall Be Deprived Of His Life Or Personal Liberty Except According To Procedure Established By Law
before a magistrate within a period of 24 hours of his capture should be strictly complied with.

In the case of Hari Charan v. State of Madhya Pradesh\textsuperscript{270}, the Supreme Court observed that “The High Court had correctly concluded that there was sufficient evidence on record to prove that the deceased was taken into an illegal custody. When this witness appeared in court, he was absolutely terror stricken. The evidence in the record clearly showed that death of the deceased was a direct result of the inexcusable and inhuman torture by the police.”

In Prithipal Singh v. State of Punjab\textsuperscript{271}, The apex Court stated “Police atrocities are always violative of the constitutional mandate, particularly, Article 21 (protection of life and personal liberty) and Article 22 (person arrested must be informed the grounds of detention and produced before the Magistrate within 24 hours). Such provisions ensure that arbitrary arrest and detention are not made. Tolerance of police atrocities, as in the instant case, would amount to acceptance of systematic subversion and erosion of the rule of law. Therefore, illegal regime must be glossed over with impunity, considering such cases of grave magnitude.”\textsuperscript{272}

The Supreme Court also noted that it is very difficult to prove the atrocities done by police officials on a common man. It is very difficult to find any proof, in cases where the victim is alleged to have died in custody of the police. "Rarely in cases of police torture or custodial death, direct ocular evidence is available of the complicity of the police personnel, who alone can only explain the circumstances in which a person in their custody had died. Bound as they are by the ties of brotherhood, it is not unknown that police personnel prefer to remain silent and often even pervert the truth to save their colleagues”.\textsuperscript{273}

Another important case that highlighted police atrocities was the case of State of U.P. v Ram Sagar Yadav\textsuperscript{274}. The Court, in this case, alluded to the 113\textsuperscript{th} report of Law

\textsuperscript{270} HARICHARAN & ANR V. STATE OF M.P. & ORS., 2011 (SC) 581-584, 9\textsuperscript{TH} MARCH 2011
\textsuperscript{271} PRITHIPAL SINGH ETC V. STATE OF PUNJAB & ANR., 2009 (SC) 523-527, 4 NOVEMBER 2011
\textsuperscript{272} PARA 48, PRITHIPAL SINGH V. STATE OF PUNJAB
\textsuperscript{273} PARA 41, PRITHIPAL SINGH V. STATE OF PUNJAB
\textsuperscript{274} STATE OF UTTAR PRADESH V. RAM SAGAR YADAV & ORS, 1985 (SC) 416, 18 JANUARY, 1985
Commission of India, emphasizing the disturbing issue of torture and assault in the custody of police. The case is about a man named Brijlal, was falsely arrested by the police and brutally beaten in their custody. One of the neighbours of Brijlal, had some dispute with him and as a result of dispute his neighbour filed a complaint against him, accusing him of cattle trespass. Thereafter, the police officers demanded a sum of money for settling the case through illegal gratification. After constant demands, Brijlala gave a sum of Rs. 100 to one of the police officer. But the police officer demanded more money. Aggrieved by the irresponsible and greedy behaviour of the police officials, Brijlal complained to the Superintendent of Police who in turn forwarded the report to Station House Official. Goaded at that striking advance utilized by Brijlal, the Station House Officer showed him the lesson and conveyed two different constables to convey him to police headquarters. Infuriated by the strong step taken by Brijlal, the police officer against whom the complaint was made, decided to teach him a lesson and thus, got him arrested without following any of the procedures. He was arrested and kept in police custody for entire day and was beaten brutally. In the afternoon he was brought before the Magistrate. His statement was recorded in which he stated all the torture and abuse that he faced at hands of police. He was in such a bad condition that he could not even stand properly. By the evening, he succumbed to his injuries.

“The Court in the Brijlal case communicated that it ought to be comprehended that when an aggrieved person approaches a police station to file a complaint, the police authorities must comprehend their obligation as law implementers and should remember their constitutional obligation. The court noticed that a police official should dependably work to locate the genuine truth and to work hard to help the aggrieved person to accomplish justice. The court additionally expressed that it has been watched incalculable time that the police by abuse and torture has attempted to manipulate the real occurrence by covering it with some other counterfeit story. The Apex Court was furious as to how a police officer who abuses his power on people within his custody could escape without being condemned.
Accordingly, it is suggested to strictly adhere to the procedure given the criminal procedure code.”

The Supreme Court also observed that “Before all of us close, we want to implore to the Government that the requirement to amend the law appropriately so as to ensure that policemen who imply atrocities on persons who're in their custody aren't allowed to get away by reason associated with paucity or lack of evidence. Police officials alone, can give evidence about the circumstances when a person in their custody is inflicted with injuries during their custody. The people, upon whom the police in the police station inflict atrocities, are left with no evidence to tell about whom the offenders tend to be. It is so ironical, if an individual who files a complaint to the police regarding bribery was carried out to death through that policeman, their two companions as well as his superior official, the Station House Officer”.

Another case that highlighted the terrifying facts about police authorities was brought up before the Supreme Court in Mehboob Baccha & Ors. v. State Rep. By Supdt. of Police. In this case, the accused was beaten very severely and tortured to a great extent. His wife was raped in front of him by the police officials. After going through the facts of the case any common man would lose its faith in police administration. Justice Markandey Katju held in this case, that if there ought to be a punishment of death penalty for rarest of rare cases, then it should be awarded in this case. Yet it was surprising to the point that none of the denounced were accused of murder. How insidious an illegal detention can be is clearly demonstrated in this case.

In Mahmood Baccha case, the supreme court drew attention to the extent and magnitude of offense is dreadful to the point that it has collapsed the entire criminal justice system and it should take as an eye opener for averting such kind of cases later. However, we have to admit that there is no end to such torture and misuse of power by the people who have been named as the enforcers of the law.

If the people who have been given the responsibility for the protection of public and enforcement of law and order in the country are behaving in such cruel and abusive
manner, then the criminal justice system prevailing in India will soon become a mockery. There ought to be an improvement in the strategies for the interrogation methods; or else there will be no advance in our system. Further, if improvement and development of the legal system is restricted then clearly the advancement of the country will never happen and India will never rise above the status of a developing country.

Though National Human Rights Commission was established by the Parliament of India, to manage the issue of misuse of power by the police authorities, the problem is still persistent.

The National Human Rights Commission’s data shows that “the number of complaints relating to ‘deaths in police custody’ were reported to be 74 and 894 in ‘judicial custody in the year 2017.’”

Abuse of habitual criminal offenders and additionally political detainees by police authorities is exceptionally far reaching. This abuse and torture is done to secure confessions, to get illegal gratification of cash and to exploit prisoners. Methods for ill treatment and abuse comprise of giving electric shocks, the suspension through roofs, Lathis (long wood sticks) and tossing. Most of this abuse occur in periods related with illegal arrest where the detention are unrecorded.

Despite the official recognition of the issue and several mandatory guidelines issue by judiciary and steps taken by the legislative authorities, the menace of custodial abuse and torture is still prevalent. The judiciary has always taken active participation in protecting the fundamental rights of the citizens and conveying the entire nation the significance of such rights through their judgments. Public Interest Litigation has reinforced the belief that individuals are entitled to assert their rights

3.6 Critical Perspective on Public Prosecutor

When any criminal law is violated it leads to the commission of a crime which is viewed as an offense against the State. Any offense against the State is supposed to be handled by the lawyers representing the State in its official capacity. Thus, it is to
be kept in mind that the Public Prosecutor is expected to perform his duty objectively based on proof and evidence and not based on emotions and purpose of revenge for the victim. The role of the public prosecutor is the most crucial one during the entire trial. Their fundamental obligation is to ensure that justice is delivered and in order to secure justice they should fulfil their duty with an objective approach based on evidence and proof. If there is any kind of evidence that supports the accused, then even that evidence should be brought to the notice of judiciary during trial. In consequence to this, it is the obligation of an Public Prosecutor to convey to consideration of the court, an issue that the defendant could have brought to notice, yet has neglected to do so. While performing their duty the public prosecutor must act in a balanced way and it should convey in any sense that the public prosecutor is defending the victim or appearing on behalf of the accused. Thus, it is to be emphasized here that the public prosecutor appears in the court on behalf of the state and should frame his arguments based on proof and evidence only. If the Public Prosecutor tries to go beyond this objective approach, then ideals of fair trials are lost.

Police Officials should never dictate the Prosecutor to carry on the trial in a specific manner. The public Prosecutor in an impartial and unbiased entity which is independent of the Police department. External entities like the politicians, the victims’ family or other influencing bodies shall not interfere with the prosecutor’s action, specifically the decision to carry on or withdraw the case. Since the Public prosecutor is a representative of the state in the courtroom hence he/she should think in interest of the citizens of the country and conduct the trial accordingly. It has often been observed that the prosecutors use illegal and illicit techniques to produce false evidence because of their biased approach towards the accused, which has already been presumed guilty by all. This leads to wrongful prosecution and subsequently wrongful convictions. This practice of producing false evidence needs to be checked and the prosecutors need to be reminded that they must perform their duty in strictly unbiased and fair manner. A Public Prosecutor has the obligations of a “minister of justice” and not simply that of a prosecutor.

The Public prosecutor is the most critical characteristic in the Indian legal system. This is particularly considering its significance, as the Supreme Court has recognized,
the criminal justice system in India " is generally an arrangement of requests, not an arrangement of trials." In the state courts where in overabundance of 90% of criminal cases are filed, ninety-four percent of the convictions are the outcome of pleading guilty, and ninety-seven percent of convictions are the delayed consequence of the trial. Through the availability of these many appeals, prosecutors have enormous options and alternatives

Indian Legal System is ‘adversarial system of justice’- a legal system found in common law countries where the plaintiff and defendant are represented by their own lawyers and trial is conducted by each one of the lawyers putting forth their issue and evidence in order to convince the judge. Though India has this adversarial system which gives the right to be represented adequately by a lawyer, only the wealthy and well-off people can afford to pay the fees of their lawyers which may be anything ranging between thousands to lakhs. The court fees, the fees of the prosecutor and other miscellaneous expenses incurred during trial is practically impossible for the poor and destitute to pay. It has been often observed that the accused who are poor and not able to bear the high expenses of lawyers are either not represented by lawyers or are given inexperienced and untrained lawyers under the umbrella of free legal aid. This section of poor and destitute seldom have the opportunity to be represented by experienced, skilled and trained advocates in the courtroom. Thus, for them, the legal system is more of an inquisitorial one where the ‘investigating magistrate’ is not an unbiased judicial officer, but the public prosecutor.

The ratio decidendi in Bachan Singh276 case obliges the prosecution to prove that the person charged with an offense constitutes a huge threat to society and is beyond any correction. If above two vindicating conditions, separately from other mandates which have been encompassed in specific cases, is failed to be proved by the prosecution, then that will confer the accused a right to participate and rebut the evidences presented by the prosecution. In the said case, the Court stated that if a death sentence is imposed the trial court must specify in its findings that there were sufficient aggravating circumstances and it was not outweighed by the mitigating circumstances. It also observed that the focus has now shifted to the criminal than on

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276 BACHAN SINGH V. STATE OF PUNJAB, 1980 (SC) 898, 9 MAY, 1980
the crime and that in making the choice of punishment the court must pay due regard to both crime and criminal. The court also specified that Article 21 of the Constitution of India will be attracted even in the application of the death sentence. Imposing death penalty without considering all these elements violate the constitutional mandate of *due process* under Article 21. The judgement was widely criticized because the court has not specified the criteria in calculating the aggravating and mitigating circumstances in deciding the sentence. The Court has regrettably, not considered the sentencing process as seriously as it should have been. Therefore, the case remained as judge-centric rather than ethical sentencing.

Here it becomes crucial to cite an important landmark judgement where the Supreme Court pronounced some critical guidelines that reshaped the criminal justice system. It is the case of *Zahira Habibulla H. Sheikh v. State of Gujarat* (2004), often referred to as the ‘best bakery case’. It raised several important issues and critical question before the judiciary, which resulted in some of the very important radical outcomes. In this, a huge massacre was alleged to have been committed where an entire building was brought done by fire in which 14 people were trapped and burnt alive in Vadodara. The case came, when up for consideration before the Supreme Court, *Rajeev Dhavan*, one of the prominent senior advocate explained it as “The severest indictment ever of the Justice and governance system of any State”.

The significant aspect in this case were two crucial issue- the witness and the prosecutor involved. It was alleged by one of the key eye- witness, Zahira, that she was compelled to give false deposition and hence had to turn hostile due to danger and compulsion. With regard to the same she made statements and filed affidavits after end of trial and judgment by the trial court. Amid the trial, certain significant concerns regarding the safety and protection of the witnesses were brought to light. The standard and reliability of the evidence being produced in the court should dealt by legal and accepted methods of extracting such evidence and proof. The most shocking fact about the trial in high court was that there was no witness examination of the victims in this case. After observing the inefficient trial of the case in the High

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277 Supra Note 91, 1159  
278 Zahira Habibullah Sheikh & Anr V. State Of Gujarat & Ors, 2006(CRL.) 446-449, 8 March 2006
Court of Gujrat, the Supreme Court transferred the case to the High Court of Maharashtra and ordered retrial. The Apex Court observed that in the High Court of Gujrat, “The Public Prosecutor was acted more as a defence counsel than as a prosecutor whose duty was to present the truth before the Court”.

The role executed by the public prosecutor was challenged on many fresh grounds that gradually came before the Maharashtra High Court. The court held that it was the prosecutor’s obligation to carry out proper examination and investigation of the victims and witnesses in a fair and honest manner. Unfortunately, he did not carry out his responsibility in a diligent way. It was also observed that “the public prosecutor was trying to delay the judgment by not following various essential steps that they had to follow while performing their duty as the public prosecutor”.

In another case of Shamsher Singh v. State of Punjab\textsuperscript{279}, the Supreme Court held that if we go as per the nature, explanation and interpretation of the executive power then the office of public prosecutor tends to be considered as the office of executive. The Supreme Court quoted “Nevertheless, the conclusions of some courts create doubt as to its exact nature. To the suggestion that the public prosecutor should be impartial (a judicial quality), the Kerala High Court equated the public prosecutor with any other counsel and responded thus that every counsel appearing in a case before the court is expected to be honest and truthful. He must of course, champion the cause of his client as efficiently and effectively as possible, but fairly truthfully. He is not supposed to be impartial but only fair and truthful.”

The Supreme Court observed in Thakur Ram vs. State of Bihar\textsuperscript{280}, that “Barring a few exceptions, in criminal matters the party who is treated as aggrieved party is the State which is the custodian of the social interests of the community at large and so it is for the State to take all steps necessary for bringing the person who has acted against the social interests of the community to book”. The underlying reasoning and justification of any criminal act being considered as a ‘crime against state’, is that the prosecutor should be a representative of the state to ensure that the trial system does not become a means of taking personal revenge on the accused.

\textsuperscript{279} Shibesh Singh & Anr. v. State Of Punjab, 1974 (SCR) 2192, 23\textsuperscript{rd} August, 1974
\textsuperscript{280} Thakur Ram V. The State Of Bihar, 1966 (SC) 911, 26\textsuperscript{th} November, 1965
The Indian Criminal Justice System has been recognized to be in a dilemma as per the Malimath Committee Report (2003). However, the interpretation of this dilemma was not done properly. As opposed to concentrating on key issues that led to the collapse of the Criminal Justice System, the Committee prescribed modifications that were totally different from jurisprudential standards.

In addition to the cases mentioned above, few more important judgements highlighted the indispensable role of the Public Prosecutors in trial. The Supreme Court, in *R K Jain v. State*[^281^], gave the circumstances and guidelines which have to be followed by the prosecutor if he wants to withdraw a particular case. The Apex Court, in *Shonandan Paswan v. State of Bihar*[^282^], held without the consent of the court the the public prosecutor cannot withdraw from prosecution. After the consent is given then he can leave the case at any stage. In an important case which was decided by Supreme Court, the issue of State Governments withdrawal of prosecution came to light. It was the case of Abdul *Karim v. St. of Karnataka* where some prominent criminals were being tried and the State Government wanted to withdraw prosecution against them. The Apex Court disapproved the withdrawal of the State Government and protected the right of the citizens of the country to avert such withdrawal of prosecution.

In *Krishan Singh Kundu v. State of Haryana*[^283^], the Punjab & Haryana High Court has held that “the very idea of appointing a police officer to be in charge of a prosecution agency is abhorrent to the letter and spirit of sections 24 and 25 of the Code”. Similarly, the judgment from the Apex Court in *SB Sahana v. State of Maharashtra*[^284^] held that whether the meaning and nature of the office of public prosecutor is executive or judicial, there is no doubt that the prosecution should be unbiased and impartial.

[^281^]: R K JAIN V. STATE, 1980 (SC) 1510, 22ND APRIL 1980
[^283^]: KRISHAN SINGH KUNDU V. STATE OF HARYANA, 1989 (P&H) 1309, 31ST MARCH 1989
[^284^]: S.B. SAHANA V. STATE OF MAHARASHTRA, 1995(SCC) 787, 9TH NOVEMBER 1995
Further, in the case of **Mukul Dalal v. Union of India** 285, the Supreme Court again emphasized that “the office of the public prosecutor is a public one and the primacy given to the public prosecutor under the scheme of the court has a social purpose”. But abuse of the power given to the public prosecutors has changed the ethics and ends of this social purpose.

It has been observed in many cases that prosecutors often deceive the accused person by asking for severe punishment for them, in order to strengthen their power of negotiating. For the purpose of getting guilty pleading from the accused, the prosecutor may request the court for higher punishment like capital punishment. A prosecutor may request for the death penalty in a desire of securing a confession from the accused which would eventually lead to plea bargaining. If the accused does not accept the terms of plea bargaining, then the prosecutor will continue with the case at trial and will argue for securing a death penalty for the accused as punishment, even though prosecutor doesn’t believe in the offense to be as grave as deserving death sentence. This is how public prosecutors deceive the court and the accused in the name of plea bargaining.

In domain of sentencing guidelines, prosecutors influence and often govern the severity of punishment. The prosecutors sometimes offer to advise the concerned judge that the litigant has given “generous support.” In several cases, prosecutors may accept to reduce the charges, withdraw their notice to resort to higher sentences, approve for a particular sentence or make some other concession in return for the accused statement of accepting his guilt and waiver of a trial by jury. Those accused who don’t accept the plea bargaining must suffer long trials which may take years to complete. If held guilty, they suffer much more extreme sentences than they might have been awarded if they had accepted the plea bargaining. Judges are regularly left with practically no discretion.

In such scenario, it is often noticed that the poor and destitute are not given their basic human rights. Often, a huge amount is demanded as surety for the purpose of bail.

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285  **MUKUL DALAL V. UNION OF INDIA, 1988 3 (SCC) 144, 4TH MAY 1988**
Invariably the victims are from disadvantaged sections of the country; who may be linguistic or additional minorities.

3.7 Legal Aid

Recently, another stream of procedural aspect has developed to protect the rights of the victim. It was developed in a thoroughly new shape and form and with evolved contours following Supreme Court’s support to the concept of providing free legal aid in its many judgments and rulings. Legal aid is that assurance of law to every individual who wants to seek the protection of their rights in the court of law, on the other hand it’s the constitutional obligation of the judiciary to furnish the aggrieved with a legal representation who would represent the aggrieved in the courtroom. An impoverished person is that person who cannot pay for or employ a prosecuting lawyer and hence will be supported financially for the same on government expenses.

In the case of Hussainara Khatoon v. State of Bihar\textsuperscript{286}, the Supreme Court highlighted about the plight of numerous under trial prisoners who were in jail only because they were denied the right to legal aid. Due to the carelessness of trial courts, no legal representation was offered to them and as a result they had to wait in jail till their case trials could be held in court. The right to legal aid is a constitutional obligation as specified by the apex court of India, which mandates that in no situation an individual shall be refused from implementing his right to free legal assistance in the court room.

The law that define and confer the power to arrest consists of prescribed rules, to guide the investigating officer and other law enforcement agencies about the procedure of arrest. In a conservative society like ours if a person is arrested even on a mere apprehension the society will declare and consider him as a wrongdoer even if he is released afterwards without framing charges and therefore the Apex Court has mandated the investigating authorities to double-check the information received before performing an arrest to evade unwarranted public criticism on an individual even after it has been proved that he is innocent.

\textsuperscript{286} Hussainara Khatoon v. State Of Bihar, 1979 SCR (3) 532, 9\textsuperscript{TH} MARCH 1979
In yet another landmark judgement, the Supreme Court exonerated the accused because he was not given free legal aid to represent himself during the trial. It was the case of In Sukhdas v. Union Territory of Arunachal Pradesh\(^{287}\), where the apex court held that if a person is convicted without giving him the opportunity to be adequately represented by a lawyer, then that would amount to wrongful trial and subsequently would result in wrongful conviction of the accused. It is a sheer violation of his fundamental rights enshrined in Article 21 of the constitution. The court further held that it is mandatory duty of the trial court to see to it that each party of the case is adequately represented during trial. In addition to the responsibility of the trial court, the Supreme Court, too, has an obligation to ensure that every party to case is given proper legal aid during the trail of the case. Through this judgement the Apex Court admonished the important of free legal aid to all trial courts in the country.

Further, in another important case of M.H. Hoskot v. State of Maharashtra\(^{288}\), the Supreme Court held that that “if a prisoner sentenced to imprisonment is virtually unable to exercise his constitutional and statutory right of appeal inclusive of special leave to appeal for want of legal assistance, then it is implicit in the law under article 142 read with articles 21 and 39A of the constitution, that the power to assign counsel for such imprisoned individual ‘for doing complete justice’ should be followed.” Through this judgment, the scope of Article 39 A was explained by the Supreme Court. It was observed by the Court that though an accused is entitled to be provided with free legal assistance through Article 39A, but this doesn’t imply that the accused can force the State government to be give him free legal assistance to hire an advocate as per his preference by filling a writ of Mandamus in the Supreme Court.

Justice Bhagwati has always been the flag bearer of judicial activism through pronouncing significant judgments. In one of his judgments he highlighted and retrietated the constitutional obligation of the State Government to ensure that every accused is provided with appropriate legal assistance as per his/her needs. This was the case of Khatri v. State of Bihar\(^{289}\), where Justice Bhagwati while pointing to the

\(^{287}\) Sukdas v. Union Territory of Arunanchal Pradesh, 1986 SCR (1) 590, 10\(^{th}\) March 1986

\(^{288}\) M.H. Hoskot v. State of Maharashtra, 1979 SCR (1) 192, 17\(^{th}\) August 1973

\(^{289}\) Khatri v. State of Bihar, 1981 SC (SCC) (1) 627, 19\(^{th}\) December 1980
supreme court’s decision in the above mentioned Hussainara Khatoon’s case quoted that “right to free legal aid, just, fail and reasonable procedures is a fundamental right. It is elementary that the jeopardy to his personal liberty arises as soon as the persons is arrested and is produced before a magistrate, for it is at this stage that he gets the 1st opportunity to apply for bail and obtain his release from the police custody. This is the stage at which an accused person needs competent legal advice and representation. No procedure can be said to be just, fair and reasonable which denies legal advice representation to the accused at this state.” Through this judgment, the judiciary interpreted Article 21 in light of the constitution right to be provided with legal assistance to the needy.\textsuperscript{290}

A break-through was witnessed in the case of 	extit{Zahira Sheikh}\textsuperscript{291}, when Supreme Court observed that that a procedure is wrongful when the public prosecutor is not performing his duty and the key witness is very not given sufficient protection during trial. The Supreme court had to transfer the case from the Gujarat High Court to the Maharashtra High Court for the effective adjudication of the case without any mismanagement of justice.

The rationale and ideology behind the ‘right to free legal aid’ is to ensure that when an individual, in the capacity of the petitioner of defendant, comes to the trial court he ought to be represented by a legal practitioner. This would ensure the protection of the fundamental rights enshrined in our constitution and would further the ends of fair, just and reasonable justice system. This right to free legal assistance has been evolved by the judiciary for those needy citizens who are poor and destitute and have no means to bear the expenses of their trial. Unfortunately, through various judgements of the Supreme court it has been discovered that during numerous trials in the country, the accused were not represented by any advocate and hence were wrongfully prosecuted and convicted. Later though they were exonerated by the Apex court, but their precious years of life were wasted and lost because of the sheer negligence of trial courts.

\textsuperscript{290} M.P. JAIN, CONSTITUTIONAL LAW OF INDIA, 1053, LEXIS NEXIS, 6TH ED., 2008

\textsuperscript{291} ZAHIRA HABIBULLAH SHEIKH & ANR V. STATE OF GUJARAT & ORS,2006(CRL.) 446-449, MARCH 2006
This unfortunate trend of violating the rights of the accused to be provided with legal assistance has been often observed in cases related to terrorism and Prevention of Terrorism Act, 2002. For instance, in the case of Mohd. Hussain v. the State (Govt. of NCT) Delhi\textsuperscript{292}, the accused was wrongfully prosecuted in the trial court and the High Court, owing largely to the reason of being devoid of legal representation. The accused herein, was detained as being a suspected terrorist, accountable for Delhi bomb blast. During his trial in the court, he was initially provided with legal assistance through an advocate, however, after some time the advocate did not turn up for hearings. The accused being a foreign national was, hence, devoid of any legal assistance and the trial was continued without his legal representation. He was found guilty in trial court and the High Court and was given death sentence.

When the matter came before the Supreme court, it was noticed by the judiciary, that the trial could failed to perform its constitutional obligation of providing adequate legal assistance to the accused, especially in serious cases like that of terrorism. The Supreme court warned the trial court that the justice system would be of no meaning if the trial courts continue to conduct trials in such unfair and biased manner. No deliberation was given to the indispensable need of legal assistance and thus the accused’s right to be given legal aid was violated. In this case, the trial Court and the high court were informed about the situation, but they did not take any action on the same. The Court held that “It’s the duty of the state to provide the accused with a counsel to represent him in the court of law. The state failed to perform its duty by not providing the accused with the council and this lead to the violation of the fundamental Articles 21 and 22. The court hence violated the rights promised by the constitution to every citizen and non-citizen in India.”

A similar nature of issue was raised in the case of Jayendra Vishnu Thakur v. State of Maharashtra\textsuperscript{293}. In this case, it is was emphasized that is it constitutional obligation of the trial court to secure the right to legal assistance and legal representation of the accused. This right becomes crucial at the stage of examination-in-chief and examination of witnesses, where the person charged with the criminal

\textsuperscript{292} Mohd. Hussain @Julfikar Ali V. The State (Govt. of NCT) Delhi 2012 (SC) 1091, 31\textsuperscript{ST} August 2012

\textsuperscript{293} Jayendra Vishnu Thakur V. State Of Maharashtra, 2009 7(SCC)104, 11\textsuperscript{TH} May 2009
offenses ought to be provided with defense council who can argue on his behalf in the courtroom. As per the principles enshrined in our Indian Constitution every person has the fundamental right to have a just, fair and reasonable trial. This principle must be effectively followed at every stage of judicial process.

According the Report of law Commission of India\textsuperscript{294} of, it is high time that the government and its public servant, namely the judiciary takes crucial steps to bring in justice to every case before it. The Report quoted the following suggestion “Judiciary must accept the norm of democracy that justice not only is done, but it appears to be done. How government could fight against corruption if the judiciary itself is acting some time against the Right to Information Act, regarding disclosure of assets on ground of being not a public servant but constitutional authority. It amounts to double standing as on one hand they claim salaries and other benefits on the ground of being a public servant and denying the liability to disclose the assets by saying not a public servant. However, true fact is that they are public servant within the meaning of sec 21 I.P.C.”

The Supreme Court must also “correct its illegal wrong judgments, which are still being followed in the country. They must provide justice when the aggrieved party knocks its door and not try to compromise the dispute as it did in Maneka Gandhi case, because Art. 14 guarantees restitutive justice”\textsuperscript{295}.

Judges should play a dynamic part in bringing reality and not simply being a quiet onlooker of the case. There ought not be an assumption of constitutionality of the law since it has a tendency to assume a dominance of power favouring a particular party to dispute and hence disturbs the balance unfairly. This absolutely influences the rule of equality of power, which is guaranteed through principles enshrined under article 14 read with article 13(1) and 13(2). By questioning that the aggrieved person to prove the wrong or damage endured demolishes the assurance of equal protection of law. Such a conclusion with respect to court is to a great degree low on the moral check of the justice system.

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\textsuperscript{294} REPORT NO. 230, LAW COMMISSION OF INDIA  \\
\textsuperscript{295} RESTITUTIVE JUSTICE- REPARATION MADE BY GIVING THE SAME THING OR GIVING AN AMOUNT EQUAL TO IT AS COMPENSATION IS CALLED AS RESTITUTIVE JUSTICE
\end{flushright}
3.8 Witness Protection

In a criminal trial, witness plays a very crucial part in bring justice to the victims of the crime. A criminal trial is based upon the establishment of proof that is acceptable as per the requirements of law in the courtroom. For acquiring evidence during trial, witnesses are needed for proving direct evidence or circumstantial evidence. Their statements are the most important evidence that can either lead to conviction of an accused or to the acquittal. Thus, their protection and security is of utmost importance to legal system. The laws and programmes that can protect the witnesses and provide them with sufficient security needs to be framed and implemented effectively. In absence of such framework, the wrongdoers and the culprits further fortify their acts and can easily further plague the criminal justice system. Unfortunately, such laws and legal framework, have not yet been brought into existence. Though there are some provision regarding witness protection in India, their implementation has been a big failure in the criminal justice system. For instance, these witnesses are not even given respect in the court room.

Harassment of witnesses has become a major predicament in the criminal justice system. Often if the criminals or offenders are notorious and influential ones, the witness are bribed, pressurized, frightened, kidnapped and sometimes even killed. This is the major reason for witnessing turning hostile or withdrawing their submissions made in the court.

3.8.1 Treatment of Witnesses

The present legal framework has underestimated the importance of witness protection. In most case witnesses are send notice for appearing in the court, not considering their personal conditions and situation they might be in. The witness can be a poor person who might not have sufficient financial resources to get to the court, or maybe the witness cannot afford to take leave from his work for appearing in the court. Further the protection of witness has been highly disregarded in most cases. It is often seen that most of the witness are not educated or well versed with the procedures and complications of legal system.
In the matter of **Swaran Singh v. State of Punjab** the Supreme Court observed, “A witness has to visit the Court at his own cost, every time the case is differed for a different date. Nowadays it has become more or less fashionable to repeatedly adjourn a case. Eventually the witness is tired and gives up.” The Court additionally observed that while deferring a case with no legitimate reason, a Court unintentionally becomes a reason for for failure of criminal justice system. Waiting for hours for their case to appear, is the most prominent trouble faced by all witnesses. Further the approach adopted by most of the prosecutors and lawyers towards the examination and cross examination of the witnesses makes them feel as they themselves are the culprits of the wrongdoing.

### 3.8.2 Perjury

The statements and the information given by the witness is of utmost significance because an accused can be held guilty or innocent based on the same. This it is critical to understand here that perjury or “intentionally giving a false or misleading statement in the court of law” by the witnesses needs to be checked seriously. Sometimes, the judge even realizes that whatever the witness is stating isn't valid and the witness is contradicting his/her previous statements. However, the judge disregards this reality and continues the trial based on the false evidences given by witnesses. This is one of the major factor that leads to wrongful conviction of the accused.

The procedure for the trial of contempt of lawful authority of public servants, for crimes against public justice and for crimes related to written evidence in the form of documents submitted, in given under Section 340 of the Criminal Procedure Code, 1972.

The section states the prerequisites for the making the complaint-

“A complaint made under this section shall be signed-

a) Where the Court making the complaint is the High Court, by such officer of the High Court as the Court may appoint;

b) In any other case, by the presiding officer of the Court.”
In order to get the criminal justice system on the right track, it is extremely important that the High court and the Supreme Court become more attentive and careful. They need to keep a close eye on trials being held by the lower courts. The legal framework can't be left unchecked under the governance of States. A legitimate check ought to be kept up on the dismissals and recording of proof by the lower courts. Such check can be facilitated by internet technology where all the subordinate courts can be connected to the concern High Court of the State. The Bar Council of India and the State Bar Councils must become more vigilant on their part and try to improve the system.

It has been observed that the case where witnesses turn hostile at later stages of trial are mostly related to terrorism cases involving legislations like Prevention of terrorism Act, 2002 (POTA) and The Terrorist and Disruptive Activities Prevention Act, 1987. The prosecution in these important and delicate cases have not been successful because the key witnesses are threatened, kidnapped or killed by the criminals. Failure to provide safety to witnesses leads to the failure of entire criminal justice system.

In recently famous cases like Jessica Lal murder cases and Best Bakery case, most of the key witnesses did not turn up to testify, or even if they did, they retracted from their statements on account of being threatened. In various cases, Human Rights Commission has intervened when adequate protection was not provided to witnesses, and filed various petitions in court for providing witnesses with sufficient security and protection. The reason why the accused or the criminals are able to get hold of the witnesses, is the lacunae of proper witness protection laws and legislation in our Criminal Justice system. Even if the after the evaluation of the requirement for security to a specific witness, the court or the police authorities have failed to provide him/her the essential security personnel.

To improve the contemporary criminal justice system, a committee was appointed by the Home Ministry in April 2003. The committee was headed by Justice V.S. Malimath (former Chief Justice, High Court of Gujarat). The committee suggested that it is the need of the hour to frame laws relating to witness protection in India and
then to effectively implement them. Without pointing on a specific case, the committee suggested that it is very crucial at this point of time to censure the expanding inclination towards witnesses turning hostile. The committee further suggested that the reasons and factors for such situation need to be analysed in depth and the legislation should be accordingly framed. The panel said nothing past making an uncovered suggestion of receiving such a law. It did not try to go into how the idea of witness protection program can be adjusted to the circumstances and conditions of India.

3.8.3 Judicial Activism

Lately, the Indian judiciary has played a pro-active and significant role in developing and supporting the laws and rules relating to witness protection and security.

In recent time the judiciary has been giving significant amount of encouragement to establishing witness protection programs in India. The Best Bakery has marked a new epoch in the concept of witness program through the various guidelines that were propounded by the Hon’ble Supreme Court of India. The court stated that the state has obligation to protect the witness for safeguarding fair and smooth trial especially in cases where there is apprehension on witness being submitted to torture or harm. This sort of situation may arise in cases where either of the parties are influential in money and power and witness’ statements can be tilted in favour of the party who succeeds in the bargain. Hence the state needs to monitor protection and legitimate care the witness. The court further observed that it is the obligation of the state ensure that witness is comfortable and ensure his safety and to protect him from the fear of harm from the people against whom he is giving testimonials.

In case of Vikas Yadav vs State of U.P. 2003 the Delhi High Court pronounced certain guidelines to be followed by police department for giving security and ensuring the safety of the witnesses, where the case relates to life imprisonment or death penalty. The judgement was given to ensure the that the witnesses don’t turn hostile because of any threat to their life.
The guidelines have been issued by Usha Mehra and Pradeep Nandrajog., JJ on a petition filed by Neelam Kataria, whose son Nitesh was allegedly murdered by Rajya Sabha MP D.P. Yadav's son Vikas and nephew Vishal.

The Delhi High Court has given the following guidelines in giving witness protection:

“1. The Court has also made it compulsory for the investigating officer of a case to inform the witness about the new guidelines.

2. The Court has appointed the Member Secretary of the Delhi Legal Services Authority to decide whether a witness requires police protection or not.

3. The competent authority shall take into account the nature of security risk to him/her from the accused, while granting permission to protect the witness.

4. Once the permission is granted, it shall be the duty of the Commissioner of Police to give protection to the witness.”

The Delhi High Court further held that these guidelines should be followed by the police authority till proper laws are framed and enacted for the witness protection.

3.8.4 Initiatives by The Police

Since the terrorist related activities are increasing day by day in India, the Mumbai police have framed a plan consisting of primarily four guidelines to secure the protection of key witnesses in the terror related and other important cases in India. Though these guidelines are still under consultation, it would be sent to the State Government for its consideration, after which it will be implemented as a proper legislation.

The framed plan is made on the following four guidelines:

“1. Transferring the witness from his city of residence to another city.

2. Government will provide the witness with a job like the one he is/was doing.

3. The witness shall be given a new name, identification, ration card; and a new passport.
4. The government will accept the responsibility of the witness's entire family and provide it with security cover.”

**Work need to be done**

It wouldn’t be wrong to say that “Police misconduct causes wrongful convictions.”

“*It is a system that still carries many attributes of its origins in British-run colonial India, and gives a high degree of discretion to how state governments apply the penal code — and who ends up behind bars, whether serving prison sentences, or in temporary army or police custody*”**297**. And the Indian police has been accused of serious misconduct while conducting investigation and also in cases of arrest. On an interlinked reading of the CrPC, it becomes very apparent that the police has been granted wide sweeping powers and it has been the mandate of the courts to consistently lay down provisions to circumscribe these wide discretionary powers by imposing several conditions to safeguard legitimate citizens interests.

In India, except in the state of Jammu & Kashmir, all the remaining state law enforcement agencies are obliged to follow the mandates stipulated under the Constitution of India.**298**. The police department in India has a separate administrative mechanism under the code of Criminal Procedure. However, neither does it give out the impression that they are supra constitutional and nor asserts that the constitutional mandates cannot be enforced directly to supervise the police, in contrast to the popular presumption, it can certainly enforce any constitutional mandates against law-enforcing agencies. There is no constitutional sanction conferred to the police officers to administer any sort of transgressions in the course of their business, on a justification that, such misconduct was to support and maintain the essential judicial integrity and the proper investigation of the crime. This entails the principle that in the administration of criminal justice the means resorted to reach the end are equally

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296 [Russell Covey, Police Misconduct as a Cause of Wrongful Convictions, 90 Washington University Law Review](https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=6013&context=law_lawreview)


important as the end itself and it does not justify the notion that the state should permit the investigation agencies to administer third degree measures to prove the crime and to get the criminal convicted. The fundamental objective behind this policy is to make sure that, justice is ensured through fair practices without undermining the constitutional and statutory mandates. This will further enable the prosecution to present their cases with outmost clarity in evidences than resorting only to the admission of the accused during the police custody. “Viewed from this value premise, any argument against the enforcement of bill of rights against the police appears to be an argument that the police must be allowed to be supra constitutional order that they may protect the society from the criminals and law breakers.” 299

Statutory provisions are available under Criminal Procedure Code to guide the investigation agencies, from the opening the charge sheet till to the beginning of trial procedures, these includes registration of the FIR, intimation about the arrest of the accused to the near relatives, procedures that need to be followed during the progress of investigation, maintenance of diary at the place where the accused has been arrested, presenting the accused before the nearest magistrate court within 24hrs of his arrest, are some of them.

The constitution of India has guaranteed “every citizen the fundamental freedoms of speech, expression and faith, right to reside, right to establish industry, business as well as assembly” 300. These fundamental rights are essential requirements for any progressive and modern society. Parliamentary democracy as well as the federal structure would be the two salient options that come with India's upbringing. Nevertheless, we cannot presume that the administrative institutions conceptualised on these values are devoid of any aberrations. The groundwork of parliamentary democracy in reality is groomed out from party agendas and grownup franchise. 301

The role played by the police administration and the judiciary is very crucial, as the former is obliged to bring the accused before the law and the latter is entrusted to

300 ARTICLE 19, CONSTITUTION OF INDIA.
301 JOEL SAMAH, CRIMINAL PROCEDURE, 4, CENGAGE LEARNING, 9TH ED. 2011
check through the trial, whether all the indictment charged against the accused are true beyond any reasonable doubt. This doxology is well maintained through the various procedural guidelines incorporated under the Code of Criminal Procedure. The code elaborates the rights of the accused and the duties of the investigation officer at the time of making an arrest and the requirements that need to be fulfilled at the time of arrest of the accused person.

The Judiciary has acknowledged the grave human rights violation happening during the investigation process and the third-degree techniques and tortures incorporated by the investigation agencies to adduce evidences and confessions at the time of interrogation. Many a times the interrogation process last for a prolonged period without actually registering the arrest of the person so interrogated. The principle notion is that the state or its agencies should not assault or torment the individuals to meet the justice.

For this reason, the Judiciary has laid down highly polished guidelines describing the methods that need to be incorporated at the time of arrest and interrogation. It also directed how these guidelines should to be circulated amongst the Director Generals of Police and the Home Secretaries of every state. The court stated that the investigation officer shall seek permission of the magistrate before handcuffing a person who has already been remanded to judicial or police custody. The non-adherence of these directions by the investigating officer or the officer associated with the jail is punishable under the contempt of court act, 1971 along with other provisions of the law.

3.9. Critical Perspective on Judiciary

3.9.1 Introduction

In India, the judiciary is regarded as the protector and guardian to the principle of “rule of law” which in turn epitomizes the significance of peace, security and harmony among the citizens of the nation. Indian Judiciary is that constitutional branch of our democratic government, that ensures to every individual in our country the right to fair trial and the means to achieve justice.
To accomplish this goal of securing justice, it is important that the judicial officers and their judicial service is available adequately to all the aggrieved victims who come before the court.

However, it has been observed through the course of extensive research, that majority of the petitioners have to wait for endless months and, sometimes years, just to begin with proper trial in the courts. Hence our judiciary is not able to perform its functions of granting justice to all efficaciously. One of the leading intensive research done on the working of judiciary was headed by Mr. Nick Robinson 302, a senior research fellow in India, who wrote an elaborate research paper discussing the reasons and causes for the delay in the work of judiciary. He stated, “If statistical data be discussed than it can be infer that presently on an average one judge presides over the cases filed by one million people, which are a very small number”.

The constitution of India guarantees to all its citizens the protection of their rights including the remedies for enforcement of their rights 303. However, the huge pendency of cases in the courts are defeating the very ideals of the constitution and our criminal justice system. The accused person is often arrested in criminal cases and put behind bars for years, before the trial of his case begins in the court. Those accused who are illiterate or don’t have the means to pay for their bail have to spend at least two to five years as “undertrials” in the prison. Till the time, when their cases come to the court for hearing, these accused have already served the punishment for the crime they have been arrested for. Further, most of the time, the under-trial prisoners are acquitted after their trial, wasting their precious years of life in prison. Here the judiciary fails to protect the rights of the citizens and the innocent people have to pay the price for this failure.

The plight of undertrials was highlighted in the case of Hussainara Khatoon and Others v. Home Assistant State of Bihar,304 in 1979. The Supreme court took note of various articles published in Indian Express regarding the terrible conditions in the

303 ARTICLE 32, CONSTITUTION OF INDIA
304 HUSSAINARA KHATOON V. STATE OF BIHAR, 1979 SCR (3) 532, 9TH MARCH 1979
Prisons of Bihar. The articles in the newspaper disclosed that several prisoners, including women and children, have been detained in the prisons as under-trials for at least 2-5 years. Out of them, most of the under-trials have been arrested for minor charges, the punishment of which would not be more than few months, however these detainees have been in the prison since 3 to 10 years. A writ petition of habeas corpus was filed in the Supreme Court which revealed a disturbing picture of under trials in the state of Bihar and challenged the administration of justice in the state.

The Supreme Court admitted the petitions and ordered the Government of Bihar to submit an extensive report on the prisoners and the under-trials. The Apex Court pronounced a landmark judgment in his case and held that the right to speedy trial is an essential part of the administration of justice in any state. Further, this right is a constitutional right and it is the obligation of the state to ensure the protection of it. The Supreme Court said that “Article 21 from the Constitution lays down that nobody shall be deprived of life or individual liberty except based on the procedure established legally. The procedure ought to be reasonable, fair and otherwise such deprivation will be illegal.”

Supreme Court quoted “there are several under-trial prisoners who are charged with offences which are bailable but who are still in jail presumably because no application for bail has been made on their behalf or being too poor they are unable to furnish bail. It is not uncommon to find that under-trial prisoners who are produced before the Magistrates are unaware of their right to obtain release on bail and on account of their poverty, they are unable to engage a lawyer who would apprise them of their right to apply for bail and help them to secure release on bail by making a proper application to the Magistrate in that behalf. Sometimes the Magistrates also refuse to release the undertrial prisoners produced before them on their personal bond but insist on monetary bail with sureties, which by reason of their poverty the under-trial prisoners are unable to furnish and which, therefore, effectively shuts out for them any possibility of release from pre-trial detention. This unfortunate situation cries aloud for introduction of an adequate and comprehensive legal service programme, but so far, these cries do not seem to have evoked any response. We do not think it is

305 PARA 5, HUSSAINARA KHATOOK V. STATE OF BIHAR, 1979 SCR (3) 532
possible to reach the benefits of the legal process to the poor, to protect them against injustice and to secure to them their constitutional and statutory rights unless there is a nationwide legal service programme to provide free legal services to them.”

The Court further observed that it is extremely discouraging to see that even after the amendments to the Criminal Procedure Code, 1973, our criminal justice system is dependent on the value of money for the impetus of creating a deterrence effect for the offenders of law. The court suggested that the outdated and primitive practice of bail in cases of pre-trial based only on sureties should be reconsidered. The parliament should make some amendments and suggest alternatives to the guarantee of bail, especially for poor people. The court further stated that these guidelines for bail should not only apply to court but also to police department.

With regard to the issue of delay in the disposal of cases in India, Nani Palkivala once said-

"May I turn to the situation in India which has the second largest number of lawyers in the world? While it is true that the justice is blind in our country, it is also lame. It barely manages to hobble along. The law may or may not be an ass, but in India it is snail; it moves at a pace which would be regarded as unduly slow in community of snails. A lawsuit, once started in India, is the nearest thing to the eternal life ever seen on this earth. Some have said that litigation in India is a form of fairly harmless entertainment. But, if so, it seems to be a very expensive way of keeping the citizens amused. If litigation were to be concluded in the next Olympics India would be quite certain of winning at least one gold medal."  

Another crucial impediment in the administration of justice is the issue of access to courts by the parties to the case. It often creates obstacles for the common man to secure justice from Courts. Where the petition for enforcement of fundamental rights

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is involved and the case come before Supreme Court, it is inconvenient for those who reside far from New Delhi (for example in South or East India). People who are poor and don’t have sufficient financial resources to turn up for every hearing in the court; or people who are old or disabled and can’t be expected to travel for hours, are the ones who give up the idea to claim their rights in the court. This theory of access to justice plays a crucial role in securing justice to the victims of crime.

While referring to the cost of litigation in criminal cases in the country, Nick Robinson in his Research article stated that “the litigation in India is the game of the rich”. When any aggrieved person goes to the court to claim his right he should not only be supported by some strong proof to defend his case but should also be prepared to spend at least lakhs for the lawyer’s fees and other expenses. It is observed that in very few cases the state gives compensation to those who were wrongly prosecuted and convicted and had to spend their entire earning to prove themselves innocent.

The problem of bail and its sureties has been a great challenge for poor and destitute. One of the major reasons for the growing number of under-trials in India, is the fact that many poor people cannot afford to pay sureties to secure bail after arrest. The concept of sureties is such that a specific amount of money has to be deposited with the court in order to ensure that the person who has been granted bail will turn up for his hearing whenever required by the court. If he fails to do so, the amount of money submitted by him will be confiscated. Though this method of ensuring the appearance of person in the court, who has been granted bail, is reasonable per se, but not for all the sections of the society. In case of poor and restitutes who cannot afford to pay the sum for the purpose of bail have to depend on other to provide them with money.

In the case of Motiram v. State of Madhya Pradesh 307, the Supreme Court had to face the challenge of deciding some of the most critical issues regarding bail given to those who can’t afford the sureties. In 1978, the Apex court had to decide on three important issues. First, whether the Criminal Procedure Code, 1973, entitles a person to get bail on the basis of personal bond. Second, what should be the criteria for repayment of the amount submitted for bail and how should that be calculated.

307 MOTIRAM V. STATE OF MADHYA PRADESH, 1978(SC) 1594, 24TH AUGUST 1978
Thirdly, in case an individual is living or residing in a different district or state, or he is the owner of properties which are located in different districts or states, whether his bail demand can be rejected on the same grounds.

It was observed by the Apex Court that the criminal procedural law is having various shortcomings and lacunas with regard to the representation of the poor section of the society. It has various ambiguous laws and complexities that need to be clarified through some amendments or guidelines. The ‘balance of the procedural law’ for various sections of society needs to be inculcated in the legislation with regard to some specific issues that have been raised in this case. As has been mentioned under Article 14 of the Constitution of India, “the right to equality before law” shall be put to practice in all procedures of criminal trial.

Recently another major impediment, in the criminal justice system, has been the appointment and transfer of judges. Tis a barrier for smooth functioning of criminal justice system as per many criminologist. The procedure for appointment of judges of Supreme Court and High Court is done through ‘collegium system’ of appointment. It has been debated that this blanket of collegium system on our judiciary is full of errors and unfair procedures. This system gives discretionary power to chief justice to appoint judges of after consultation with other senior judges. There is a 22-yearl old practice which is being carried out by the judiciary irrespective of the fact that the constitution does not give any power to the judiciary to do so. In 1993, this practice was challenged in the case of Supreme Court Advocates-on-Record Association v. Union of India\textsuperscript{308}, where issue was highlighted regarding the reasons and grounds on which the appointment of judges was done in High Court and Supreme Court. The authority and discretion of chief justice in this regard was also challenged. The Supreme Court upheld the collegium system and the discretion of the chief justice to decide the appointment of judges. The apex court held that while finalizing the appointment of judges the chief justice should consult at least two senior most judges of the Supreme Court and once the decision is made it will be binding. Further,

\textsuperscript{308} \textit{Supreme Court Advocates-on-Record Association V. Union Of India}, 1993 (SC) 1303, \textit{6\textsuperscript{th} October 1993}
Supreme Court has the power to increase the judicial strength if there is a requirement for it.

This judgement was full of errors and had not addressed some of the crucial points which were relevant to the appointment. The Constitution of India has provided a systematic distribution of power to each organ of state. However, through this judgment, an imbalance was created in the power arrangement. The term *concurrence can be called in place of consultation, as it would change the ideology on which the Constitution laid down the principles for the judiciary to follow.* It was observed in this judgment that the judiciary had exceeded the power that our Constitution, ‘the Grundnorm’, had bestowed on it. The president has the latent power given by the Constitution to it. However, the stand taken by the bench in this case, was against the due procedure and hence needs to be challenged on various grounds. The supreme court has been given certain powers and responsibilities under various Articles of the Constitution. But these powers and functions ought to be exercised within the constitutional boundaries and not in arbitrary manner. The direction to replace the word ‘consultant’ to ‘concurrence’ necessitates an amendment to constitution, yet the Supreme Court did not follow any procedure to make the changes. This is a very crucial point, that has not been addressed sufficiently.

The Apex Court, while pronouncing the judgement made it clear that the decision taken by the Chief Justice of India shall be final and binding in nature. Such decision can be about appointment or transfer of judges. But Article 222 of the constitution states that the President may after consultation with the Chief Justice, can make decisions regarding transfer of judges. This implies that the opinion or the decision of the Chief Justice of India is not bound on the President.

Thus, the decision that was made in this judgement is to be considered as *per incurium* judgement, which questioned the constitutional mandate of India. This instance depicts how the judiciary encroaches the functions and responsibilities vested with the executive of our country. The Constitution of India clearly mandates that the strength of the judges of the Supreme Court and the High Court must be decided by the executive officials. However, this judgement has conspicuously surpassed the
provision of the Constitution, where the collegium system would decide on the appointment and transfer of judges.

Witness examination is an indispensable and crucial part of our criminal justice system. It is one of those tasks which must be performed with caution and sensitivity. The delay in hearing of cases also contributes largely due to the complexities in witness examination procedure. The witness examination becomes more difficult when the witness has to wait for years for the case to come up for hearing. Most of the witnesses, thus, don’t turn up for trials because of the huge lapse of time. Moreover, the quality of the statements given by witnesses also tends to degrade with passage of time, since they tend to forget some important points.

It becomes critical to suggest here that; the judiciary has expressly disregarded the “separation of powers” which is an important feature of the constitution. Appointment of judges is a function that comes under the realm of executive power. However, judiciary through the collegium system has overridden this function. The importance of the issue, examined above, is very crucial for smooth functioning of criminal justice system and hence can’t be neglected.

The rationale behind this is that the framers of the constitution, mostly legal philosophers, were very much aware of the significance to constrain the powers of the three pillars of our democratic government. The judiciary, the executive and the legislator have been granted different functions though some of them might be interdependent. However, each of these pillars should try their best not to abrogate the arrangements of the constitution. The judiciary ought not exceed its power by stating that its best for the country.

3.9.2. The Delinquencies of Judicial System

Judicial officers are bound to follow certain conduct and ethics which are attached to their profession. They are prohibited from indulging in unethical activities. Those actions that give undue advantage to the judicial officers, due to the reason of their position, should be avoided at all costs. These activities are detrimental and degrade the working of the
courts. Instances of these activities include: to secure a special remedy in a case before court for family members and acquaintances; receiving bribes, gifts or any personal favors; involving in inappropriate discussions with parties and advocates, representing those parties; being biased towards one party of the case proceedings; treating advocates and lawyers in the considerable outrageous and biased manner and so on.

“There's been a substantial debate in the past one year relating to the establishment of the Constitutional Evaluation Commission. It's been argued that the Commission comprising eminent jurists, parliamentarians who examine the actual functioning associated with five years of India's establishment and suggest regions of review. Obviously, this had resulted in an irrational criticism. Some suggested it as an attempt to ruin the luxurious character from the Constitution while some have suggested that it's an effort to undermine an excellent document made by Dr. Bhim Rao Ambedkar”.

While deciding on any case, a judge shall be rational and fair. Only after thoroughly going through the relevant facts and arguments, presented before them, they should make any such decision. Further it has been suggested by various researchers and analysts the personal views of a judge and the mind-set of the judiciary shall not affect their job of pronouncing fair and unbiased judicial decisions. There is an entire chain of examples where supreme court was questioned on their judgements.

In the landmark judgement of Maneka Gandhi v. Union of India, the central issue was regarding the seizure of the passport of the plaintiff. The passport as taken by the government officials on the grounds of public security Sec 10(3) (c) of the Passport Act 1967. During the act of seizure, she was not given any opportunity to speak and defend herself, thus denying her fair trial. A writ petition was filed in Supreme Court

309 M.P. JAIN, CONSTITUTIONAL LAW OF INDIA, 7, LEXIS NEXIS, 6TH ED., 2008
for violation of article 14\textsuperscript{311}, 19\textsuperscript{312} and 21\textsuperscript{313}. Though the judgement criticized the act of government officials, however it failed to answer some of the crucial constitutional issues. Restitutive justice, enshrined under article 14 of the constitution was anticipated as a relief from the apex court. However, the court did not address the issue leading to a situation where article 142 remained unanswered.

When an aggrieved person files a writ petition in Supreme Court of India, he/she awaits complete justice. The implication of complete justice here means that every single issue that has been brought by the petitioner in front of the court will be addressed by the court. The issue should be addressed in the form of proper judgement and not mere observations since Supreme Court of India is a justice delivery institution and not a compromise making body. While pronouncing the judgement, the Supreme Court did not consider Section 57(1)\textsuperscript{314} of the Indian Evidence Act and the section 166 of the Indian Penal code for penalizing the culprits. Critically analyzing this judgement, we can say that it raises certain issues regarding the authenticity of judiciary and its decisions. These issues ought to be further discussed in detail.

The purpose behind critically analysing the above cases is to throw light on the inconsistent nature of judgements given by the Apex Court on certain issues. These kinds of judgements highlight the biased nature of judiciary, which tends to favour the government and its executive to certain extent. The judicial officers shall realise that judiciary is an independent organ of the state and thus it ought to function without any biased opinions.

3.9.2.1 The Biased Approach of Indian Judiciary

\textsuperscript{311}CONSTITUTION OF INDIA, ARTICLE 14- EQUALITY BEFORE LAW THE STATE SHALL NOT DENY TO ANY PERSON EQUALITY BEFORE THE LAW OR THE EQUAL PROTECTION OF THE LAWS WITHIN THE TERRITORY OF INDIA PROHIBITION OF DISCRIMINATION ON GROUNDS OF RELIGION, RACE, CASTE, SEX OR PLACE OF BIRTH.

\textsuperscript{312}CONSTITUTION OF INDIA, ARTICLE 19- PROTECTION OF CERTAIN RIGHTS REGARDING FREEDOM OF SPEECH ETC.

\textsuperscript{313}CONSTITUTION OF INDIA, ARTICLE 21- PROTECTION OF LIFE AND PERSONAL LIBERTY NO PERSON SHALL BE DEPRIVED OF HIS LIFE OR PERSONAL LIBERTY EXCEPT ACCORDING TO PROCEDURE ESTABLISHED BY LAW.

\textsuperscript{314}SECTION 57(1) FACTS OF WHICH COURT MUST TAKE JUDICIAL NOTICE. —THE COURT SHALL TAKE JUDICIAL NOTICE OF THE FOLLOWING FACTS: — (1) ALL LAWS IN FORCE IN THE TERRITORY OF INDIA;]
The notion of fair trial and complete justice rests to a large extent on the judiciary. Factors such as number of judges in the country, their sensitivity towards cases and their mind-set are very critical for responsible judicial system in India. The Criminal Justice System in India, has witnessed some shocking and disturbing judgments of lower courts, which have conspicuously manifested the biased and prejudiced opinions of judges. The infamous verdict delivered by High Court of Madras in the case of Kilvenmani massacre can never be forgotten.

In this case, the Madras High Court acquitted the upper-caste landlords who were convicted by lower court for killing 42 Dalit labourers (including women and children) by burning them alive in a hut in Kilvenmani in Tamil Nadu in 1968. The ground given by High Court for acquitting them was that since most of the accused persons were rich landlords, they would never go themselves to the site and burn people alive. It is hard to believe this argument.315

It has been observed that many of the judges of lower courts and High Courts are orthodox, casteist and have religious prejudices in their opinions which are often reflected in their judgements. Usually when the case involves Muslims, Dalits or underprivileged section of society, the judiciary has been biased in their judgement and have favoured the upper class people as the judges themselves belong to.

In another horrifying incident in Bihar, Patna High Court replicated the same despicable mind set. The Court acquitted upper caste landlords who were charged for lynching Dalits in Bihar villages. There are two such instances where Patna High Court acquitted upper caste landlords (Ranvir Sena) who were charged for brutally killing many innocent Dalits including women and children. The first case was the Bathani Tola massacre that took place in Bhojpur in 1996. The accused included twenty-three upper caste landlords who ruthlessly killed twenty-one Dalits, including children and babies less than 10-month old. All the accused were convicted by the trial court, including three of them who were given capital punishment. But the Patna High Court, in 2012, acquitted all the accused stating that there was not enough

315 HTTP://WWW.LIVEMINT.COM/Politics/DQ0xQDBul30bAbLsOr7GlK/48-Years-After-Keezhvenmani-How-The-Dalit-Discourse-is-Play.html, Last Visited On 17TH November 2017
evidence to prove their guilt. This came as an utter shock to the entire nation and to criminal justice system. The judiciary completely ignored the significant evidence and witness statements that were produced in the court. The decision irreparably harmed the faith of citizens, especially minority class and underprivileged section of the society, in judiciary and its decisions.

In yet another case, in Lakshmanpur Bathe, the same group of Ranvir Sena, the militia of the upper castes landlord, killed approximately 58 persons by burning down their house in 1997. All the victims belonged to the Dalit community and included many children and pregnant women. The incident shocked the nation. Former Indian President late KR Narayanan called it a ‘national shame’. The trial court had convicted twenty-six people who were charged for killing approximately 60 people by burning them alive. The trial court observed that “More than the ‘rarest of the rare case’, it was a heinous crime”. Shockingly, the Patna High Court, in 2013, acquitted all the accused for “lack of evidence”.

“The trial court convicted several from among the accused. But an appeal from these convicted persons led the Patna high court to reverse their convictions, leading to their acquittal. The victims of this act of injustice have approached the Supreme Court. Whether the apex court overrules the acquittals by the Patna high court, and reconfirms the conviction of the accused, depends again on the mind-set of the judges who preside over the bench.”

Another significant judgment that was heavily criticised by everyone was in the case of ADM Jabalpur v. Shivkant Shukla. In 1975, by the orders of the President a state of national emergency was declared in India under Article 352. During emergency, the fundamental right enshrined in the constitution to ‘access the courts
for enforcement of the fundamental rights’ was also suspended. This issue was brought before the court in ADM Jabalpur case, where the scope of judicial power and audit was challenged. The principal issue was whether the fundamental right to access high court under Article 226 and Article 32 can be subject to suspension during emergency. Supreme Court held that “the direction of the emergency for the suspension of the fundamental rights was to avoid some immediate contingencies but if such rights will be allowed at that time than it would frustrate the objectives of the emergency. And therefore, no person was allowed to question his detention during the period of emergency under Article 359(1)”\textsuperscript{322}.

This judgement came as a moral blow to the principles and ideals enshrined in our Constitution. It violated the very rationale and notions behind Constitution of India of granting fundamental rights to citizens and individuals. Some of the fundamental rights can be suspended by the state, but only after stating any compelling and grave reasons. However, in none of the situation can it be justified to suspend the rights enshrined under Article 32. Suspension of Article 32 will automatically violate Article 14, 19, 20,21 and 22. The justification given by the Supreme Court, “that the petition at the time of emergency can frustrate the objective of the emergency” can be considered to some extent. But this does not imply that any person can be but behind bars without giving an opportunity of being heard. Such situation will violate the cardinal principle of rule of law.

Though Article 359(1) states that by President order, the right to enforce fundamental rights by accessing courts can be suspended during emergency. However, this does not imply that the power to avail procedural safeguards under the preventive detention act can’t be availed. Executive power must be performed within the constitutional limits. Executives cannot override the provisions of constitution or interpret it as per their selfish needs. Not only were the constitutional provisions violated by this judgement, but the principles of torts, Indian Penal Code and Indian Evidence Act

\textsuperscript{322} Suspension of the enforcement of the rights conferred by part iii during emergencies
(1) Where a proclamation of emergency is in operation, the president may by order declare that the right to move any court for the enforcement of such of the rights conferred by part iii (except article 20 and 21) as may be mentioned in the order and all proceedings pending in any court for the enforcement of the rights so mentioned shall remain suspended for the period during which the proclamation is in force or for such shorter period as may be specified in the order.
relating to wrongful confinement were also neglected. “It should be noted that the issue of national emergency suspends the enforcement of the fundamental rights but it does not mean that it will limit the power of the courts to issue writs under Article 226\textsuperscript{323} and Article 32\textsuperscript{324}, hence they have the power to issue the writ of habeas corpus whenever there is a situation of wrongful confinement.”\textsuperscript{325}

3.9.2.2. Objectifying the Minority

Our judicial system has numerous flaws which affect the efficacy of delivering justice to all. The instability and irregularity of verdicts given by different judges is one of them. It is often observed that the High Courts reverse the orders of lower courts which is sometimes based on rational facts and proper evidence. However sometimes the reasons given for reversing the verdicts are unreasoned and flawed. Further, contradicting judgments are given by the different judges of the Supreme Court pertaining to similar cases and facts. This happens because the personal beliefs and values of judges are reflected in their approach towards a case. Their beliefs can be religious, casteist or national which subject the accused to high prejudices. Also the judiciary’s blind faith in police and its investigation can also lead to wrongful conviction.\textsuperscript{326}

Judiciary’s blind faith in police and its investigation can also lead to wrongful conviction. There have been numerous instances, mostly related to terrorism activities, where the police have arbitrarily arrested people from Muslims community. Further they fabricate false evidence to prove their guilt. When the police officers fail miserably to arrest the real terrorist or culprits, they target the Muslim youths to cover their failure. Such abuse of power by police and delinquencies of judiciary to examine the evidences produced in court leads to miscarriage of justice. It’s a horrible state of affairs for not only those innocent people who are wrongfully convicted and put behind bars but also the victims of the crime who have not got justice because the real culprits are still roaming freely.

\textsuperscript{323} Article 226- Power of High Courts to Issue Certain Writs
\textsuperscript{324} Article 32- Power of Supreme Court To Issue Certain Writs.
\textsuperscript{325} M.P. JAIN, CONSTITUTIONAL LAW OF INDIA, 1430-1437, LEXIS NEXIS, 6TH ED., 2008
The process of appeal is an expensive one and not everyone can afford it. It has been observed that the police often target poor and destitute who have no means of hiring an expensive lawyer or fighting a case or several years in court. The family and relatives of the people who are wrongfully convicted have to suffer too. The financial burden, the mental torture and the time-consuming procedure of trials and appeals is a nerve-racking experience for them. It has been documented in many news articles and journals that Maoist extremism prevalent in states of Chhattisgarh, Jharkhand and Andhra Pradesh have resulted in aimless arrests by police. In such situation, the families of poor and tribal youth have suffered miserably.

It takes decades for the petition of appeal to be heard and the decision of higher courts to acquit the wrongfully convicted. It is laborious process, where most of the victims give up hope on the justice system of the country. The judicial injustice results in secondary victimization of the people who are wrongfully convicted. In 2012, Jamia Teachers’ Solidarity Association, took out a report on the plight of those who were wrongfully arrested and convicted. The report, *Framed, Damned, Acquitted: Dossiers of a ‘Very’ Special Cell*[^1], highlights the atrocities of police officers, the arbitrariness and abuse of power at the hand of investigative officers and the carelessness of the judiciary. The report consists of 16 cases where youths from Muslim community were wrongfully detained and were framed for crimes they never committed. Most of the accused were produced before Patiala Courts in Delhi, from there they were remanded to police custody or Tihar Jail. In all of these 16 cases, the accused had to spend years waiting for their trial. They were finally acquitted by the High Court of Delhi.

Describing the plight of the accused, the report stated “Even though these men – whose cases we document here – were acquitted, the process itself, first of illegal detention and torture, then of incarceration and trial, exacted a heavy toll. Businesses were destroyed; family members suffered humiliation, trauma and even mental illnesses; children had to abandon studies while parents died heartbroken. Some cases like that of young Md. Amir Khan, which were practically open and shut cases, where the prosecution had virtually no leg to stand on, got drawn out for 14 painful and long

years.”

One of the accused, in the report, named Syed Maqbool Shah, described his plight after getting released, as “I don’t know what to do. I have no job and no hope of getting any.” He was arrested by Police on charges of Lajpat Nagar blast case in Delhi in 1996. He spend 14 precious years of his youth in jail being held as an undertrial.

Another book, *Prisoner No. 100: An Account of My Nights and Days in an Indian Prison*, is an account of the horrifying years, a young Kashmiri woman had to suffer because of being wrongfully arrested by the Delhi Police. Anjum Zamarud Habib, a political activist was arrested under the Prevention of Terrorism Act (POTA) and was sentenced to a five-year jail term. She appealed in High Court and was released in December 2007. Recalling her experiences, Anjum says, “I am a free person today but the wounds and scars that jail has inflicted on me are not only difficult, but impossible to heal.”

### 3.9.2.3. Death Penalty and Arbitrariness in The Judicial Process

Death Penalty has always been considered as the most severe punishment to be given to a criminal who has committed the most serious and gravest crime. In India, it is given in “rarest of the rare” cases that demand such punishment to set an example before the country. However, there are no fixed rules or laws on deciding what case have to be considered as “rarest of the rare” cases. It is solely based on the discretion of the judges and their approach towards a case. For example, for some judges, offenses relating to sexual violence and rape is regarded as the most gravest of crimes and thus they would not hesitate to give death sentence to criminals. However, for some judges their sensitivity towards sexual violence crime is balanced with regard to other crimes such as murder.

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329 [IBID](IBID)

Justice P.N. Bhagwati has always been against the concept of death sentence and considers it as an arbitrary instrument at the hands of judiciary. In the famous case of Bachan Singh v. State of Punjab\textsuperscript{331}, Justice P.N. Bhagwati observed that death penalty violates the provisions of constitution and is infringement of human right at both national and international levels. He further stated that death penalty has become a tool of arbitrariness for judiciary and it is a huge threat to the stability of criminal justice administration in our country. Since there is no legal regulations or specific guidelines that are binding on the judges while pronouncing death sentence, thus the practice should be abolished. It is highly dangerous and inappropriate to depend on the judiciary to execute the right of giving death penalty, to anyone they consider, as deserving criminal. It would ultimately collapse the entire criminal justice administration.

He further stated-

“It is, therefore, obvious that when a judge is called upon to exercise his discretion as to whether the accused shall be killed or shall be permitted to live, his conclusion would depend to a large extent on his approach and attitude, his predilections and preconceptions, his value system and social philosophy and his response to the evolving norms of decency and newly developing concepts and ideas in penological jurisprudence.”\textsuperscript{332}

Highlighting on the issue, Justice Bhagwati expanded the concept and emphasised on the existent approach of different judges and their decision-making process that differ with every kind of crime. This leads to inconsistency in the sentencing policy and destroys the ideals of justice system.

As he further observed-

“One judge may have faith in the Upanishad doctrine that every human being is an embodiment of the divine and he may believe with Mahatma Gandhi that every offender can be reclaimed and

\textsuperscript{331} AIR 1980 SC 898

\textsuperscript{332} PARA 47, PG. 1362, BACHAN SINGH V. STATE OF PUNJAB (MINORITY JUDGMENT) (AIR 1982 SC 1325); PARAS 64-65, ROYAL COMMISSION ON CAPITAL PUNISHMENT 1949-1953, REPORT, LONDON, HER MAJESTY'S STATIONERY OFFICE, 1953.
transformed by love and it is immoral and unethical to kill him, while another judge may believe that it is necessary for social defence that the offender should be put out of way and that no mercy should be shown to him who did not show mercy to another. One judge may feel that the Naxalites, though guilty of murders, are dedicated souls totally different from ordinary criminals as they are motivated not by any self-interest but by a burning desire to bring about a revolution by eliminating vested interests and should not therefore be put out of corporal existence while another judge may take the view that the Naxalites being guilty of cold premeditated murders are a menace to the society and to innocent men and women and therefore deserve to be liquidated. The views of judges as to what may be regarded as special reasons are bound to differ from judge to judge depending upon his value system and social philosophy with the result that whether a person shall live or die depends very much upon the composition of the Bench which tries his case and this renders the imposition of death penalty arbitrary and capricious”.

Justice Bhagati also criticized the police authorities and investigative agencies. He brought to light some of the malpractices adopted by police department to gather evidence and confession by illegal methods. Commenting on the work of investigative officers, he stated that there are numerous areas that demand our attention for improvement. Since 1982 to present 2008, the methods adopted by police are still the same and are not based on modern scientific techniques and methods. The methods of investigation are primitive and unrefined. Third degree tortures are still resorted to, by the police, that too very often.

He describe it in conspicuous terms:

“Our convictions are based largely on oral evidence of witnesses. Often, witnesses perjure themselves as they are motivated by caste, 

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333 PARA 49, PG. 1362, BACHAN SINGH V. STATE OF PUNJAB (MINORITY JUDGMENT) (AIR 1982 SC 1325); PARAS 64-65, ROYAL COMMISSION ON CAPITAL PUNISHMENT 1949-1953, REPORT, LONDON, HER MAJESTY’S STATIONERY OFFICE, 1953.
communal and factional considerations. Sometimes they are even got up by the police to prove what the police believes to be a true case. Sometimes there is also mistaken eyewitness identification and this evidence is almost always difficult to shake in cross-examination. Then there is also the possibility of a frame up of innocent men by their enemies. There are also cases where an overzealous prosecutor may fail to disclose evidence of innocence known to him but not known to the defence. The possibility of error in judgment cannot therefore be ruled out on any theoretical considerations. It is indeed a very live possibility…”

Justice Bhagwati warned:

“Howsoever careful may be the safeguards erected by the law before death penalty can be imposed, it is impossible to eliminate the chance of judicial murder… the possibility of error in judgment cannot therefore be ruled out on any theoretical considerations. It is indeed a very live possibility and it is not at all unlikely that so long as death penalty remains a constitutionally valid alternative, the court or the State acting through the instrumentality of the court may have on its conscience the blood of an innocent man”

These infirmities and delinquencies in the criminal justice system, as explained above by Justice Bhagwati, were also highlighted during the making of constitution. The constituent assembly had raised similar concerns regarding the danger that death penalty can pose to the nation thirty years before. One of the members of the constituent Assembly, Prof. Shibbanlal Saksena, had warned about the punishment of hanging a criminal to death. Prof Saksena was himself awarded death penalty for his involvement in 1942 independence movement. He spend 26 months in a condemned cell before being released.

334 IBID PARA 51
335 IBID PARA 54
He had the opportunity to share his painful and horrific experience in the jail. As he described his experience in Assembly, he stated that he had witnessed 37 persons being hanged during his term in jail. He believed that out of these 37 prisoners, seven of them were completely innocent and were wrongly framed for charges. During the debates in Assembly, he urged for an ‘inherent right to appeal to the Supreme Court’ when death sentence is given to anyone. He suggested that appropriate provisions shall be incorporated for the right to appeal against death sentence.

As he stated in Assembly—

“I have seen people who are very poor, not being able to appeal as they cannot afford to pay the counsel. I see that Article 112 says that the Supreme Court may grant special leave to appeal from any judgment, but it will be open to people who are wealthy, who can move heaven and earth, but the common people who have no money and who are poor will not be able to avail themselves of the benefits of this section. Therefore, in the name of those persons who are condemned to death and who though innocent were hanged in my presence, I appeal to the House that either in this article or in any subsequent article there must be made a provision that those who are condemned to death shall have an inherent right of appeal to the Supreme Court.”

To strengthen the above view, Dr. Ambedkar, the chairman of the Constitution Drafting Committee, expressed his opinion as—

“rather than have a provision for conferring appellate power upon the Supreme Court to whom appeals in cases of death sentence can be made, I would much rather support the abolition of the death sentence itself. That, I think, is the proper course to follow, so that it will end this controversy. After all, this country by and large believes in the principle of non-violence. It has been its ancient tradition, and although people may not be following it in actual practice, they certainly adhere to the principle of non-violence as a moral mandate which they ought

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336 Constituent Assembly of India, Vol. 8, 3rd June 1949.
to observe as far as they possibly can and I think that having regard to this fact, the proper thing for this country to do is to abolish the death sentence altogether.”

The idea is to recognize the problem of criminal justice administration with regard to death penalty. Despite the notion of ‘rarest of rare’ cases, giving death punishment to criminals is considered as an arbitrary act. Unfortunately, most of the judges in our country have expressed their opinion in favour of the death sentences holding it as constitutional, and directing that it should be considered only for most severe crimes.

3.9.2.4. Disparity in Sentences –

A crucial aspect of wrongful conviction is disparity in verdicts given by court. Disparity in sentencing prevails “when defendants with similar criminal records found guilty of similar criminal conduct receive dissimilar sentences.” There are two significant components that influence the decision-making process. The first is the ‘legitimate factors’, that decide how much punishment shall be awarded to the convict. These include the type of offense, the seriousness of offense, the intention of the accused, direct and circumstantial evidence and so on. The second one is ‘extra-legal factors’ that influence the sentencing policy. These include race, ethnicity, economic standing, gender, or the exercise of certain procedural rights (e.g., trial).

It has to be kept in mind that all sentencing variation are not unjustified. In some cases where the seriousness of offense or the blameworthiness of the offender is different, though the crime committed is same, sentencing disparity can be reasonable and necessary. Sentences represent the true nature of the crime committed and harm suffered by the victims. This disparity has to be examined by differentiating between those factors that are legitimate and those factors whose deliberation violated the offender’s constitutional rights.

**Akshardham Case (2015)**

This case is a recent and glaring example of the discrepancies in the judgment of Supreme Court. There has been numerous instance where Supreme Court has denied

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337 Constituent Assembly of India, Vol 8, 3rd June 1949
giving relief to the victims of abuse of power of the police or executives, thereby denying them their human rights. This case is one of those numerous instances.

In 2016, a joint plea was filled in Supreme Court by six people who were wrongly convicted in Akshardham terror case (2002). They were prosecuted and imprisoned for more than a decade till they were exonerated by the Supreme Court in 2014. However, when they filed a petition in Supreme Court asking for compensation for wrongful conviction, the court refused to entertain their petition.\textsuperscript{338}

The dismissal of their petition had serious repercussions on the human rights movement in India. It practically endorses the continuation of the arbitrary decisions which the police and investigation authorities make while aimlessly detaining and arresting Muslim youth on charges of ‘Islamic terrorist’ connection or while arresting and torturing tribal men and women and charging them of Maoist links. “It provides them with immunity against the punishment that they deserve for their ham-handed policy of persecuting innocent citizens.”\textsuperscript{339} In this case also, it was clearly visible that the Gujrat Police had fabricated the evidence to prove these six men guilty of the bomb blast. This has also brought enormous dishonour to the police for their alleged false encounters.

“Curiously enough, while one Supreme Court bench acquitted the victims of such police persecution, another bench refused to grant them the right to compensation for their unjustified incarceration. What explains the inconsistency in the two judgments? The six persons who sought compensation were accused in the Akshardham terror attack in Gujarat in 2002. After spending some 10 years in prison, they were acquitted by a Supreme Court bench in 2014 in response to their appeal against their conviction. The bench comprising justices A.K. Patnaik and V. Gopala Gowda held that the prosecution failed to establish their guilt beyond reasonable doubt and they deserved exoneration from all the charges.”\textsuperscript{340}

After the Supreme Court acquitted them of all the charges, these six wrongfully convicted persons after a year filed another petition in the Apex court asking for

\begin{footnotesize}
\textsuperscript{339} Ibid Para 2
\textsuperscript{340} Ibid Para 3
\end{footnotesize}
compensation for the unmeasurable loss that they had suffered for being in prison for nearly 10 years. The counsel representing them was the famous advocate K.T.S. Tulsi. While presenting his case he appraised the bench stating, “The apex court gave them back freedom but who can give them back the 10 years they spent behind bars for no fault? The state must adequately compensate them as it violated the right to life brazenly.”

However, this time the judiciary failed to provide justice to them. While pronouncing the judgement, a bench comprising of Justices Dipak Misra and Justice R. Banumathi, rejected their petition for relief of compensation on the ground that if a court acquits any person from a charge, such acquittal does not automatically entitle those acquitted to compensation. Further if the court gives compensation to those acquitted then it will set a ‘dangerous precedent.’

The reasons given in the judgement are not rational and just. They have no applicability of judicial mind. While deciding on any case of compensation, the judges can decide through numerous factors, whether compensation ought to be given or not. It is true that not every case necessitates compensation, however in this case it was very much required. Secondly, the ground of setting ‘dangerous precedent’ is full of mistakes and has not logic to it. By not giving compensation to the acquitted victims of wrongful prosecution, sets a wrong example in society. It encourages the arbitrary and excessive use of power by the police and investigative authorities. This judgement had far reaching consequences, especially fortifying those who were responsible for such wrongful arrest.

It needs to be emphasized here that those people who are convicted in lower court have to spend a large amount of money to arrange for lawyers for the purpose of appeal in higher court. This is an arduous and expensive process. Apart from the advocates fees there are several other financial burdens to fight a case in higher court, until they get justice. And in this case the time period of 10 years is very crucial to be considered. Further, the mind-set of the judge who is going to hear their case is also very important. Not every judge is perceptive enough to analyse all the evidence and

341 IBID PARA 4
decide the matter with unbiased and just opinion. There are thousands of innocent people who have been detained in jail since many years. They have been arrested on false charges of ‘Islamic terrorism’ or ‘Maoist extremism’. Their fate depends on the unsympathetic and independent verdict of judicial system.

**Challenges to Assessing Sentencing Disparity**

In order to examine the justification and need for disparity in similar cases we have to disentangle the objectives of punishment from the decision of punishment of the judge. “Throughout the many characterizations of the goals of sentencing, four goals stand out.”

The first goal is deterrence effect for the society and potential criminals. The second goal, is to detain the offender so as to stop him for further committing any crime. The third goal is the retribution against the wrongdoer for his criminal acts and social transgressions. Finally, the objective of punishment is to rehabilitate the criminal and thereby assuring that he/she would not indulge in any criminal activity in future. A well-structured policy of sentencing will not adhere to a specific single objective of punishment for guiding the judges in their decisions. Since these four goals are partially complementary “the main burden of reconciling the competing goals of the criminal justice system falls on the sentencing judge”.

As has been stated by **Justice Richard Posner**: -

“A judge is more comfortable in thinking that his decisions are compelled by ‘the law’—something external to his own preferences—than by his personal ideology, intuitions, or suite of emotions. But there is also a natural tendency to try to reassure the public that judicial discretion is minimal, in order to defend the legitimacy of the judiciary. The tendency is paradoxically most pronounced at the Supreme Court level, the paradox being that it is the most political court. Precisely because it is a political court, its members feel the greatest need to deny that it is that. The aim is to enhance judicial

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342 Blumstein, Cohen, Martin, Tonry 1983, 48
power relative to that of other branches of government. I am not, however, meaning to suggest that it is wrong for the judges to be concerned about their power relative to those branches. The judiciary is a vital branch of government and needs to protect itself against inroads, though I am sympathetic to arguments that the judiciary, and in particular the Supreme Court, flexes its muscles too strongly.”

The insight of judiciary has to be reasoned on their performance. However very scant number of research studies on the association between on the expected and the existent judicial performance is there. People who accuse judges for biasness should be sensitive to the fact that there is relationship relation between perception and performance. “Judges perceived by the public or by the legal community as disfavouring a group may be regarded as biased, but that perception is unfair if the judges’ votes in cases do not disfavour the group. For example, it may be unfair to accuse an appellate judge of pro-state bias in criminal cases if the judge votes for defendants at a higher rate than several other judges on the same court”. 344

3.9.2.5. The Problem of Under-Trials and Bail

It was the Hussainara Khaatoon case345 the court has effectively cut open the disturbing organic defects in the criminal justice system for the first time before the nation when it challenged the increasing impact of delayed trial, bail and the non-availability of free legal aid services and questioned the rights of the suspect and the accused. It is pointed out that the attitude of legal and the constitutional system are

343 Sir Richard Posner, how judges think, for other depictions of the formalist approach to judging, see, for example, Brian Bix, jurisprudence: theory and context 183 (Sweet & Maxwell ltd. 4th ed. 2006) (1996) (describing formalist judicial decision making as "a nearly mechanical, nearly syllogistic move from basic premises to undeniable conclusion"); Brian Leiter, positivism, formalism, realism, 99 Colum. L. Rev. 1138, 1145-46 (1999) (book review) (describing legal formalism as a "descriptive theory of adjudication according to which (1) the law is rationally determinate, and (2) judging is mechanical. It follows, moreover, from (1), that (3) legal reasoning is autonomous, since the class of legal reasons suffices to justify a unique outcome; no recourse to non-legal reasons is demanded or required.")


345 Hussainara Khatoon V. State of Bihar, 1979 SCR (3) 532, 9th March 1979
highly insensitive towards the rights of the poor who is in pursuit of justice. This seems to be so because of the high element of dependency of justice administrative system on the Judges and prosecution of the trial courts. It was also pertinent to note that the humanity and human consideration are not of any value and concern in the trial proceedings and the respect for the dignity of an individual and individual freedom was found absent. Therefore, as pointed out by Justice Bhagwati, it can be stated that the practical implications of provisions for bail operated very harshly against the poor.\footnote{Mohammad Ghouse, The Pre-Trial Criminal Process and The Supreme Court, Vol 13, Indian Bar Review, (1986)}

In Majority of the cases the alleged accused would be the sole wage earner of his family, having a living standard of below poverty line. Therefore, there should be necessary measures to sensitize the bail procedures mentioned in the code to cop up with the requirements and peculiarity of the police system to sort out the problems face by the poor population of India. In the adversary process, right to bail of the accused person is coterminous to the accusatorial system. Accusatorial system propounds the notion that an alleged accused person is ought to be considered innocent until his guilt is proved beyond reasonable doubt by way of an adversarial process, therefore he shall not be subjected to any sort of deterrence before his conviction, for that may defeat his confidence in the preparation of his defence.

The concept of bail is embodied in the code to protect the interest of the accused person till he has proven guilty. It is observed that a person will be in a detrimental position to find a counsel to defend his case and to support his family in meeting the expenses of employing attorney for representing him in the court and other miscellaneous expenses related to his defence. Therefore, the accusatorial system constituted in its procedures an option to avail bail in normal circumstances, which in turn enable the accused to remain outside of jail until the trial court has found him guilty of the offence.\footnote{Mohammad Ghouse, The Pre-Trial Criminal Process and The Supreme Court, Vol 13, Indian Bar Review, (1986)}
The Code of Criminal Procedure, 1973 specifies that an accused can be granted bail in case of bailable offences, on personal bond, with or without sureties. In instances where a person is charged for bailable offenses, he has a statutory right to bail. In cases of non-bailable offenses not punishable with death or life imprisonment, the decision of granting is judiciary's discretion. Further if the accused is woman or child, bail can be granted at the discretion of the court even if the offense is a non-bailable offences punishable with death or life imprisonment. It is important to note here that the discretion given to the court to grant bail in cases of non-bailable offenses not punishable with death or life imprisonment is an important aspect of criminal justice system. It can be inferred from this provisions of the code, that the drafters of the code wanted to consider that an accused shall not be presumed guilty on mere accusation of chargers.

However, the classification of the offences into bailable and non-bailable is a criterion which is prepared under the code to subjugate the rights of the accused in availing bail. For this reason, he has to undergo long-term confinement as long as the police are not completing the investigation process and a trial is initiated and concluded by the court.

The Law Commission of India in its 78th report, in 1975, stated clearly that the population of under trial prisoners constituted 57.6 percent of the total prison population in India. However, no major steps were taken to solve the problem.

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348 sec 435- the code of criminal procedure-state government to act after consultation with central government in certain cases:
(1) the powers conferred by sections 432 and 433 upon the state government to remit or commute a sentence, in any case where the sentence is for an offence-
(a) which was investigated by the Delhi special police establishment constituted under the Delhi special police establishment act, 1946 (25 of 1946), or by any other agency empowered to make investigation into an offence under any central act other than this code, or
(b) which involved the misappropriation or destruction of or damage to, any property belonging to the central government, or
(c) which was committed by a person in the service of the central government, while acting or purporting to act in the discharge of his official duty shall not be exercised by the state government except after consultation with the central government.
(2) no order of suspension, remission or commutation of sentences passed by the state government in relation to a person, who has been convicted of offences, some of which relate to matters to which the executive power of the union extends, and who has been sentenced to separate terms of imprisonment which are to run concurrently, shall have effect unless an order for the suspension, remission or commutation, as the case may be, of such sentences has also been made by the central government in relation to the offences committed by such person with regard to matters to which the executive power of the union extends.
3.9.3. The Notion of Fair Trial

The ‘right to fair trial’ is a significant principle of International Human Rights law and ought to be the hallmark of any civilized nation. This incorporates two essential aspects of criminal prosecution. First being ‘presumption of innocence’ and second is that ‘guilt must be proved beyond reasonable doubt’. These two components of right to fair trial have been adopted by all common law countries. It is tailored to protect the basic rights and freedoms of individuals by prohibiting whimsical deprivation of the same. This idea of ‘right to fair trial’ has its roots in the ‘principles of natural justice’. The standards which form the basis of accessing whether a trial was fair or not, are multiple and complex and in a constant state of evolution.

In Indian Criminal Justice System, the right to fair trial has been incorporated in the constitution as well as the criminal procedural code. Keeping in mind, the significance of fair trial, the Indian judiciary has always performed within the constitutional contours promoting the principles of natural justice.

Observing the growing horizons of fair trial the Supreme Court in Zahira Habibula case said in the following words its importance: “The principle of fair trial now informs and energizes many areas of the law. It is reflected in numerous rules and practices. It is a constant, ongoing development process continually adapted to new and changing circumstances, and exigencies of the situation - peculiar at times and related to the nature of crime, persons involved - directly or operating behind, social impart and societal needs and even so many powerful balancing factors which may come in the way of administration of criminal justice system………the principle of a fair trial manifests itself in virtually every aspect of our practice and procedure”.

The Apex Court also observed that “Each one has an inbuilt right to be dealt with fairly in a criminal trial. Denial of a fair trial is as much injustice to the accused as is

350  Zahira Habibullah Sheikh & Anr v. State of Gujarat & Ors,
to the victim and the society. Fair trial obviously would mean a trial before an impartial Judge, a fair prosecutor and atmosphere of judicial calm. Fair trial means a trial in which bias or prejudice for or against the accused, the witnesses, or the cause which is being tried is eliminated. If the witnesses get threatened or are forced to give false evidence that also would not result in a fair trial. The failure to hear material witnesses is certainly denial of fair trial.”

3.9.3.1. Presumption of Innocence and Wrongful Convictions

According to Article 14(2) of the International Covenant on Civil and Political Rights “Everyone charged with a criminal offense shall have the right to be presumed innocent until proved guilty according to law.” The principal part of the right to fair trial is that the burden to prove an individual guilty lies on the prosecution and that the alleged offender should always be given the benefit of doubt. Although this article doesn’t specify the standard of proof in the Indian context it is taken to mean ‘proof beyond reasonable doubt’. This principle is based on the legal adage as was propounded by the Supreme Court of The United Sates in Coffin v. United States in the following words “no man should be condemned on a criminal charge in his absence, because it was better to let the crime of a guilty person go unpunished than to condemn the innocent.”

Presumption of innocence is the cardinal component of the right to fair trial and holds considerable significance. No trial can begin without considering this principle in court. Presumption of innocence implies that burden of proving the guilt of an accused lies on the prosecution. Until the guilt is proved beyond reasonable doubt, the accused is considered to be innocent in the eyes of law and thus has the benefit of doubt. This principal is primarily to protect the interest of the accused in criminal trial. This presumption in fact is a legal instrument created in favour of the accused based on the legal inference that most of the accused may turn out to be completely innocent and thus shall not be given he status of a criminal during trial.

351 International Covenant on Civil And Political Rights, Available At Http://Www.Ohchr.Org/En/Professionalinterest/Pages/Ccpr.Aspx,
352 Coffin v. United states, 156 U.S. 432 (1895)
While constantly and incessantly questioning the frequent use of the principle of ‘presumption of innocence’ the court observed in Shivaji Sahebrao Bobade v. State of Maharashtra “Jurisprudential enthusiasm for presumed innocence must be moderated by the pragmatic need to make criminal justice potent and realistic. A balance has to be struck between chasing chance possibilities as good enough to set the delinquent free and chopping the logic of preponderant probability to punish marginal innocents.” But then again this doubt, in opinion, is raised mostly because of the manner in which this principle was applied by inexperienced and less competent judges.

The Apex Court in State of U.P. v. Naresh and Ors postulated:

“every accused is presumed to be innocent unless his guilt is proved. The presumption of innocence is a human right subject to the statutory exceptions. The said principle forms the basis of criminal jurisprudence in India.”

In case of Kali Ram v State of Himachal Pradesh, the Supreme Court emphasized the importance of this right and the presumption of innocence and the duty of the prosecutor, defense counsel and other court authorities involved in a case to not pre-judge a case before the final verdict. It held as follows:

“It is no doubt true that wrongful acquittals are undesirable and shake the confidence of the people in the judicial system, much worse, however, is the wrongful conviction of an innocent person. The consequences of the conviction of an innocent person are far more serious and its reverberations cannot but be felt in a civilized society. Suppose an innocent person is convicted of the offence of murder and is hanged, nothing further can undo the mischief for the wrong resulting from the unmerited conviction is irretrievable. To take another instance, if an innocent person is sent to jail and undergoes the

353 (2001) 4 SCC 324
354 1973 AIR 2773
sentence, the scars left by the miscarriage of justice cannot be erased by any subsequent act of expiation.»355

3.9.3.2. Independent, Impartial and Competent judges and Wrongful Convictions

One of the institutional frameworks that allow the right to fair trial be exercised and enjoyed is that of an independent and impartial court which is also the competent one to try the case. A presupposition of independence of any institution is that it is functionally insulated from the undue interference or influence of any other administrative unit of the state, in our case the judiciary is independent in its functioning from the influence of other executive branches of the state.

In Indian judicial system, the state government is responsible for appointing the sessions judges and judicial magistrates, after consulting the high courts of respective state. However, after the appointment is done by the state government, the government has no role to play in the working of those judges. The lower court judges are only answerable to the high court of their state and not the government. Government can in no capacity influence or interfere with the decisions of the Court. The independence of judiciary of subordinate judges is hence secured. Further the provision of Constitution, for instance Article 50, expressly proclaims that there shall be separation of power between executive, legislature and judiciary.356

For securing impartiality in the justice system, Section 479 of Criminal Procedural Code provides that a judge or magistrate who is either a party to the case or is otherwise personally interested shall not preside over such case. The notion behind this provision is that “no man shall be judge in his own cause”. In Shyam Singh v. State of Rajasthan357, the court observed that “the question is not whether a bias has actually affected the judgment. The real test is whether there exists a circumstance

355 KALI RAM vs STATE OF HIMACHAL PRADESH, 1973 AIR 2773
356 TIWARI
357 1973 CRI LJ 441, 443, (RAJ.)
according to which a litigant could reasonably apprehend that a bias attributable to a judicial officer must have operated against him in the final decision of the case”.

The rationale behind incorporating this section is to secure fairness and unbiased decisions that would be born if the power to frame charges of the criminal nature would rest in the hands of a political or an administrative entity. During criminal trials, the state is responsible for prosecuting the accused as a crime is considered as a public offense committed against the state. Further, the fact that the investigative agencies is also a branch of the state, it is extremely important that the judiciary is visibly free from the shackles of executive control or influence. Section 6 of the Criminal Procedure code embodying the above mentioned principle separates the duties of executive magistrates from that of judicial magistrates. The constitutional provisions, including Article 50, necessitates that the government shall take all requisite measures to secure the independence of judiciary from executive. Impartiality can be imputed from the conduct of a judge but bias is a deciding factor for the ascertainment of a court’s impartiality.

Commenting upon the abuse of court processes in order to achieve a wrongful conviction, the court observed in Vinod Kumar v State of Punjab\textsuperscript{359} follows: “We have expressed our agony and anguish the manner in which trials in respect of serious offences relating to corruption are being conducted by the trial courts. Adjournments are sought on the drop of a hat by the counsel, even though the witness is present in court, contrary to all principles of holding a trial. That apart, after the examination-in-chief of a witness is over, adjournment is sought for cross-examination and the disquieting feature is that the trial courts grant time…… there is no cavil over the proposition that there has to be a fair and proper trial but the duty of the court while conducting the trial to be guided by the mandate of the law, the conceptual fairness and above all bearing in mind its sacrosanct duty to arrive at the truth on the basis of the material brought on record. If an accused for his benefit takes the trial on the path of total mockery, it cannot be countenanced. The Court has a sacred duty to see that the trial is conducted as per law. It is anathema to the concept of proper and fair trial.”

\textsuperscript{358} ARJUN SUDHIR, FAIR TRIAL AND THE PROSECUTOR: A COMPARITIVE STUDY OF INDIA AND HE US,
\textsuperscript{359} VINOD KUMAR V. STATE OF PUNJAB, CRIMINAL APPEAL NO. 554 OF 2012
3.9.3.3. Venue of trial and Public Hearing

Another important facet of fair trial is that it necessitated a public hearing in an open court. Article 14(1) of the International Covenant on Civil and Political Rights ‘entitles’ an individual to the same in the following words: “All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”

“A judgment is considered to have been made public either when it was orally pronounced in court or when it was published or when it was made public by a combination of those methods.”

This right is not just the prerogative of the parties involved but also the masses at large. This right means that the hearing is conducted orally and publically and this should be done by the court suo-moto without any specific request from the parties involved. It is Court’s prerogative to notify, the parties and other members of public who would be interested in the hearing, about the time and place of public hearing. The court is also obliged to furnish adequate facilities for the same.

The court while emphasizing on the need to take into account the inspiration of trust in the public, of the courts through the administration of justice observed in Naresh Sridhar Mirajkar v. State of Maharashtra as follows: “A Court of justice is a public forum. It is through publicity that the citizens are convinced that the Court renders even-handed justice, and it is, therefore, necessary that the trial should be open to the public and there should be no restraint on the publication of the report of the Court proceedings. The publicity generates public confidence in the administration of justice. In rare and exceptional cases only, the Court may hold the trial behind closed doors, or may forbid the publication of the report of its proceedings during the pendency of the litigation. Long ago, Plato observed in his Laws that the citizen should attend and listen attentively to the trials. Hegel in his

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360 Justice G. Malathi, from trial to final judgement, 58 (2016)
361 1967 air 1
Philosophy of Right maintained that judicial proceedings must be public, since the aim of the Court is justice, which is a universal belonging to all. Save in exceptional cases, the proceedings of a Court of justice should be open to the public.”

3.9.3.4. Double Jeopardy

Double Jeopardy is based on two main principles - the doctrine of *Autrefois Acquit* and the doctrine of *Autrefois Convict*, which imply previously acquitted and previously convicted respectively. The principle of double jeopardy prohibits the legal system to put to trial any person who has already been acquitted or convicted by the court regarding the same offense or some other offense which is based on same facts. This doctrine has been aptly incorporated in our constitution under Article 20(2) which states that: “Protection in respect of conviction for offences- No person shall be prosecuted and punished for the same offence more than once”. This Article is supported by the provisions of Criminal Procedural Law under Section 300.

Section 300 guarantees that if an individual has been acquitted or convicted for an offense, he would be protected from being tried for the same offense anywhere in India. However, the principle of double-jeopardy does not protect an individual from

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362 Naresh Shridhar Mirjakar v State of Maharshtra, 1967 air 1

363 Person once convicted or acquitted not to be tried for same offence.

(1) a person who has once been tried by a court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under subsection (1) of section 221, or for which he might have been convicted under sub- section (2) thereof.

(2) a person acquitted or convicted of any offence may be afterwards tried, with the consent of the state government, for any distinct offence for which a separate charge might have been made against him at the former trial under sub- section (1) of section 220.

(3) a person convicted of any offence constituted by any act causing consequences which, together with such act, constituted a different offence from that of which he was convicted, may be afterwards tried for such last- mentioned offence, if the consequences had not happened, or were not known to the court to have happened, at the time when he was convicted.

(4) a person acquitted or convicted of any offence constituted by any acts may, notwithstanding such acquittal or conviction, be subsequently charged with, and tried for, any other offence constituted by the same acts which he may have committed if the court by which he was first Tried was not competent to try the offence with which he is subsequently charged.

(5) a person discharged under section 258 shall not be tried again for the same offence except with the consent of the court by which he was discharged or of any other court to which the first-mentioned court is subordinate.

(6) nothing in this section shall affect the provisions of section 26 of the general clauses act, 1897 , (10 of 1897 ) or of section 188 of this code.
being tried for an offense which is different from the offense he was previously acquitted/convicted.

This provision is also grounded on the common-law maxim of “nemo debet vis vexari” which literally means that no individual should be put at peril for the same offence again. Further, this doctrine has secured international position under Article 14(7) of the ICCPR that states: “No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country”.

In *Jitendra Panchal v. Intelligence Officer, N.C.B*364, while seizing a consignment in Newark, USA it came to the knowledge of the investigating officers that the appellants were involved in drug trafficking to the States as well as Europe out of India, and the appellant was arrested in Austria and extradited to the US, prosecution against them was also launched in India, on a complaint in the subsequent year in a special court the appellant was complained against off. The appellants were charged and tried against in the District Court at Michigan, and were sentenced and imprisoned for 54 Months in 2006 and was deported to India in 2007, was arrested and sent to Metropolitan Magistrate in Mumbai and was remanded to judicial custody.

The appellants contention was of double jeopardy if he was to be tried against was rejected, while extending his judicial custody and dismissing his application for bail.

The court observed: “Perusal of the provisions of law under which the petitioner has been sought to be prosecuted in India would reveal that the ingredients of the said offences are totally different from those of the offence for which the petitioner was charged and punished in U.S.A. The said offence apparently related to conspiracy for possession of controlled commodity in U.S.A.

The offence for which he was charged in U.S.A. neither related to any of the ingredients of the offences punishable under the provisions of the NDPS Act under which the petitioner is sought to be prosecuted in India, nor the same could be said to be an offence to which any of the provisions of law comprised under the NDPS Act would apply, nor the prosecution and punishment in U.S.A. can be said to be by

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364 2008 CRILJ 974
the Court of competent jurisdiction in relation to the offences under the said sections of the NDPS Act nor even similar thereto. By no stretch of imagination, acquisition and possession of hashish in India and importation into India from Nepal and exportation out of India as well as sale of hashish can be said to be the ingredient of the offence under Section 846 r/w Section 841 of Title 21 of the U.S. Drugs Laws, nor the petitioner was subjected to prosecution and/or punishment under any of such offences in U.S.A. Similarly, conspiracy for all those acts in India was not the subject matter of prosecution and punishment by the District Court, New York, U.S.A. Besides, the Court at Mumbai was not competent to deal with the offence under Section 846 r/w Section 841 of Title 21 of the U.S. Drugs Laws, nor the District Court at New York was competent to take cognizance of any of the offences under the NDPS Act committed in India. Merely because same set of facts gives rise to offences in India under the NDPS Act, the conviction under a totally different provisions of law arising out of the same set of facts would not bar the Court in Mumbai to deal with the matter against the petitioner nor the principle of double jeopardy is in any manner attracted in the case in hand.365

The protection granted under Article 20(2) of our constitution is quiet narrow as compared to other common law countries’ constitution. According to our constitution the protection of Article 20(2) is available only when the individual claiming the protection is not just only prosecuted but is also punished for the same, and in turn is sought to be prosecuted for the second time for the same offence.

3.9.4. Right To Fair Trial - Constitutionalisation Of the Criminal Procedure

The notion of fair trial is not only a provision incorporated in the procedural laws, but also finds its place in the Constitution of India. The facets of right to trial are numerous. Other than the ones mentioned above, another significant component of fair trial is the right to remain silent. The 180th Report of Law Commission of India has accentuated on two crucial aspects - Article 20(3) and the right to remain silent. The report states that if an accused is called in police station for investigation before the commencement of trial then he/she has the absolute freedom to choose to speak or to remain silent. If the accused remains silent during the interrogation, no presumption

365 JITENDRA PANCHAL V. INTELLIGENCE OFFICER, N.C.B 2008 CRILJ 974
shall be drawn that he is guilty of the offence, because by virtue of the Article 20(3),
the accused has the constitutional right to remain silent. 366

Article 22 of the Indian constitution guarantees every individual a right to fair trial
and it has been protected under the procedures engraved in the criminal procedure
code. It will be no exaggeration to assert that there is an inherent philosophic
correlation between the provisions of Constitution and Criminal Procedure Code of
India. The theme that reinforces this kith and kin is that, even though the fundamental
rights are elaborated in the Constitution of India, it is because of the Criminal
Procedure Code these rights could be endorsed. The procedures that are specified in
the code are for properly safeguarding these rights for the benefit of the individuals.

The concept of procedures for the purpose of making rules and regulations were
incorporated into the Constitution at the time of framing, by replicating the ideas from
the legal system of Britain and the mechanism of the Police system of Britain.
However, the framers of the constitution drafted Constitution on the intellectual level
of an Indian constable. 367

When India was newly independent, at that time the Supreme Court glorified the
procedural concept of the criminal law by incorporating and endorsing the civil and
political rights. “The constitutionalizing of the criminal procedure is necessary for the
ratification of the promises made by the framers of the Constitution via the provisions
of the Constitution, which can be performed only under the procedural guidance of
the criminal justice system”. 368

3.9.5. Other Factors Leading to Wrongful Conviction

3.9.5.1. Work Pressure on Judges

The most significant impediment in delivery justice in our country is the
disproportionality in the number of judges in India and the total number of cases that
are filed in courts. The ever-increasing cases and the dearth of judges in our country

366 180TH REPORT OF LAW COMMISSION OF INDIA, ARTICLE 20(3) OF THE CONSTITUTION OF
INDIA AND THE RIGHT TO SILENCE, LAWCOMMISSIONOFINDIA.NIC.IN/REPORTS/180RPT.PDF,
VISITED ON 17TH MAY, 2014
367 MOHAMMAD GHOUSE, THE PRE – TRIAL CRIMINAL PROCESS AND THE SUPREME COURT, 183,
VOL. 13, INDIAN BAR REVIEW, (1986)
368 SUPRA NOTE 86, PG. 184
has been a major concern regarding the Indian judicial system. According to the statistical reports given by Department of Justice, Ministry of Law and Justice, India at present has 25 judges in Supreme Court and 1080 in 24 High Courts of India.\(^{369}\) Out of the 1080 high court judges only ____ are permanent judges. India has a total population of over 1.25 billion people, which implies that the ratio of judges and the population is very low at the desired level. According to the judgement in case of All India Judges Association And ... vs Union of India And Ors.\(^{370}\), it has been held by the Supreme Court that “there should be at least 50 judges for every million Indians”.

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<td>JAMMU &amp; KASHMIR HIGH COURT</td>
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\(^{369}\) HTTP://DOJ.GOV.IN/SITES/DEFAULT/FILES/HCS%2801.01.2018%29.PDF, DEPARTMENT OF JUSTICE, MINISTRY OF LAW AND JUSTICE, GOVERNMENT OF INDIA. LAST VISITED ON 01/01/2018

\(^{370}\) AIR 2002 SC 1752
A quantitative study was carried on by group of researchers analysing the magnitude of work pressure on judges and the result was appalling. According to the study “A judge in a high court spends less than five minutes, on an average, hearing a case.”

Following a study conducted by a non-governmental organisation based in Bengaluru, called Daksh, it was observed that “The most relaxed high court judges in the country

have 15-16 minutes to hear a case, while the busiest have just about 2.5 minutes to hear a case and, on average, they have approximately five-six minutes to decide a case.” Daksh is an organization that conducts studies and research on the working of judicial system in India. The study was conducted to analyse the pendency of cases and their reason from January 2015 till March 2016. During the course of research twenty-one High Courts of different states were studied and approximately 19 lakh cases and 95 lakh hearings were analysed.

It gave examples of Calcutta High Court where approximately 163 cases are placed before a judge for hearing in a single day. Since a judge has only five-and half hours a day to hear cases, each case has to be hear within a time frame of two minutes. Similarly, the study also observed that in many other states including, Patna, Hyderabad, Jharkhand and Rajasthan, the judges of the High Courts spend only two-three minutes addressing a case, given the huge number of cases filed in court. In states of Allahabad, Gujarat, Karnataka, MP and Orissa, they give only 4-6 minutes per case.

The co-founder of Daksh, Kishore Mandyam suggested that the court procedures need to be systematically reshaped so that a realistic number of cases are listed before every judge. This will give sufficient time to a judge to hear the case properly and give well-reasoned judgment. “Not that judges are not applying their mind in writing well-reasoned judgments, but what is the point in listing too many cases and deferring more than half to a next date?” Mandyam said.

If a realistic goal is presented before judges for every day hearing then it would yield better results in terms of quality of judgments. Not only, would be the judges relieved of the painful task of hearing hundreds of cases per day, but also the litigants would not have to wait for their hearing endlessly. It would also reduce the overall cost spend on the management of the courts and its process.

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372 ibid
373 Ibid 45
3.9.5.2. The Need for Specialization in A Particular Field-

The notion of specialization of judges in a specific field is very crucial to the quality of judgments given and the understanding of the complexities of each case. Though it has always been considered that a judge ought to be a generalist and should have adequate knowledge about every aspect of law, however the real picture is different. Numerous American studies have emphasized on the importance of specialization of judiciary and suggested that it has become the need of the hour.

Martin Shapiro in his book “The Supreme Court and Administrative Agencies” states that when judiciary specializes in a subject-matter it becomes one step different from administrative lawmakers. It further states that the degree of the specialization has considerably increased over time. “People within and outside the courts have given considerable attention to some aspects of that development, but they have not sufficiently considered the implications of the extent and growth of judicial specialization”. 374

The positive effect that specialization has, over the thinking process of judges and the approach of judiciary, cannot be neglected. In a publication by Jeffrey Rachlinski, Chris Guthrie and Andrew Wistrich, the impact of specialization on the behaviour of judges has been studied. The article describes in detail about how the decision-making process completely changes when judges have gained specialization in a particular subject and how meticulously the judges decide on cases. The article attempts to ascertain the impacts of specialization on the quality of judgment delivered. 375

“Specialization can have powerful effects on judicial decisions through immersion of judges in specific fields of legal policy and judicial expertise and through the enhanced influence of political and legal interests in those fields. At present, understanding of those effects is limited. Because of the potential importance of

374 Martin Shapiro, the supreme court and administrative agencies 53 (1968) (“to the extent that [courts] specialize, they lose the one quality that clearly distinguishes them from administrative lawmakers.”).
those effects, more concerted efforts by scholars to identify them would have great value”. 376

In yet another article by the same authors, Rachlinski, Guthrie, and Wistrich, an analysis has been made on how judges decide cases and what factor play an important role in influencing their decision. The authors have conducted a series of well-designed experimental studies that focused on the ‘cognitive processes of judges as decision makers’. 377

**Conclusion**

It is no denying the fact that no criminal justice system can be ideal and flawless, and “fallibility leads to miscarriages of justice”378, so it is not wrong to say that even when all the standards of a trial are maintained people can still be wrongfully convicted. These convictions occur when innocent individuals are convicted in criminal trials or when individuals are forced and coerced to confess to crimes they never committed.

The term of wrongful convictions is also used “when the court finds a person guilty despite having a good defense or where an appellate court reverses a conviction (regardless of the defendant’s factual guilt) obtained in violation of the defendant’s constitutional rights.”379 To sum up, it wouldn’t be wrong to say that roughly where fair trial processes are not followed the superior courts have overturned the decisions of the lower courts.

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376 IBID
A wrongful conviction is terrible injustice and this injustice increases manifold times when the individual is asked to remain incarcerated in prison and more so when on death penalty. \(^{380}\) "The injustice of being convicted and imprisoned for a crime one did not commit is intuitively apparent." \(^{381}\)