Chapter – V

STATUTORY CONTROL OF POLICE IN INDIA

Introduction

Who guards the guardians is a question haunting all the democratic countries. It is a dilemma that arises both in relations to controlling the discretionary actions of the police and also in controlling the police from violating the rights of the common man by abusing their authority. In some other countries, both the legislature and judiciary are very much keen in taking timely actions to control the cops. But, many measures are proved to be ineffective and produced adverse results.

In order to maintain respect for law, society has shown an increasing concern with the fairness and legality of the methods by which the law is enforced. When the enforcement mechanisms are ineffective and inadequate, respect wanes and legal controls become impotent. Hence, the society needs efficient and effective law enforcement machinery. The police in the accusatorial system are a quasi-judicial body in some respects. While enforcing law, the police

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1 Judges Rules and PACE Act in England, Bill of Rights and Exclusionary Rule of USA shows that timely actions were taken by them to control the cops.

2 Exclusionary Rule, Judge’s Rule and PACE Act are prone to severe criticism from various corners of the community. Police are not controlled by the exclusionary rule. The chief of police, Los Angeles stated that, after adopting the exclusionary rule the liability to prevent the commission of crimes has been greatly diminished. Monard G. Paulsen, “The Exclusionary Rule and Misconduct by the Police, 52 J.Crim.L.C & P.S 255, On accepting the rule, great many, obviously guilty people were acquitted. That is why Justice Holmes and Brandeis in Olmsted v. U S, 227 U S 438 (1928) stated that, the interest of ‘justice’ itself is ‘vindicated’ by the exclusion of evidence rule. Dalin H.Oaks argued for the replacement of exclusionary rule by an effective tort remedy against the offending officers because it is a failure. 37 Uni.Chi.L.R 665,755 (1969-70). Similarly, the judge’s rule also criticized for lack of clarity. It was only an administrative order which has no legal force. The Police and Criminal Evidence Act is also criticized on the same grounds. It has no counter-weight in the form of remedies for abuse apart from the police complaints mechanism. More over many police powers are legally unlimited.- Andrew Sanders, “Rights, Remedies, and the Police And Criminal Evidence Act”, [1988] Crim.L.R 802.
find themselves more and more controlled by rules, partly law imposed and partly court imposed. The ultimate object of these controls is to enforce the law properly in the situations. How far these controls are effective to correct the police is a question to be analyzed.

It is the duty of all citizens to uphold the law. Only thing, which differentiate the common man and the police, is that the law granted the police man slightly greater power in the law enforcement area. If all citizens uphold the law in its true sense, there arises no problem. But unfortunately, the rate of violations of the law increase day by day. In this situation, the work of the law enforcement machinery also increased and the society expect a much higher standard of behaviour from the police. When this institution goes beyond their power and when it feels that this institution infringes the common man's liberty and freedom, control measures become inevitable. These measures are of two types, viz., internal and external. Internal control mechanisms include statutes and internal administration. External controls include mandates of the courts. The administrative mechanisms may not be effective to control the police because of the culture prevailing in this organization. The higher officers may not take action against the lower cadre on the ground that it will affect the morale of the organization. The other two mechanisms are, in fact, working properly.

**Nature of Discretion**

By discretion, we mean, the power to decide whether to act or not. The law grants power to the police to determine whether any legal action is to be taken or not in a particular case by taking into consideration all circumstances available. Discretion granted to the investigating officers plays a crucial role in the administration of
criminal justice from the beginning to the end of the investigation of a case.

The police exercise discretion in deciding whether to arrest or not, whether to investigate or not, whether to prosecute or not. These discretions are desirable and inevitable in a democratic society. Criminal law being the part of the social mechanism to provide peace and order in the community and the steps required for it could vary from case to case the work of the police needs discretion.

Police have enormous discretionary power and exercise of that power affects the life and liberty of citizens. If the discretion is not exercised properly, the consequence may be disastrous. In order to avoid unwanted consequences exercise of discretion by the police should be legally controlled. By assuming the investigative powers, police became a quasi-judicial body and were not expected to take directions from anybody and they are independent in their sphere of action. Since the police, being a public authority wielding power has to act fairly and justly. Through legislations as well as judge made law, regulative measures were framed to ensure fairness and justness in the action of the police. This imposed more control over the police. The effectiveness of the control largely depends on the respect shown by the concerned functionaries for and obedience to the law. External control, even by judiciary, could not be effective because such control is not routine. However, the society reposes much confidence in judicial control and whenever there is violation of these laws recourse to judicial remedy is common. Undoubtedly, the courts live up to the

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4 Frank J.Vandall; “Police Training for the Tough Calls; Discretionary Situations”; 25 Emory Law Journal, 393, [1976]
expectation of the people and restrain the police from wrongful exercise of power and lays down standards of behaviour. The courts expand the scope of protection by constitutionalising the criminal law process and control the persons or institutions. In *Mapp v. Ohio*, the US Supreme Court observed:

> We can no longer permit it the right to privacy embodied in the fourth amendment, to be revocable at the whim of any police officer who in the name of law enforcement itself chooses to suspend its enjoyment.

Administrative discretion in the matter of law enforcement is now subjected to judicial control since it is not wise to leave the area unfettered. The uncontrolled power often leads to misuse, which will finally affect the life and liberty of the common man. Apart from this, it will adversely affect the working of criminal justice system creating anarchy.

**Need of Controls on Discretion**

The rule of law seeks to control the behaviour of all persons and institutions by setting standards of behaviour. Exercise of power shall be authorized by law. They are accountable for the breach of the standards laid down by law. Compliance with the legal requirements is the cardinal aspect of rule of law. Rule of law makes the police machinery humane and just. Powers granted to police were accompanied by safeguards against abuse as well as rules, which are addressed to protect competing values such as rights of the accused person. These safeguards and rights in effect act as control mechanisms.

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5 367 U.S. 643 (1961)
6 *Id.* at p.660
An anonymous writer in 1847 in Law Review, characterized investigation that:

It must never be forgotten that an enquiry of this kind is conducted by power against weakness, by society against an individual, by a person skilled in the art of examining and perfectly collected at the time against a person unskilled and frequently confused by terror, by a person at large against a person in custody, and in short that every advantage is on the side of the interrogator and every disadvantage on the side of the examinant.  

The crux of this writing is that, the police have a psychological advantage over the person whom they are questioning. Even if the examinee is a habitual offender or a hardcore criminal, he cannot withstand the interrogation because of his disadvantaged position. This is so particularly when the person is questioned at the police station. In order to prevent investigation from becoming unfair or oppressive it is necessary to provide safeguards.

The Royal Commission on Police in its report stated the objectives as “to secure a system of control over the police which will achieve the maximum efficiency and the best use of arrangements for dealing with complaints”. There was ample room for complaints against police but there was no mechanism for dealing with complaints. The complaints were about the oppressive character of the police. Hence, there felt the need for reforming the police in order to elicit maximum efficiency and to make it a community friendly institution.

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In criminal justice system, there must be a balance between checking and guarding against error or injustice on the one hand and facilitating efficiency on the other. The Royal Commission on Criminal Procedure (Philips Commission) recommended that there should be a fundamental balance in criminal justice between the rights of suspects and the powers of the police. This balance can be achieved only through the imposition of effective control. The control mechanism should be designed in such a way as to attain both ends. Guarding against injustice should not affect adversely the efficiency of the police system. Based on this Commission report, in England, Police and Criminal Evidence Act, 1984 (PACE) was passed, which provides for a legislative framework for the operation of police powers and suspect’s rights. This legal framework helped the courts in UK to check and control the miscarriage of justice by the police.

Exposing miscarriage of justice is the best method of preventing future abuses. Only, when it is exposed, control mechanism can be imported into the area. Once the control is applied effectively, there is less chance for its repetition in the future. The causes of miscarriage of justice varied from case to case. Generally, the reasons are the suppression of evidence by the police, which are helpful to the defence, and other illegally obtained incriminating evidence such as induced confessions, illegal search and seizures. Illegality is perpetrated by the police either to obtain a conviction or to harass the accused. In either case, the police action cannot be justified. This results in the failure of the mechanism. The rules of criminal justice should be formulated in such a manner as to protect the individual defendant who is in a weak

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position when weighed against the State and its mechanism for crime control. Many of the rights, liberties, immunities of the person, which the law declares, puts constraints on the police, which are made to protect rights of the defendant considering his weak position.\footnote{11} Irrespective of all these protection, the accused is at a disadvantageous position at the time of interrogation and collection of evidence. This need not be considered as unfair because it is to ensure fairness to the community in general. Fairness in investigation does not mean that, there should be some compromise with the truth in order to protect the rights of the accused. That is why the Criminal Law Revision Committee of UK argued that, “fairness is not something which is due to the defence only”, and concluded that, “it is as much in the public interest that a guilty person should be convicted as it is that an innocent person should be acquitted”.\footnote{12} Lord Patrick Devlin opined that, “when a criminal goes free, it is as much a failure of justice as when an innocent man is convicted”.\footnote{13} Both situations are unwarranted in the criminal justice system. However, the liberty of an individual should not be allowed to be sacrificed in order to increase the efficiency of crime control. Lord Devlin was right in pointing that, an injustice on the one side is spread over the whole of society and an injury on the other is concentrated in the suffering of one man.\footnote{14} The police are very keen in getting a conviction after spending many days for investigation. It is the conviction that makes their work worthwhile; an acquittal not only frustrates them but also casts doubt upon their credibility and

\footnote{12}{Id. at p. 416.}
\footnote{13}{Patrick Devlin, The Criminal Prosecution in England, Oxford University Press, 1960 at p. 113.}
\footnote{14}{Ibid.}
efficiency. The fear of acquittal coupled with pressure of public demand for conviction forced the police not to adhere with all the rules, which specifically protect the rights of accused persons. The fear that the court may find the case with insufficient evidence to warrant a conviction, force them to extract a sworn statement of the accused admitting guilt, for which the accused will be subjected to prolonged questioning and even physical assault. Mr. Williams Sergant, a London based doctor on psychological medicine, pointed out that a person who is put under sufficient strain is reduced to an abnormal mental state in which he may say anything that he thinks the interrogator wants him to say. In India, confession to a police officer is not admissible, except discovery on the basis of it. But, the confession may lead to obtain other evidences or will help them to fabricate evidences against the accused. Hence sufficient control mechanism may be employed to curb such practices.

The police must be more accountable to the public in a way that, they would not interfere with the rights of the common man and at the same time ensure that they discharged their duties properly and legally. Moreover, police must be adaptable to the growing needs and the changes in the public life. So, along with the development of the society, the police must also change their attitude in criminal work as people expect a better police system which is enough to safeguard their life and property in the changing world. The 1960 Royal Commission on Police considered that the purpose of their recommendation was “to bring the police under more effective control by making them more

16 Id. at p.10.
17 This is termed as ‘democratic policing’. See, David Alan Sklanski, “Police and Democracy” 103 Mich.L.R.1699, 1700.
fully accountable, while securing that they are no longer hampered in carrying out their tasks by the remnants of a system designed many years ago in different conditions for different purposes”.

Custodial interrogation is a vulnerable area in which the police take advantage of the situation and the ignorance of the accused. Very often they act illegally and the rights of the accused are violated. No doubt, police have the authority to question the suspect in order to solve crimes. But they have no authority to coerce or induce the suspect and obtain a statement, which violates the protection against self-incrimination.

The police in the adversary accusatorial system are free to take their own decision in the law enforcement areas. They are given maximum freedom in the investigative process and similar amount of discretion in the administration of criminal justice also. Discretion and freedom to use this discretion are indispensable to any legal system. But when they misuse this discretion and take excessive freedom, which violates the prevailing norms, some kind of control is needed to correct it. Otherwise, it will have a disastrous effect on the criminal justice administration.

The yardstick of judging the efficiency of police in a democracy is whether the people in general feel and accept the police as protector of their rights, person and property. Experience shows that the Indian police organization could not keep the police image properly and at times, they failed in protecting the person and property of the common man. While drafting the procedural laws governing criminal

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19 Both accusatorial and inquisitorial systems recognize the accused’s privilege against self-incrimination.
investigation and trial viz., CrPC and Evidence Act, the British administrators incorporated certain provisions specifically to prevent violations of the law by the police. At the same time, ample discretion is granted to the police to perform their functions.

The control of discretion is justified on the ground that it avoids unwarranted consequences of the police actions. Mere arrest may destroy the reputation or cause grave injury to a family. Similarly prosecution of a person may cause lose of his job. The discretion in criminal law enforcement has ameliorative purposes. It must be used with caution and for the betterment of the society.

Though police investigation report has no special importance, it plays a crucial role in the criminal process. All the criminal procedures heavily depend on the police investigation report. This report does not contain raw objective facts. Instead, the police present an entire picture of reality, which is connected with the accusations against the suspect, with evidence collected in support of it and shaped by numerous decisions taken in the course of the investigation. Indeed, the reality is a construction by the police chosen from several hypotheses. So, the final result of investigation is an amalgam of evidence found, evidence created and inference made. Hence, we need a full and exhaustive use of the discretion by the police in the investigation process. At the same time, if the discretion is not controlled, it will cause harm to the society and some times the very purpose of investigation will be destroyed. Unwarranted arrests, fabrication of evidence, unwanted and illegal prosecution, mental and physical abuse of suspects are certain results of uncontrolled exercise of discretion.

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Discretion sometimes leads to evils and tyranny. It may breed general disrespect for law. Ultimate result will be the creation of a lawless society. Charles D. Breital, a judge of the New York Supreme Court, has put it very well and said:

So, too, it must be conceded that discretion – even legally permissible discretion – involves great hazard. It makes easy the arbitrary, the discriminatory and the oppressive. It produces inequality of treatment. It offers a fertile bed for corruption. It is conducive to the development of a police State or at least, a police minded State.²¹

Creation of a police State is not the aim of the criminal justice system. The system must make the police more visible, active, and successful in enforcing the law. Police are bound by the Constitution to uphold the ‘rule of law’ and to respect the rights of the citizens. They are under a duty to keep themselves with the requirements of ‘rule of law’ and fundamental rights embodied in the Constitution. Hence, we need control to ensure regularity and consistency in law enforcement.

One of the hallmarks of a free society is the ability of its citizens to go about their business without the need to explain to any one in authority what they are doing and without the fear that they may be subject to arbitrary challenge or arrest.²² Personal freedom is very important. To interfere bodily with a person, strikes at the heart of his individuality. Even if it is done by the governmental agency, it is a serious crime. It is, therefore, reasonable to expect from the government that when it is authorized on behalf of the state, by giving its police force the power to arrest, search and seizure, it should only be on clear grounds and in situations of necessity. Hence, the question is not how to

eliminate or reduce discretion, but how to control it to avoid the unequal, the arbitrary, the discriminatory and the oppressive.

**Scheme of control**

Controlling the police is a difficult task for the criminal justice system. In India, three types of controls are in existence to give a sense of direction to the police and to supervise their work. They are: i. Statutory Control, ii. Administrative Control and iii. Judicial Control

Investigation into the crimes is the most important duty of the police. All the controls on law enforcement agency are mainly look forward to make them more useful to the community and to streamline the investigative process. On the basis of investigation, the statutory and administrative control measures can be apportioned into three different stages of investigation: before investigation, during investigation and after investigation.

A. **Control before Investigation**

Control measures, which are applied before starting the investigation generally aims at the general administration of police and to clarify their powers and duties. This intends to the formulation of an efficient police system for effective policing. It is exercised at various stages from the selection of personnel to the police to the drafting of legislations to regulate their powers and duties.
i. Selection, Training and Administration

As per the Police Act, 1861 ‘police’ include all persons enrolled under the Police Act.\(^{23}\) His enrolment is not an automatic one. Only the person who received a certificate in the prescribed form under the seal of the Inspector-general or such other officer duly authorized can function as police officer.\(^{24}\) This certificate is an important one without which one cannot exercise the powers and functions and cannot enjoy the privileges of a police officer. Whenever the person ceases to be a policeman, he should surrender the certificate to an officer empowered to receive it. On enrolling as a police man the person will be barred from entering into other employments\(^ {25}\) and he will be considered to be always on duty.\(^{26}\)

State-wide control and superintendence of the police vests with the State government.\(^{27}\) The administration of the police in a district is vested in the District Superintendent of Police subject to the general control and direction of the District Magistrate.\(^{28}\) While the ‘superintendence’ of the police in the state is vested in the State Government, the ‘administration, general control and direction’ vested in the District Magistrate. Superintendence by the State Government connotes its power of arranging, inspecting and controlling the working of the police. This control is executive and administrative in nature. Executive control denote framing of rules under the Police Act and administrative control include, the power to determine organization,

\(^{23}\) Police Act, 1861 s. 1. \\
\(^{24}\) *Id.* s. 8. \\
\(^{25}\) *Id.* s. 10. \\
\(^{26}\) *Id.* s. 22. \\
\(^{27}\) *Id.* s. 3 \\
\(^{28}\) *Id.* s. 4.
strength, equipment, recruitment, training, discipline, posting, transfer, promotion and other financial matters.

The government has general responsibility to ensure that the police perform their functions efficiently. For this purpose, it can order disposition of the police force, call for reports regarding state of crime and law and order situation, order enquiries, ask the police to pay special attention to certain crime or law and order problems. But, the State Government has no power to issue directives to the police as to how a case be investigated and how a particular law and order situation be handled.

Section 7 of the Act, empowers the senior officers to take action when a police officer is negligent in the discharge of his duty or unfit for the same. This power is subject to Article 311 of the Constitution, where two procedural safeguards are given in relation to the tenure of office of a civil servant. First is that, no civil servant can be removed or dismissed by an authority subordinate to the appointing authority and secondly, no removal or dismissal or reduction in rank, except after an enquiry affording reasonable opportunity of hearing. It is the general responsibility of the State Government to ensure that the police perform their functions efficiently and within the limits set by the law of the land. That is why; the act is specific in granting power of general control and direction to the District Magistrates. But if, the law enforcement officers are not abiding the rules and regulations, the provisions of rules and the machinery to enforce it will be of no avail. The selection, training equipment and leadership of police are more

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30 The Police Act, 1861 s.4.
effective means of securing lawful and fair conduct in their day-to-day operations than the provisions of general laws.

ii. Clarifying Powers and Duties

The duties and powers of police in India are laid down in the Police Act and the Code of Criminal Procedure. In order to perform their duties wide powers have been given to them. Police is entrusted with the duty of maintenance of law and order. Powers are also conferred on them to carry out investigation in a case. These powers are original in nature and not delegated by any other authority and no authority can interfere in the performance of duties and the exercise of powers by the police. No discretion is given, even to the police, in the exercise of their duties. They are bound by the law of the land to perform their duties, which are obligatory and must be exercised properly.

Section 23 of the Police Act, 1861 states the duties of the police officers. The discharge of these duties imposed by law on the police officers cannot be made to depend on the permission of any private person or authority. It is the duty of the police officer to lay information before a Magistrate and to apply for summons, warrant, search warrant or other legal process against a person committing an

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31 The Police Act, Section 23 “it shall be the duty of every police officer promptly to obey and execute all orders and warrants lawfully issued to him by any competent authority; to collect and communicate the intelligence affecting public peace; to prevent the commission of offences and public nuisances; to detect and bring offenders to justice and apprehend all persons whom he is legally authorized to apprehend, and for whose apprehension sufficient ground exists; and it shall be lawful for every police officer, for any of the purposes mentioned in this section, without a warrant, to enter and inspect any drinking shop, gaming-house or other place or resort to loose and disorderly characters.

32 A.K. Veeramani v. State of Kerala, 1974 KLT 630. Petitioner was the Asst. Commissioner (crimes), Thiruvananthapuram. On 4-2-71 some untoward incident happened near the University College. The petitioner took action to disperse the unruly students by use of force, in the course of which, police entered the college. On the same day the Government ordered an enquiry into the incident and suspended the petitioner pending enquiry. He questioned the suspension.
As per section 25, the police officer has to take charge of all unclaimed properties and to furnish an inventory to the Magistrate. It is also the duty of the police officer to regulate public assemblies and licensing the same.\textsuperscript{34}

The Code of Criminal Procedure lays down the procedure to be adopted in carrying out the duties of the police officers both in maintenance of law and order and in the investigation of a case. Maintenance of law and order is largely the responsibility of the police. The police are duty bound to interpose for the prevention of cognizable offences and to investigate actual or suspected commission of offences.\textsuperscript{35} Police have the power to arrest, search, seize and interrogate a person.\textsuperscript{36} They can also make preventive arrest.\textsuperscript{37} On completion of the investigation, the police file final report before the Magistrate for taking further legal steps against the accused. All these show that, they have unfettered powers for the enforcement of law.

The police are being controlled by statute in their exercise of powers. If any police officer is found to be guilty of any violation or neglect of legal duty, he is liable to be punished.\textsuperscript{38} Similarly, if there is any wilful disobedience of any direction of the law as to the way in which they have to conduct themselves as public servants,\textsuperscript{39} they are liable to be punished.\textsuperscript{40} Torturing anyone to extract confession\textsuperscript{41} keeping a person in custody without complying with legal requirements

\textsuperscript{33} Police Act, s.24.
\textsuperscript{34} Id. s.30.
\textsuperscript{35} Police Act, s.23, Cr.P.C ss.149, and 157.
\textsuperscript{36} Cr.P.C, ss.41 – 60.
\textsuperscript{37} Id. s.151.
\textsuperscript{38} Police Act, s. 29.
\textsuperscript{39} Police officers are public servants as per section 21 of I.P.C.
\textsuperscript{40} IPC, s.166.
\textsuperscript{41} Id. s.330.
are treated as wrongful confinement and punished accordingly. The police have to exercise their powers in accordance with the law.

Many legal safeguards are provided in order to ensure fairness in the actions of police. Power to investigate and allied responsibilities of the police are subjected to limitation put forwarded by guaranteeing certain rights of the arrested person. This scheme enjoins the police to be "right conscious" while exercising the powers of investigation.

Irrespective of the safeguards envisaged under the legal system, the police routinely violate the rights of the common man. This happens mainly due to three reasons. First, wide powers are given to the police without any effective measures to check the violations. No *modus operandi* for the implementation of these powers is set out in the law. The person who is aggrieved by the abuse of power by the police can approach the court with criminal or civil action. But, to prove a case against the police is very difficult. Independent evidence may not be available in such cases since most of the events are happening inside the police station. Availability of independent witnesses is also an impediment in pursuing legal remedies. Yet another problem, which is usually seen, is the reluctance from the part of the aggrieved to pursue the costly legal remedies.

Secondly, even in cases where procedures are violated the law provides no adverse consequence. It will not vitiate the trial nor affect the status of the officer. The manner in which the evidence is procured

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42 For example, police have the authority to conduct search without warrant in a dwelling place. In order to take revenge, they can conduct search in a house, pretending that they received some information from the arrested person. They can create troubles to the residents of that house. There is no measure to check such abuses.
does not affect its legal validity and it is admissible in trial.\textsuperscript{43} Exclusion of tainted evidence rule is not applicable in India. The Indian judge can exclude the evidence if he found that the evidence is untrustworthy or the procedure adopted by the investigating officer causes prejudice to the interest of the accused.\textsuperscript{44} Thirdly, loopholes in the laws and the absence of much needed legislative amendments to remedy the situation in fact leave the abuse of power by the police unhindered.\textsuperscript{45}

‘Rule of law’ requires that official actions shall be in accordance with Rules. Law in such a context act as enabling as well as a limiting factor. Laws and definitions will act as control measures. Any ambiguity in this will lead to exercise of arbitrary power. It will lead to uncontrolled discretion. It is an accepted fact that the court will appreciate the discretion given to various levels of officials differently. Larger unfettered discretion given to the lower levels of functionaries is generally not favoured by the judiciary though such a power is approved in case of a higher official. Should we have the same apprehension in the matter of criminal justice administration also? In

\textsuperscript{43} Paramjith Singh v. State of Punjab, A.I.R. 2008 SC 44, where the court stated that, “this avoidable controversy need not detain us any further since it is well settled that even a defect, if any, found in investigation, however, serious has no direct bearing on the competence or the procedure relating to the cognizance or the trial. A defect or procedural irregularity, if any, in investigation itself cannot vitiate and nullify the trial based on such erroneous investigation”.


\textsuperscript{45} For example, as per section 50A of the Code, the officer making the arrest has to inform the arrested person about his right to inform any of his relatives or friends about his arrest and the place where he is being held. Suppose, after passing such information, if the person is taken to another police station and held there, police can easily evade the queries of his relatives simply saying that, the person is already released. This is what actually happened in Joginder Kumar, (1994) 4 SCC 260, where the Ghaziabad police took petitioner into custody. When enquired, police told that he would be released in the evening after questioning in connection with a case. But he was transferred to Mussoorie police station. When the relatives approached the Mussoorie police, Joginder was transferred to some other location. But, if there is a provision to treat the custody of the person in another police station as a new custody, police may not be in a position to play such tricks. Police and Criminal Evidence Act, 1984 of England included such a provision to control the police from abusing their power using loopholes in the Act.
fact, in the administration of criminal law the lower level functionaries have to take decision on the spot without the guidance of higher officials. Very often policeman on the beat has to take an immediate decision. Hence, most of the decisions may be the child of the circumstances. Sometimes, the decision taken may be in conflict with the interest of the society. But, in such circumstances, police will be justified in tailoring law enforcement practices and they claim that it is for ensuring effective police service to the society. One has to agree with the claim.

iii. Protection of Life and Liberty

It is a constitutional mandate that life and personal liberty of a person shall not be deprived. 46 If it is to be deprived, it could be done only through a procedure established by law, which is interpreted to mean a procedure, which is fair, just, and reasonable. 47 This standard laid down by the court binds the police in the law enforcement process. Coupled with this new jurisprudential dimension of Article 21 a parallel development took place by rejecting the narrow interpretation given to the term "liberty" in A.K.Gopalan. 48 The Supreme Court in Kharak Singh v. State of U.P. 49 expanded the meaning of liberty to include the right of privacy and declared the U.P. Police Regulation as unconstitutional. The court observed that an unauthorized intrusion into a person’s home and the disturbance caused to him violated his personal liberty enshrined under Article 21 of the Constitution. 50

46 Constitution of India, Art. 21
47 Maneka Gandhi v. Union Of India, A.I.R.1978 SC 597
48 A.K.Gopalan v. State of Madras, A.I.R 1950 SC 27. where the Supreme Court had taken a literal view of the expression ‘personal liberty’ because the word ‘liberty’ is qualified by another word ‘personal’, which is a narrow concept.
50 In this case the petitioner was an accused in a decoity charge. He was put under surveillance under the U.P. Police Regulation, which includes secret picketing of his
The *Maneka*\textsuperscript{51} decision very much influenced the criminal justice administration in India. Supreme Court has in a number of cases scrutinized various aspects of criminal justice administration in the light of Article 21. *Hussainara khatoon v. State of Bihar*\textsuperscript{52} showed the pathetic condition of men, women and children, who are languishing in jails for years awaiting trial. Court, after taking this situation seriously, observed that it is a shame for the criminal justice system that persons are incarcerated in jails without trial. Speedy trial is a most valuable right of an accused person\textsuperscript{53} and it is part of right to life and liberty.\textsuperscript{54} In *Antulay v. Nayak*,\textsuperscript{55} court examined the acceptability of a law, which does not insist for speedy process. The Court raised the question: “can it be said that the law which does not provide for a reasonably prompt investigation, trial, and conclusion of a criminal case is fair, just and reasonable?” The question in this case was whether speedy trial is a

\textsuperscript{51} Supra n. 47

\textsuperscript{52} (1980)1 SCC 81.

\textsuperscript{53} Sixth Amendment to the U.S. Constitution, 1791, provides that, ‘In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial’. Article 3 of the European Convention on Human Rights provides that, “every one arrested or detained shall be entitled to trial within a reasonable time or a release pending trial”.


\textsuperscript{55} (1992)1 SCC 225.
fundamental right or not. The apex court found that fair, just, and reasonable procedure implicit in Art.21 of the Constitution creates a right of the accused to be tried speedily.\textsuperscript{56} It is the right of the accused and it encompasses all the stages, namely, the stage of investigation, inquiry, trial, appeal, revision and retrial. By giving due regard to the dictum of this case the Supreme Court in \textit{Common Cause, a Registered Society v. Union of India}\textsuperscript{57}, after observing that the pendency of criminal proceedings for long periods operated as an engine for oppression, issued directions for the release on bail or the discharge of the accused and closure of such cases, which are pending for a long time awaiting trial. In all such cases court considered the keeping of persons as under trials as violation of their constitutional rights.\textsuperscript{58} The reasons for long delay in conducting the trial are multifold. The nature of offence, the number of accused, the number of witnesses, the workload in the particular court, means of communication, the delay in the completion of the investigation, and several other circumstances influenced the process of trial. Hence, it is unwise to fix a time frame for the completion of trial in all cases. This prompted the Supreme Court to over-rule \textit{Common cause}\textsuperscript{59} in \textit{Ramachandra Rao v. State of Karnataka}\textsuperscript{60}, where it is stated that it is neither advisable, nor feasible,


\textsuperscript{57} A.I.R. 1996 SC 1619.

\textsuperscript{58} Mansukhlal Vithaldas Chuhan v. State of Gujarat, A.I.R. 1997 SC 3400. In this case the court acquitted the accused in a bribery case stating that it would not be fair to direct initiation of the case right from the stage of sanction and to keep him undertrial for an indefinitely long period; Raj Doe Sharma v. State of Bihar, A.I.R. 1998 SC 3281, where the Supreme Court directed all the lower courts to complete the prosecution evidence within two years from the date of recording the plea of the accused on the charges framed if the offence is punishable with imprisonment for a period not exceeding seven years. If the accused is in jail for half or more of the maximum period of punishment prescribed for the offence, the court would release him on bail on such conditions as it deem fit

\textsuperscript{59} Supra n. 57

\textsuperscript{60} A.I.R. 2002 SC 1856.
nor judicially permissible to draw an outer limit for conclusion of all criminal proceedings. More over criminal courts are not expected to terminate the trial or the criminal proceedings due to lapse of time. But at the same time while dealing with the criminal cases the courts must exercise their powers to speed up the trial. Hence, the agents of criminal law enforcement must take steps to speed up the process in order to ensure that the arrestee get a speedy disposal of his case.

In Babu Singh v. State of U.P.\textsuperscript{61} court observed that, denial of bail in a murder case without sufficient and reasonable ground would amount to denial of personal liberty to the accused person. This principle was reiterated by Bhagawati, J. in Kashmira Singh v. State of Punjab.\textsuperscript{62} In this case, court deprecated the practice of the High Courts in denying the bail so long as the conviction and sentence were not set aside. The refusal of bail would be deprivation of personal liberty, if the court were not in a position to dispose of the appeal for a long period. The prolonged delay in disposal of the trials and thereafter appeals in criminal cases, for no fault of the accused, conferred a right upon him to apply for bail.\textsuperscript{63}

In Prem Shanker Shukla v. Delhi Administration,\textsuperscript{64} Supreme Court invoking Art.21 to answer the question of using handcuffs to under trials, observed:

Even in case where in extreme circumstances, handcuffs have to be put on the prisoner, the escorting authority must record contemporaneously the reasons for doing so.

\textsuperscript{61} (1978)1 SCC 579. In this case, the appellants were acquitted by the sessions judge in a murder case. The High Court convicted them and sentenced them to life imprisonment. Appellants applied for bail during pendency of their appeal before the Supreme Court.

\textsuperscript{62} A.I.R. 1977 SC 2147.


\textsuperscript{64} A.I.R 1980 SC 1535
Otherwise, under art.21, the procedure will be unfair and bad in law.65

In this case court has given strict directions to the police regarding handcuffing of an under trial prisoner when he is taken to the court. The court prevented the practice of handcuffing under trial prisoners while transporting from jail to court and vice versa in this case. The objective satisfaction of the police officer that the prisoner will escape from custody breaking the police control, that matters while taking a decision regarding handcuffing. But, in taking such a decision, the nature of the accusation shall not be a criterion. Similarly, while ruling that handcuffing is violative of Article 2166 court directed the Union of India to issue appropriate guidelines in this regard.67

The Indian courts have taken advantage of Article 21 to deprecate the physical assault on accused and prisoners by the police.68 By this, the court reminded the police to act fairly as per the dictates of the Constitution. Transparency in the police action and accountability to the people are fundamental to the criminal justice administration. Article 21 of the Constitution of India, which guarantees valuable rights, enable the courts to police the police.

Article 22 of the Constitution, which guarantees four rights to an arrested person, viz, i. the right to be informed of the grounds of arrest ii. the right to consult and to be represented by a lawyer of his choice. iii. the right to be produced before a magistrate within twenty four hours

65 Id. at p.1543
of his arrest iv. the right not to be detained beyond the said period without the authority of the magistrate. This provision guarantees safeguards to an arrested person and is important in two counts. Firstly, it protects the rights of the arrested person and secondly, it checks the police abuses and thereby controls the police. This provision intended to strike a balance between the needs of police on the one hand and the protection of human rights from oppression and injustice at the hands of the law enforcing agencies. Police cannot simply arrest a person and keep him in custody. The arrest must be on reasonable justification. If there is no justification for the arrest, the party can invoke Art.22 and there is every possibility for an earlier release.

In all the cases of abuse of power by police, the court employs the two words, ‘life and liberty’ to redress the grievance. In *Shakil Abdul Gafar v. Vasnth Reghunath Dhoble* court observed:

> Life or personal liberty includes a right to live with human [dignity?] rights. There is an inbuilt guarantee against torture or assault by the State or its functionaries. Chapter V of the Code of Criminal Procedure, 1973 deals with the powers of arrest of persons and the safeguards required to be followed by the police to protect the interest of the arrested person. Articles 20(3) and 22 of the Constitution of India further manifest the Constitutional protection extended to every citizen and the guarantees held out for making life meaningful and not a mere animal existence. It is therefore difficult to comprehend how torture and custodial violence can be permitted to defy the rights flowing from the Constitution.

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72 *Id.* at p. 4569.
Thus the expanded canvas of Article 21 could afford better protection of the rights of the person. The courts in India put in, the service of article 21 to control the abuses and the dehumanizing acts of the police.

**v. Maintenance of Law and Order**

The police are entrusted with the duty of nipping crime in the bud and to keep public tranquillity. The Code of Criminal Procedure granted powers to police to discharge their functions properly. It is the duty of the police officer to prevent cognizable offences. The Police Act gives them wide powers for prevention not only of cognizable offences but also breaches of the law generally. In order to prevent the commission of a cognizable offence police can arrest any person who is preparing to commit the offence. While discharging this function the police needs neither orders from a magistrate nor a warrant. In this area police is having the same powers of arrest as in the case of the commission of a cognizable offence. It is a preventive action, whereby police can take action against the person who causes breach of peace or disturbance of public tranquillity. For this purpose, the police could display photographs of criminals at prominent places.

In order to exercise the power of preventive arrest the police have to satisfy some conditions. First, there must be a design to commit a cognizable offence and the person to be arrested is a party to that design. Second, the police officer must know that design and third,

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73 Section 149 of the Code Similar duty is cast upon the police by section 23 of the Police Act, 1861. Kerala Police Act, 1960 chapter iv, Police regulation- Rules for preservation of order (Ss. 18-28) and chapter v, Executive Powers and duties of the police (Ss. 29-38) contain similar provisions to maintain law and order in the society.

74 *Emperor v. Thakuri*, 41 Cri.L.J 778 (Oudh); Police Act, s23.

75 Cr.P.C, s.151.

76 *Ayyappankutty v. State*, 1987 Cri.L.J. 1593 (Ker.)

77 *Prahlad Panda v. Province of Orissa*, 1950 Cri.L.J. 891 (Ori.)
it must appear to the police officer that the commission of the offence cannot be prevented otherwise than by an arrest. The knowledge of the police officer is that matters. Mere apprehension that the person may commit a cognizable offence is not sufficient. In *Balraj Madhok v. Union of India*\(^\text{78}\) court observed:

> The power given under this provision impinges in one of the important liberties of an individual. Hence, it is necessary that in exercise of that power, there should be strict compliance with the requirements of law\(^\text{79}\)

If the requirements of law are not complied with, the remedy lies in the court proceedings. In such a situation court observed that “there is no absolute dictum that under no circumstance can the High Court go into the question of the proper exercise of the discretion by a police officer in making an arrest under section 151. The jurisdiction of court to go into the matter is not barred altogether”\(^\text{80}\). In order to take action under section 151 of the Code the belief of the police officer must have rational connection to the formation of belief and should not be extraneous or irrelevant. Mere apprehension or assumption that there is every chance for a breach of peace in the society is not sufficient to invoke section 151 of the Code. It is a noble safeguard to control the police from arresting a person without proper explanation.

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\(^{78}\) 1967 Cri.L.J. 865 (Del.). In this case, the petitioner was arrested u/s.151 and produced before the Magistrate who allowed him to go on bail. But, the petitioner failed in producing the security ordered by the court and hence kept in judicial custody.

\(^{79}\) *Id.* at p. 866.

\(^{80}\) *Mohammad Ali v. Sriram Swarup*, 1965 (1) Cri.L.J.413 (All.). The petitioner in this case was arrested and ss.107/117 of the Code proceedings were initiated. The case was dropped by the Magistrate for want of evidence. The petitioner filed case against the respondents for illegal arrest and unlawful custody.
B. Controls During Investigation

Powers of the police can be divided into two viz., power to maintain law and order, and power to investigate a crime. First is the power to prevent violation of law and to enforce the laws. It includes preventive action of the police dealing with unlawful assemblies and dealing with suspects and habitual offenders. The power to investigate includes all procedures from receiving information about the commission of an offence to the filing of final report before the court.

The laws, which grant power, fix the limit of the same. The limitations provided in law control the police activities and thereby protect the rights of the citizens. This is achieved through statutory schemes, which conferred rights to the citizens, and the accused thereby provide restrictions on the exercise of police powers. Generally, the Constitution, Code of Criminal Procedure, Law of Evidence, and the Police Act are the statutes, which control the police in the performance of their duties. The areas in which, control is exercised are the following.

i. Arrest and Detention

Arrest is deprivation of liberty, an important value that is upheld by the Constitution as well as statutes. Right against arbitrary arrest and detention is a fundamental right in India. The constitutional mandate is that, no one has the authority to deprive the life and liberty of a person except by a procedure established by law. The procedure and safeguards are provided in the Code of Criminal Procedure. Arrest

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81 Cr.P.C, ss.149-153
82 Id. s.129, Police Act ss.30A and 31
83 Id. s.106-110.
84 Article 21 of the Constitution provides that ‘no person shall be deprived of his life or personal liberty except according to procedure established by law’.
means apprehension and confinement of a person by a valid authority. The decision to arrest should be made giving due regard to the liberty of the person and the interests of the society. So, it must be a decision best suited to the circumstances. The power to arrest a person itself creates limits for it. In order to control the police from abusing their power many safeguards have been provided in the Code of Criminal Procedure.

The power to arrest mainly depend on the question, whether the offence is cognizable or non-cognizable. No warrant is required to arrest a person who had committed a cognizable offence. Same is the rule in cases where arrest becomes necessary as a preventive measure in respect of a person intending to commit cognizable offence. In non-cognizable offences, arrest could be effected only with a warrant from the magistrate.

Though the police could use force, if necessary to arrest a person, the Code put a limit to this power. The limitation is provided in the form of restricting lethal force in exceptional cases only. The normal rule is that the force so used should not extend to causing death of a person who is not accused of an offence punishable with death or life imprisonment. It is also provided that the arrested person should not be subjected to more restraint than is necessary to prevent his escape. In cases where it exceeds, the concerned officer is exposing himself for prosecution for the commission of an offence.

The provisions relating to arrest with or without warrant are incorporated in Sections 41, 42, 46 and 151 of the Code of Criminal Procedure.

Cr.P.C., s.2©

Id. s.151

Id. s.46 (2)

Id. s.46 (3)

Id. s.49.
The police are duty bound to inform the arrested person the grounds of his arrest. This will enable him to clarify the mistake if any as to the identity of the person or could make arrangements for bail as well as his defence. The judiciary extended the right of the accused person to such a level wherein the police is obliged to inform a person interested in the welfare of the arrestee of about the arrest and the place where he is being held. An entry has to be made in the book kept for the purpose, regarding the passing of information of arrest. It is the duty of the Magistrate to satisfy himself that the duties of the police in this respect have been complied with. Is this duty a clerical one? Should the magistrate go beyond what is stated in records and ascertain the facts and circumstances of the case to enter into a 'valid' satisfaction? Would it not be proper for the magistrate to ascertain the truth from the person produced before him? Above all, if the police violated the provisions and the Magistrate is not ascertaining the truth, what will be the consequence?

This new right, which the Supreme Court read into Article 21 of the Constitution, is now stands recognised statutorily by the incorporation of a specific section to that effect in the Code of Criminal Procedure. The arresting officer is required to inform the arrested person regarding bail, if the offence is bailable. In order to have judicial scrutiny over the arrest, the arrested person shall be produced

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91 Id. ss.50 and 75.
93 Cr.P.C. s.50A(4). The Law Commission of India, 152nd Report on ‘custodial crimes’, Para 14.9, p.172 (1994) also suggested entrusting a duty upon the magistrate to enquire that the provisions relating to arrest are complied with and also to enquire about and record, the date and time of arrest, from the arrested person.
94 Cr.P.C s.50A.
95 Id. s.50(2).
before the judicial magistrate within twenty-four hours of his arrest.\textsuperscript{96} Medical examination of the body of the arrested person should be ordered by the magistrate, if requested by the arrested person. \textsuperscript{97} If any medical examination of the arrested person is conducted a copy of the medical examination report shall be furnished to the person or his nominee by the medical practitioner, after the medical examination.\textsuperscript{98}

This right could work against the possibility of the accused being ill-treated in the police custody. The National Police Commission identified the power of arrest as one of the sources of police corruption.\textsuperscript{99} This indicates the insufficiency of the present legal scheme to regulate arrest. It could also be a pointer to the fact that the police often flout the safeguards incorporated in the law.

The ignorance of the legal provisions regarding arrest coupled with the inherent fear of the common man to raise complaint against police might be responsible for the perpetration of the police illegality. Even the victims often refuse to raise complaints against the police. The trial courts also fail to take the complaints against police illegality seriously. The inherent prejudice against an accused may be a contributory factor, which brings about this unsatisfactory state of affairs.

The police often resort to arrest without assessing the need for the same in a particular case. Thus, the power of arrest is over-used. It is resorted to even in cases where the offender could be brought before the court by issuing a summons. The power of arrest must be

\textsuperscript{96} Id. ss. 56 and 76.
\textsuperscript{97} Id.s.54 (1)…
\textsuperscript{98} Id. s.54(2)
circumscribed. It should be limited to very serious crimes that too only if necessary and warranted by the circumstances. There is a move in this right direction. The one hundred and fifty second report of the Law Commission\textsuperscript{100} recommended the insertion of provisions to limit the scope of power of arrest.\textsuperscript{101} First condition is that the police officer should satisfy himself about two matters. One is that the offence for which he is going to effect arrest is a cognizable offence and that the complaint relates to the complicity of the arrestee. The police officer has to further satisfy himself that arrest is necessary to bring the movements of the accused under restraint. This is either to inspire sense of security among the public or preventing the person from evading the process of law or preventing him from committing similar offence or violent behaviour in general.

This provision is similar to the power of a police to arrest without warrant provided in the Police and Criminal Evidence Act, 1984 of England, which provides that, a constable who has reasonable grounds for suspecting that an arrestable offence has been committed, he may arrest anyone without warrant whom he has reasonable grounds for suspecting to be guilty of the offence.\textsuperscript{102} The term ‘reasonable

\textsuperscript{100}152\textsuperscript{nd} Report of the Law Commission on ‘Custodial Crimes’, paras 14.4-14.6 pp.165-167 (1994)

\textsuperscript{101}Law Commission recommended for the insertion of two sections in the Code viz.,Sec.41 (1A) and Sec.41A. Sec.41 (1A)

“41(1A), A police officer arresting a person under clause (a) of sub-section (1) of this section must be reasonably satisfied, and must record such satisfaction, relating to the following matters:

(a) the complaint, information or suspicion referred to in that clause, is not only in respect of a cognizable offence having been committed, but also in respect of the complicity of the person to be arrested, in that offence:

(b) arrest is necessary in order to bring the movements of the person to be arrested under restraint, so as to inspire a sense of security in the public or to prevent the person to be arrested from evading the process of the law or to prevent him from committing similar offences or from indulging in violent behaviour in general.”

Sec.41A deals with notice of appearance.

\textsuperscript{102}The Police and Criminal Evidence Act, Sec.24(2).
grounds for suspecting’ means honest belief founded on grounds, which would lead an ordinary cautious person to the conclusion that person arrested, was guilty.\textsuperscript{103} The test for ‘reasonable grounds’ is partly subjective and partly objective. Subjective in the sense, that the officer must have formed a genuine suspicion in his own mind that the suspect has committed the offence in question. It is objective, because, the officer must show reasonable grounds for that suspicion.\textsuperscript{104} So, it is a reasonable man test that received by an arresting officer.\textsuperscript{105} The purpose of an arrest is to make a person answerable to a charge. It should not be made to “teach a lesson”. Therefore, there must be justification for arresting a person. But, unfortunately, this recommendation was fell in deaf years, giving ample opportunity for the police to continue with the abuse of their power of arrest. The Third Police Commission also suggested thus:

An arrest during the investigation of a cognizable case may be considered justified in one or other of the following circumstances:

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

ii. The accused is likely to abscond and evade the process of law.

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

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

It would be desirable to insist through departmental instructions that a police officer making an arrest should also record in the case diary the reasons for making the

\begin{footnotesize}
\begin{tabular}{ll}
\textsuperscript{103} & Jack English and Richard Card, \textit{Police Law}, Oxford University Press, 9\textsuperscript{th} edn. 2005, p.60. \\
\textsuperscript{104} & Peter Hungerford-Welch, \textit{Criminal Litigation and sentencing}, 4\textsuperscript{th} edn. Cavendish Publishing Ltd., London, 1998 at p.6 \\
\textsuperscript{105} & \textit{O’Hara v. Chief Constable, Royal Ulstar Constabulary}, [1977] 1 All E R 129 \\
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arrest, thereby clarifying his conformity to the specified guidelines.\textsuperscript{106}

No action, so far has been taken to incorporate the above recommendation in the Code. Instead, the wide discretionary power of arrest exists in the Code even now. Since the right to ‘life and personal liberty’ is the cornerstone of our social structure, deprivation of liberty in the form of arrest has special importance. Supreme Court has taken a firm stand in this regard and emphasized the need to balance the power of arrest with the right to personal liberty. In \textit{Joginder Kumar v. State of U.P.},\textsuperscript{107} the Court observed thus:

\begin{quote}
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. 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 \textit{bonafides} of a complaint and a reasonable belief both as to persons complicity and even so as to the need to effect arrest. Denying a person of his liberty is a serious matter…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 station without permission would do.\textsuperscript{108}
\end{quote}

Arrest of a woman after sunset and before sunrise is prohibited.\textsuperscript{109} Deviation from this rule is possible only in cases where exceptional circumstances exist, which warrants immediate arrest. In


\textsuperscript{107} (1994) 4 SCC 260.

\textsuperscript{108} \textit{Id} at p.267.

\textsuperscript{109} Cr.P.C., s.46(4).
such circumstances, too police have to obtain prior permission from the Judicial Magistrate of the First Class.\footnote{The Law Commission in its 135\textsuperscript{th} Report on ‘women in Custody’, made some recommendations regarding the arrest of women, which is incorporated as Sec.46(4) by Cr.P.C.(Amendment) Act,2005.}

The provisions intended to safeguard the interests of the arrestee are being observed in breach. Absence of effective disciplinary mechanism contributes to the perpetration of the violation of law by the police. Moreover the law gives incentive for flouting law by admitting evidences gathered illegally. The recommendation that, the police officer arresting a person must reasonably be satisfied about the complaint, suspicion, or information and that the satisfaction must be recorded and sent immediately to the Magistrate must be inserted in the Code. This will enable the court to verify the arrest records and its necessity at the earliest.

\section*{ii. Interrogation and Recording of Statements}

In order to have a clear picture about the offence, police must interrogate the persons who are acquainted with the facts and circumstances of the offence under investigation. Therefore, it is necessary that the investigating officer must be empowered to secure the attendance of persons who have relevant information. Section 160 of the Code empowers the police officer making an investigation to require the attendance of any person who appears to be acquainted with the facts and circumstances of the case.\footnote{Id. s.160(1).} But, no person below the age of fifteen years or a woman shall be required to attend any place other than the place in which such child or woman resides.\footnote{Ibid.} This provision
gives special protection to children and women against probable inconveniences that might be caused by the abuse of police powers.\textsuperscript{113}

Police have ample power to interrogate any person who is supposed to be acquainted with the facts and circumstances of the case.\textsuperscript{114} Police officer is also empowered to record the statement of the person made to him in the course of the examination.\textsuperscript{115} The Code of Criminal Procedure contains provisions to protect the examinees from possible abuse of power by the police. It is provided that, “no statement made by any person to a police officer in the course of an investigation, shall, if reduced to writing be signed by the person making it”.\textsuperscript{116} It is a statutory safeguard against improper police practices.

Police officers are statutorily prevented from inducing a person to make a statement or preventing a person making a statement.\textsuperscript{117} The detention of suspects for interrogation must be in accordance with the principles and values of the criminal justice administration. Undoubtedly, the provisions incorporate certain values, which the police officers have to respect in their actions. The police officer has no authority to interfere with the liberty of persons, unless there are compelling circumstances. No one could be forced to disclose the truth and to face the consequences. There could be no detention in custody for interrogation without judicial scrutiny. The police must uphold the integrity of the investigation process. These values are the very basis of criminal justice administration as far as the power of interrogation is concerned.

\textsuperscript{114} Cr.P.C., s.161(1).
\textsuperscript{115} \textit{Id.} s.161(3).
\textsuperscript{116} \textit{Id.} s.162 (1).
\textsuperscript{117} \textit{Id.} s.163.
Right to remain silent is derived from the principle that a person should not be used as an instrument to obtain evidence against him. It is necessary to ensure that the interrogation is fairly conducted and accurately reported. At present, the Code empowers the investigating officer to record the statement. However, the mode of recording provided in section 162 does not ensure the accuracy of the record. The police could spoil a genuine case as well as make accusation against an innocent person. There are allegations of misstatement, distortion, abuse of superior position, manufacturing statements and abuse of power by police in this regard. It is very difficult to resolve the ensuing problems in the forensic medium. So, it is better that, soon after the recording of the statement, the investigating officer shall give a true copy to the deponent and also send another copy to the Police Complaints Board, which has to be constituted in every State with regional sub-Boards. This will eliminate the possibility of possible interference by the ‘interested parties’ and if it is not correctly recorded the deponent can approach the Police Complaints Authority with a petition against the erring officer. This may be a better control measure, which will work both ways, ie, controlling the police and can to a certain extent avoid the possibility of witness becoming adverse to the prosecution.

iii. Search and Seizure

Search may take place with or without warrant. Police must be more cautious while taking a decision to conduct the search. The general rule is that, the freedom and privacy of a citizen should not be curtailed or sacrificed unless it is highly needed in the interest of justice and for the purpose of investigation. In State v. Bhawani Singh,\(^\text{118}\) court observed:

\(^{118}\) A.I.R 1968 Del. 208.
An Indian citizen’s house, it must always be remembered, is his castle, because next to his personal freedom comes their freedom of his house. Just as a citizen cannot be deprived of his personal liberty except under authority of law, similarly, no officer of the State has a prerogative right to forcibly enter a citizen’s house except under the authority of law….\textsuperscript{119}

When powers are given to tread upon the rights of the individuals for the purpose of search, adequate care has to be taken to provide safeguards against possible abuse or misuse of the power. The provisions regarding search include safeguards to protect the interests of the individual and the society from abuse of power by the police.

Generally, search is conducted with a warrant, because it is a coercive method and involves invasion of the privacy of the person. It is an encroachment upon the rights of the occupant of the place. But, in the larger interest of the society this encroachment has to be tolerated. In a circumstance where the conduct of search is urgent, it would be pedantic and often unrealistic to expect the police officer to obtain a warrant in order to search the premises.\textsuperscript{120} At the same time, the law must be able to protect the rights of the person whose building is searched. The Code provides provisions to balance the interests of the individual and the society by providing certain safeguards in favour of the individual.

As per section 165 of the Code, during investigation, if there is no time to obtain a search warrant, and immediate search of the place is necessary for the purpose of investigation, an officer in charge of a

\textsuperscript{119} Id. at p. 211.
police station or investigating officer can conduct a search without warrant. This provision includes safeguards to prevent possible abuse of power by the police. The power to conduct search is granted to the police officer, in-charge of a police station or an authorized investigating officer in this regard. This power is generally to be exercised by the officer personally and delegation could be made only in exceptional cases that too after recording reasons. Another safeguard is that before proceeding to conduct search, the concerned officer shall record the reasons for conducting search.\footnote{Cr.P.C., s.165 (1)} The power granted has to be exercised in a place within the jurisdiction of the police station. The search should not be a general search but for a particular thing. Copies of the record made prior to the search are required to send forth with to the nearest magistrate.\footnote{Id. s.165 (5)}

Property, which are alleged or suspected to have been stolen, or which may have used in the commission of an offence could be seized by any police officer.\footnote{Id. s.102} It is to be noted that this provision is wider than one dealing with arrest. If the officer who seizes the property is subordinate to the officer in charge of a police station, he shall report the matter forthwith to that officer.\footnote{Id. s.102 (2)} The seized property must be transported to the court and a seizure report must be given to the magistrate having jurisdiction over this area.

The warrant requirement for the search of premises is the safeguard of a citizen’s ‘fundamental right of privacy’.\footnote{Morris v. Beardmore, [1980]3 W.L.R 283 at p. 296} By scrutinizing the warrant application, the impartial judge actually
standing between the police and the citizen to protect the interests of both persons. However, most of the searches are conducted without warrant. The Code provides safeguards to protect the interest of the person and the society. The pre-requisites for conducting search are that the search must be necessary for the investigation into an offence, which is cognizable one. Reasonable grounds must exist for believing that anything necessary for the purpose of investigation will be found in a place and that the thing cannot be procured without undue delay. The belief of the police officer must be recorded prior to the search, and the search must be for a specific thing and not a general search. If the person whose body is to be searched is a woman, another woman shall make the search with strict regard to decency.

Section 93 of the Code deals with three circumstances in which court can issue search warrant. When there is sufficient cause to believe that the person will disobey the summons or requisition, court can issue warrant. This shows that the court is not bound to issue a search warrant whenever it is asked for. A positive satisfaction of the court is necessary and the court has to apply its mind judicially in the petition for issuing warrant.

The presence of two independent and respectable inhabitants of the locality is desirable at the time of search. This safeguard is advantageous both to the police and to the occupier; they can help to ensure and witness the regularity of a search. Preparation of the list of

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126 Bimal Kanti Ghosh v. Chandrasekhar Rao, 1986 Cri.L.J. 689 (Ori.)
127 Melicio Fernandes v. Mohan, A.I.R. 1966 Goa 23. In a private complaint filed before the Magistrate, before issuing process, issued a search warrant with respect to books referred in the complaint and also directed that the search to be extended to the houses of the accused under s.96 Cr.P.C. Accused filed a petition requesting the Magistrate either to vacate the order or stay the operation of it. It was dismissed. Accused approached the sessions court and he after hearing both parties referred the matter to the High Court. High court set aside the order passed by the Magistrate as he did not applied his mind judicially.
all things seized in the course of the search is compulsory and shall be signed by the witnesses. A copy of the list is to be given to the occupier of the place searched or to someone in his behalf. The object of this provision is to ensure an honest and genuine search and to prevent trickery by ‘planting’ the things to be ‘found’ at searches. The police can seize anything, which he believes is evidence of an offence, which he is investigating. The Code has given the above-referred safeguards to ensure the genuineness of the search by controlling the police from violating the rights of the citizens. It can act as a good control mechanism and if obeyed, in every sense, will help to minimize public concern about the conduct of searches and seizures

Search needs reasonable grounds for suspicion. The section start with the word ‘reason to believe’, which means that ‘sufficient cause to believe’ positively. Therefore, it is very clear that the court issuing search warrant must be satisfied that there is necessity for it and that the article could not be produced otherwise. Here an important duty is being cast on the court and the court should be very vigilant in exercising the discretion. The court must apply his judicial mind before issuing the search warrant. In short the satisfaction of the court as to the necessity of a search warrant should be objective.

Before proceeding to conduct the search, the police officer must record the grounds of his belief as to the necessity of the search. This would obviate the possibility of manipulation by a police officer and finding out grounds for carrying out search. The recording of reasons is

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128 Cr.P.C., s.99.
130 Supra n. 127 at p.27.
an important safeguard against arbitrary searches. The non-recording of the reasons for search would make the search illegal.\textsuperscript{133} The Allahabad High Court observed that, the officer who is conducting an illegal search could be asked to pay compensation to the person whose house has been searched.\textsuperscript{134} The Indian law gives the police officer a fair degree of discretion in the area of search. The police must show some objective basis for conducting the search, which the courts are unlikely to reject as unreasonable. The controls over the conduct of the search are basically satisfactory, but there is no way to ascertain whether all the procedures are followed strictly. The person who is being searched has no authority to bring in his own witness as a statutory right. In most of the cases, witnesses are planted and the search procedures are not complied with, because most of the searches are ‘fishing expeditions’. In such situations, the control measures become a failure.

iv. Maintenance of Case Diary

During investigation, the investigating officer is required to maintain a diary to enter all day-to-day proceedings of the investigation.\textsuperscript{135} It must start with the time of information received and end up with a statement of the circumstances ascertained through his investigation. The object of this section is to guard against a true case being spoilt by an unscrupulous investigating police officer. One cannot fully trust the honesty, capacity and discretion of the investigating police officer in the Indian scenario. So, in order to protect the public from criminals and for the protection of the accused, the court must

\textsuperscript{133} Ibid.

\textsuperscript{134} Sharda Singh v. State of U.P., 1999 Cri L J 1880 (All.)

\textsuperscript{135} Cr.P.C., s.172
ascertain the truthfulness of the information, which is obtained day-by-

day by the police officer acted.\(^{136}\)

The diary contemplated two parts. On the one hand, it has to record all the steps taken during investigation by the police officer. It should record time of reception of information by the police officer, the time of beginning and closure of the investigation and the place or places visited by the investigating officer. It should also contain a statement regarding the circumstances ascertained through the investigation.\(^{137}\) At any time, the court may call for the diary and peruse it. However, the contents cannot be considered as evidence it can be used by the court as an aid in the inquiry or trial.\(^{138}\) In *State of Bihar v. P.P. Sharma*,\(^{139}\) court observed:

> The entries in the case diary are not evidence nor can they be used by the accused or the court unless the case comes under sec. 172(3) of the Code. The court is entitled for perusal to enable it to find out if the investigation has been conducted on the right lines so that appropriate directions, if need be given and may also provide materials showing the necessity to summon witnesses not mentioned in the list supplied by the prosecution or to bring on record other relevant material which in the opinion of the court will help it to arrive at a

\(^{136}\) *Queen Empress v. Mannu*, ILR 19 All.390 (FB). The question in this case was that, whether the court has the power to order for the submission of police diaries to the court simultaneously with the record of the case submitted to the court. Court decided in the differmative.

\(^{137}\) 1973 Cri.L.J 869, 871 (Ker.)

\(^{138}\) *Habeeb Mohammad v. State of Hyderabad*, A.I.R 1954 SC 51, 60, The appellant, in this case, was the Subedar of Warrangal. On 9th December 1947 he along with a number of police officers and a posse of police force proceeded to Guntur village to arrest some bad characters. When the party reached the village, nearly 70 persons came out to meet him and to make representation. He ordered the police men to open fire and as a consequence four unarmed and inoffensive were killed. After that he gave match boxes to the police men and directed them to go to the village and set fire to the houses. About 190 houses were burnt down. 70 villagers were tied up and taken to Warrangal.

\(^{139}\) A.I.R 1991 SC 1260.
proper decision in terms of sec.172 (3) of the code.\textsuperscript{140}

The purpose of the diary is to scrutinize the work and the method adopted by the police in the case and to ascertain whether the information received by them true, false or misleading.\textsuperscript{141} The failure of the police to maintain the diary as per the dictates of sec.172 opens up adverse criticism against the police officer and diminishes the value of the case diary, but it does not have the effect of making that evidence inadmissible.\textsuperscript{142} The diary must be maintained with promptness with sufficient details, mentioning all significant facts in chronological order and with complete objectivity.\textsuperscript{143} It is a complete record of the police investigation.\textsuperscript{144}

vi. Prohibition of Certain Prosecutions

In the accusatorial system the power of the State, being the prosecutor, is pitted against an individual accused of crime. Complete resources of the State will be used against the accused. It results in an unjust game for the accused. If no safeguard is provided, the power to prosecute could be used by the State as an instrument of oppression. In

\textsuperscript{140} Id. at p.1276.
\textsuperscript{141} Queen-Empress v. Mannu, I.L.R (1879) 19 All.390.
\textsuperscript{142} Zahiruddin v. Emperor, A.I.R 1947 PC 75. in this case the appellant was a grain depot officer of East India Railway company, whose duty was to receive from contractors articles for which orders were placed by the head-office of the company, to compare them with approved samples and subsequently to distribute them. One contractor complained to the police officer that, the appellant demanded bribe to pass a sale of mustard oil. Police laid a trap for the appellant and accordingly police obtained the service of a magistrate as a witness and went to the appellant’s home. The magistrate’s statement was recorded by the police and obtained his signature in it. At trial the Magistrate was allowed to consult the written statement which he had given to the police officer during investigation. The trial Magistrate held that obtaining signature in a statement recorded u/s. 161 in contravention of sec. 162 Cr.P.C., the evidence of that witness must be rejected. Hence, he acquitted the accused. The High Court reversed the decision. Privy Council reversed the order of the High Court. Hence, acquitted. The case was returned for fresh disposal.
\textsuperscript{143} Bhagawant singh v. Commissioner of Police, Delhi, A.I.R 1983 SC 826
\textsuperscript{144} State of West Bengal v. Mohammad Khalid, A.I.R 1995 SC 785
order to avoid this unpleasant consequence safeguards are provided in the Code and in the Constitution. Among these safeguards, finality of judgment is very important. Once the case is finally decided, a new prosecution on the same facts is barred.

Successive prosecutions on the same offence and prosecution on the basis of an *ex post facto* law are prohibited under article 20 of the Indian Constitution. Article 20(1) protects the citizen from conviction except for violating a ‘law in force’. A safeguard is provided to a person from being tried for an act, under a law enacted subsequently, which makes the Act a crime.\(^\text{145}\) Protection against double jeopardy is accepted in all the countries.\(^\text{146}\) Article 20(2) states that, “no person shall be prosecuted and punished for the same offence more than once”. This provision embodies the Common law rule, *nemo debet bis vexari*, that no man should be put twice in peril for the same offence. However, art.20 (2) did not give full effect to this doctrine. It placed four conditions to get the benefit of double jeopardy protection, viz., (1) the person must be accused of an offence, (2) he must have been prosecuted before a judicial tribunal, (3) he must have been punished, and (4) he must be prosecuted for the same offence again. So, *autrefois convict* alone is applicable in India as a Constitutional right. Hence, it limits the scope of the protection extended to persons by the Common law rule. However, the statutory scheme incorporates both *autrefois acquit* and

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\(^{146}\) The American Constitution incorporates this rule in the Fifth Amendment. The doctrines of *autrefois acquit* and *autrefois convict* are accepted in U.K. In France, Article 6 of the Code states that, once all appeals have been exhausted on a case, the judgment is final and the action of the prosecution is closed. So, it is not possible to conduct another prosecution on the same facts. All members of the Council of Europe have signed the European Convention of Human Rights which extended protection against double jeopardy. Seventeenth Protocol, Article 4 states that, “No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been acquitted or convicted in accordance with the law and penal procedure of the State”.

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autrefois convict. Section 300 of the Code of criminal procedure provides such a protection. These pleas are taken as a bar against criminal trial on the ground that the accused had already been charged and tried for the same offence and was either acquitted or convicted. Even though autrefois acquit is not given as a Constitutional guarantee, the Code included that also in its ambit to protect the accused and to avoid police abuses.

vii. Privilege against Self-Incrimination

Compelling the accused to testify against himself is prohibited by all legal systems. This rule is the fundamental cannon of common law. In India, one part of the privilege against self-incrimination is elevated to the level of a fundamental right. This principle aims at making the criminal justice system humane by eliminating torture and avoiding compulsory examination of the accused. This privilege helped the accused in affording the right to remain silent at the time of questioning by the police. This privilege is recognized in the continental system also. The privilege is a check on the possible police excesses during the interrogation of an accused. Granting of the privilege discourage the investigating agency from obtaining evidence by resorting to third degree methods, and encourage them to collect evidence independently.

In either case, it acts as a control measure. Insisting to answer a question is a form of compulsion especially in the atmosphere of a police station. In such situation, the person will be in a disadvantaged

147 Constitution of India, Art:20 (3) provides: “no person accused of any offence shall be compelled to be a witness against himself”.
148 French Code of Criminal Procedure, Art:114[1], “ At his first appearance, the examining magistrate shall establish the identity of the accused, acquaint him expressly with each of the acts that are imputed to him and advise him that he is free to make no statement. Mention of that warning shall be made in the official report. German Code of Criminal Procedure, Sec:136(1) also deal with privilege against self incrimination.
position and the police should not be allowed to take advantage of the
disability of the accused. Moreover, if allowed, in almost all cases, there
will be confession and the police may not investigate the case properly.
In *Nandini Satpathy v. P.L.Dani*\(^\text{149}\), the appellant was directed to appear
at Vigilance police station, Cuttack, for being examined in a case
registered against her under the Prevention of Corruption Act, 1947 and
u/ss.161, 165, 120B and 109 of the IPC. During interrogation, she
refused to answer certain questions claiming protection of Article 20(3).
On her refusal, she was prosecuted under section 179 IPC. The Supreme
Court while justifying her refusal directed the police that, they must
invariably warn, and record the fact, about the right to silence against
self-incrimination. In cases where the accused is literate, the police must
obtain his written acknowledgement.\(^\text{150}\)

The primary purpose of the privilege against self-incrimination is
to put an end to the practice of employing legal process to extract from
a person’s lips an admission of his guilt.\(^\text{151}\) The application of this
doctrine will stimulate the prosecution for a full and fair search for
evidence procurable by their own exertions and to deter them from a
lazy and pernicious reliance upon the confession of the accused.\(^\text{152}\) The
adversary system considered this right as a most cherished one. Justice
Mackenna\(^\text{153}\) has rightly pointed out thus:

> Even if I could be sure that, all or nearly all, the
> questioned persons are guilty, I would still
> withhold these on the ground of cruelty. For I
> think it cruel to compel a man to choose between
> confessing his guilt, committing perjury, or

\(^{149}\) (1978)2 SCC 424.

\(^{150}\) *Ibid.*

\(^{151}\) Fred E.Inbau, “Self-Incrimination – What can an accused Person be Compelled to Do”, 89

\(^{152}\) Wigmore, Evidence, 2nd edn. 1923 at p. 2263.

standing mute and suffering whatever penalties you care to attach to his silence. To avoid such cruelty is in my eyes, one mark of a civilized community.\textsuperscript{154}

Various provisions in the Indian Evidence Act\textsuperscript{155} and the Code of Criminal Procedure\textsuperscript{156} prohibited forced confession or testimony as inadmissible in the court of law and protect the suspect/accused person from the consequences of such confessions. A combined reading of the provisions of the Evidence Act show that confession of any nature to a police officer is not admissible in evidence.\textsuperscript{157} The general rule regarding confession is that, a voluntary confession alone is admissible. However, it seems that the law presumes involuntariness in case where the confession is made to a police officer or to any one other than a police officer while in police custody. Indian law is categorical in rejecting confession to a police officer under any circumstances.\textsuperscript{158} The reason for this rule of non-admission of statements recorded by the police is best described in \textit{Queen Empress v. Babu Lal}\textsuperscript{159} thus:

The legislature had in view the malpractices of police officers in extracting confessions from accused persons in order to gain credit by securing conviction, and those malpractices went to the length of positive torture; nor do I doubt that the legislature, in laying down such stringent rules, regarded the evidence of police officers as untrustworthy, and the object of the rules was to put a stop to the extortion of confession by taking away from the police officers the advantage of

\textsuperscript{154} \textit{Id} at p.667.  
\textsuperscript{155} Indian Evidence Act, ss. 24,25,26 and 27.  
\textsuperscript{156} Cr.P.C., ss.162, 163(1) and 315.  
\textsuperscript{157} Indian Evidence Act, ss.25 & 26. Section 27 of the Act considered as a proviso to section25 and 26 which states that such portion of the confession which distinctly relates to the facts discovered is admissible in evidence.  
\textsuperscript{158} \textit{Ibid}.  
\textsuperscript{159} 1884 ILR 6 All. 509.
proving such extorted confessions during the trial of the accused persons.\textsuperscript{160}

The only exception, if it can call so, is provided in section 27 of the Evidence Act, which states that, if the truth of the information given by the accused is assumed by the discovery of a fact, it may be presumed to be untainted and therefore admissible.\textsuperscript{161} This exception is given on the ground that if any discovery of material objects is made by a person who is in custody, pursuant to the statement given to police, is a guarantee of the truth of the statement made by him.\textsuperscript{162} So, there must be a connection between the statement and the material objects discovered. But, in all other cases, the legislature feared that the police will influence and induce the person in custody by applying undue pressure.

The rules regarding confession to police officer guards against the practice of torture for the purpose of extorting confession. The police have the power to question anybody in the course of investigation and to record the statements if they desire. But, in order to protect the person from prejudices, section 162 of the Code lays down the mode and purpose for which, the statements may be used in evidence. The Section specifically barred police officers from obtaining the signature of the deponent in the statement. The object is to protect the accused both against the overzealous police officers and untruthful or planted witnesses.

\textsuperscript{160} \textit{Id} at p. 512.
\textsuperscript{161} \textit{Jaffer Hussain Dastagir v. State of Maharashtra}, (1962)2 SCC 872
C. Control After Investigation

Control measures adopted after investigation aims at preventing the police from misusing their discretionary power in taking a decision to prosecute the offender. This is the last stage of control, which warrants more objective application of mind by the courts.

i. Filing of final report

As far as investigation is concerned State Government or the District Magistrate have no control or legal powers over the police. This legal position has been clarified by the Supreme Court in *State of west Bengal v. S.N. Basak*, \(^{163}\) thus:

The police has the statutory right to investigate into the circumstances of any alleged cognizable offence without authority from a Magistrate and this statutory power of the police to investigate cannot be interfered with by the exercise of power under section 439 or under the inherent power of the court under sec.561-A of the Code of Criminal Procedure. \(^{164}\)

The logic is that, the powers granted to the police are original in nature and are not delegated to them by the State Government. So, State Government or the District Magistrate has no power to interfere with the performance of duties and exercise of powers by the police. In *State v. Heera*, \(^{165}\) regarding police powers court observed:

Section 3 of the Police Act provides that except as authorized under the provisions of that Act, no

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\(^{163}\) A.I.R. 1963 SC 447. It was an appeal against the order of the High Court of Calcutta quashing the investigation started against the respondents in regard to offences u/s. 420 r/w 120B IPC.

\(^{164}\) *Id* at p. 448.

\(^{165}\) A.I.R 1966 Raj. 233. In this case a question ‘whether a Magistrate empowered to take cognizance of the offence on a police report can order the police to submit a charge-sheet in a case in which the officer-in-charge of a police station concerned has forwarded a report to the effect that on investigation no offence has been made out’, is referred to the division bench by the single judge.
person, officer or court shall be empowered by the State Government to supersede or control police functionary...no executive order can emanate from a magistrate superseding the final report.\textsuperscript{166}

Then, what is the nature of the control exercised by the State Government over the police. At any stage of investigation, the Government can transfer a case from the police to the vigilance department or C.B.I or can entrust the investigation with special police formed for the purpose. Once it is transferred, the investigating officer becomes \textit{functus-officio} and is incompetent to proceed with the investigation.\textsuperscript{167}

At the end of the investigation there would be a decision either to release\textsuperscript{168} or to forward\textsuperscript{169} the accused to a magistrate empowered to take cognizance of the case. In either case, satisfaction of the investigating officer is the deciding factor. But, the police officer cannot take an arbitrary decision in this regard. It must be based on evidence, which is recorded in the diary\textsuperscript{170} by which the police can justify their decision. If the police officer found that there is sufficient evidence to send the accused for judicial proceedings, he must file the final report u/s 173 of the Code of Criminal Procedure before the magistrate. This report shall contain the facts and the conclusion drawn by the police from the investigation and in the prescribed form. It must include all

\textsuperscript{166} Id. at p.236
\textsuperscript{167} K.Chandrasekharan v. State of Kerala, 1998 Cri.L.J 2897 (SC) A case is registered against the appellants u/s. 3 and 4 of the Indian Official Secrets Act,1923 on the allegation that they had committed acts prejudicial to the safety and sovereignty of India. The investigation was conducted by the State police and then entrusted with CBI. But after a few months the Government withdrew the consent given to CBI to investigate the case. Aggrieved by this, the six accused filed petition before the High Court, which was dismissed. That judgment was challenged in this appeal.
\textsuperscript{168} Cr.P.C., s.169.
\textsuperscript{169} Id. s.170.
\textsuperscript{170} Id. s.172.
relevant documents or relevant extracts of the documents, which the prosecution proposes to rely and all statements recorded under section 161, of the persons whom the prosecution proposes to examine as its witnesses.  

On receiving the final report, the court should go through all documents before taking cognizance of the case. Acceptance of the final report should not be an automatic one. The Magistrate can either accept the report and proceed further or differ with the conclusions of the police and direct that the accused not named in the report or not sent up, should also be put on trial. The Magistrate could also take cognizance of an offence even if police report is to the effect that no case was made out, or order for further investigation, or finding that there is no sufficient ground for proceeding further, drop actions against the accused. A police officer who files a final report which is incorrect or false can be prosecuted under section 29 of the Police Act, 1861.

Though, the decision to release the accused or send him for trial is a prerogative of the police officer it must be on justifiable grounds. If upon investigation, it appears to the investigating officer that there is no

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171 Id. s.173 (5).
172 Kuli Singh v. State, A.I.R 1978 Pat. 298 at p. 303. The Chief Justice constituted a Special Bench in order to resolve the question whether the Magistrate has any jurisdiction to differ with the conclusion of the police contained in the final report submitted u/s 173 Cr.P.C.
173 M/s India Carat Pvt.Ltd.v State of Karnataka, A.I.R 1989 SC 885. A case u/s 408 and 420 of the IPC was registered against the accused and was investigated by the police. Subsequently, the police filed a report to the court stating that further is not required as the case was of a civil nature. Aggrieved by the report, the appellant approached the Magistrate seeking permission to prove the case. Magistrate allowed. Against this order accused approached the High Court and the Court quashed all the proceedings before the Magistrate. Aggrieved by this order appellants approached the Supreme Court.
174 Cr.P.C., s.173(8)
175 Sec. 29 states, “Every police officer who shall be guilty of any violation of duty or willful breach or neglect of any rule or regulation or lawful order made by competent authority. …shall be liable, on conviction before a magistrate, to a penalty not exceeding three months’ pay or imprisonment, with or without hard labour, for a period not exceeding three months, or to both.”
sufficient evidence against the accused or there is no reasonable ground of suspicion exists, the accused shall be released by the officer. An objective decision is expected from the police officer.

**ii. Deficiency in Evidence**

The police officer, who is authorized to conduct an investigation in a case, has a responsibility to send up the case to the Magistrate under Section 170 of the Code, when there is sufficient evidence against the accused to proceed further. But, if there is no sufficient evidence the police officer has the power to release him. It is for the police officer to decide whether there is sufficient evidence or not, to justify the forwarding of the accused for trial. The purpose of this section is to protect the accused against whom sufficient evidence is not procured, from unnecessary prosecutions. But, all these powers are subject to the Magistrate’s power to reject or accept the report fully or partly.

On getting the final report, the court shall scrupulously scrutinize it and the accompaniments by applying its judicial mind and take a decision either to accept or reject the report. He is not bound by the conclusions drawn by the police. He may differ with the police report.

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176 Cr.P.C., s.169

177 *A.K.Roy v. State of West Bengal*, A.I.R 1962 Cal. 135 (FB). In this case the car which was driven by the petitioner met with an accident and one lady died in the accident. The police registered a case and after investigation submitted the final report taking the view that it was an accident and the petitioner should not be blamed since the lady crossed the road negligently. The magistrate called for the case diary and after perusing the same took the view that prima facie the petitioner was guilty of rashness and negligence and so directed the police to submit a charge-sheet under sections 304 A and 279 IPC.

178 *Sampath Singh v. State of Haryana*, (1993)1 SCC 561 at p. 565 In this case there are several petitioners, who are either members of Parliament or Haryana Assembly. They jointly filed a petition before the Punjab& Haryana High Court seeking various reliefs. The main relief was to direct an investigation by CBI against Bhajan Lal, on the basis of FIR no.372/1987 of Sadar police station. The Petitioners in this case made serious allegations of corruption, misuse of authority etc. against Bhajan Lal. Earlier, the magistrate discharged the accused, Bhajan Lal. Petitioners wanted to set aside the order of the Magistrate. The High Court dismissed the petition. Hence this appeal.
He may decide to issue process even if the police recommend that there is no sufficient ground for proceeding further. \(^{179}\)

iii. Further Investigation

Police have power to conduct further investigation, even after laying the final report. \(^{180}\) The court can also order for further investigation, when it feels that the investigation is defective.

In *Ram Lal Narang v. State of Delhi Administration*, \(^{181}\) court opined that, “further investigation is not altogether ruled out merely because cognizance of the case has been taken by the court; defective investigation coming to light during the course of a trial may be cured by a further investigation, if circumstances permit.” \(^{182}\) Whenever defect or illegality in investigation is brought to the knowledge of the court, the court shall take necessary steps to get the illegality cured and the defect rectified, by ordering re-investigation. \(^{183}\)

\(^{179}\) *H.S.Bains v. State*, (1980) 4 SCC 631, 634. In this case a complaint was filed against the appellant before the Magistrate, who ordered an investigation by the police u/s. 156(3) Cr.P.C. After investigation police filed a report stating that the complaint was not true and that it might be dropped. Magistrate after disagreeing with the conclusion of the police report took cognizance of the case u/s. 448,451 and 506 IPC and directed to issue process to the appellant. The application of the appellant before the Punjab & Haryana High Court to quash the proceedings. The appeal was dismissed.

\(^{180}\) *B.S.S.V.V.V Maharaj v. State of U.P.*, 1999 Cri.L.J 3661 (SC). In this case the appellant claimed that he possess divine healing powers and attracted several devotees. The complainant approached him with the problem of dumbness of his 15 years old daughter. Appellant assured that the girl child would be cured of her impairment through his divine powers and demanded Rs.1 lakh as consideration to be paid in instalments. Complainant paid two instalments. After some time he found that the appellant committed fraud on him and he lodged a complaint before the police. Police started investigation. Appellant moved the High Court for quashing the proceedings which was dismissed. He filed appeal before the Supreme Court, which was also dismissed.

\(^{181}\) (1979) 2 SCC 322. The question in this case was whether the police can conduct further investigation in a case.

\(^{182}\) *Id* at p. 336.

\(^{183}\) *H.N.Rishbud v. State of Delhi*, A.LR 1955 SC 196. This was an appeal against the order of the Punjab High Court reversing the order of the special judge, Delhi, quashing certain criminal proceedings pending before himself against the appellant on the ground that the investigation on the basis of which the appellants were being prosecuted were in contravention of the provisions of Prevention of Corruption Act. The appeal was dismissed.
iv. Restrictions in the use of Statements

Statements given to a police officer is not a substantive piece of evidence. It has no evidentiary value.\textsuperscript{184} It can be used either to corroborate the witness\textsuperscript{185} or to contradict the witness.\textsuperscript{186} It is not a substantive piece of evidence because it is not made during trial and the system has no faith in their investigative machinery. The object of section 162 is to protect the accused from police abuses and from untruthful witnesses. Section 162 Cr.P.C. puts restrictions on the use of statements made to an investigating officer during the course of investigation. But, the section allows the defence to use the statement under sec.145 of the Evidence Act to contradict the witness, as if it is true. The prosecution cannot use the statement of the witness recorded under section 162 of the Code because there is no guarantee that it contains the true version of the statement of the witness. There are complaints that the recording of the statements are often inaccurate and a police officer can write anything he likes. It may be due to his enthusiasm to support the prosecution case or to weaken it. But, the law allows the defence to use the statement in the cross examination for the purpose of contradicting the witness. Thus, the statement gets two different statuses. If it is not correct for one purpose, how can it be good for another purpose? The Law Commission adverted to this question and opined:

\textsuperscript{184} \textit{Ramprasad v. State of Maharashtra}, A.I.R. 1999 SC 1969. It was a case of murder. The evidence include the dying declaration given by PW1 who survived.

\textsuperscript{185} Evidence Act. s.157, “In order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved”.

\textsuperscript{186} \textit{Id.} s.145, “A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved; but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him”.

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There is a material difference between contradiction and corroboration and what is good enough for contradicting a witness is not always good enough for corroborating him...the policy of law in permitting a witness to be contradicted by a police statement and not permitting him to be corroborated by the same statement is basically sound and sensible.\textsuperscript{187}

Thus, the Law Commission supports the present procedure. This seems to be a partisan view giving more emphasis to the safety of the accused at the cost of social interest in booking the culprit. It seems to be a right course to allow both parties to use the statement. It is not the point that the police statement is to be blindly adhered to. Such a course would result in tying the case to the police report. This will work out against the defendant’s ability to challenge the police version of the case and would consequently shut out the possibility of eliciting out circumstances, which belies the police version. We have to draw a line of compromise to do justice to both the parties of the case.

\textbf{Where the control fails}

Enforcement of law shall be made in accordance with a procedure, which the system accepts, as just and fair. Criminal justice system is not an exception to this. Effective enforcement of law does not warrant lawlessness from the part of the enforcers. Lawlessness in the behaviour of law enforcement agencies leads to tyranny. Law is meant for the protection of life and liberty of the people and when it fails the criminal justice system loses the true spirit. In spite of the constitutional and statutory safeguards, abuses are rampant. Why physical and mental torture and denial of rights are common? Will it not the fault of law, which simultaneously granted discretionary powers to

\textsuperscript{187} Law Commission of India, 41\textsuperscript{st} Report, vol.1, para 14.13 p.74
the police and rights to the citizens? Need not be, because the law cannot do injustice to the citizens, but who handles the law matters.

Constitution and the criminal laws are not fully available to the common man of India. The main reason for this awesome situation is that the agency for law enforcement is abusing their power and distorting the laws to meet the end as desired by them.

i. Absence of Proper Definition

In order to ‘police the police’, one must tell the police what to do, as well as tell them what not to do. The statutes in India have given clear guidelines to police about what they have to do in each and every circumstance. Irrespective of this abuse of power by the police continues. Custodial violence, torture and abuse of power are became a routine matter in India. The ‘law in the book’ becomes distanced from the ‘law on the ground’.

The decision to arrest is to be made in accordance with laws. Though the law insists existence of reasonable ground to decide to arrest, most of the arrests in India are on mere ‘suspicion’. Detention of persons for the convenience of investigation without recording the arrest is common in Indian practice. Very often, to regain liberty, the person has to wait for the mercy of the officer who has taken the person into custody; the legal remedies being beyond his means. Though the Judicial Magistrate and the Sub-divisional Magistrate have the

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jurisdiction to entertain a petition and to conduct enquiry, they usually hesitate to take any action.

Detention beyond twenty-four hours could be made only with judicial authority. But, in many cases suspects are detained in custody for longer period than allowed by law without recording the arrest. In England, police have no authority to detain a person in their custody. They have to entrust the suspect to the custody officer, who is appointed for the purpose and not involved in the particular enquiry. The suspect cannot be detained in a police station but only in a ‘designated police station’. Custody officer has given wide powers to order for the detention of the suspect if there is evidence against him or to release him if there is no evidence. So, there is an independent ‘in police’ scrutiny before the judicial intervention. More over ‘lock-ups’ in the police station become unnecessary.

In the case of persons charged and produced before the Magistrate, the records may claim that all statutory requirements are complied with. Even otherwise the Magistrates may not verify the records properly to ascertain the compliance of legal requirements. It is in this context, The Law Commission of India in its 152nd report on Custodial Crimes recommended the insertion of a new section in the Code requiring the Magistrates to verify and inquire the compliance of

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190 Poovan v. S.I Police, Aroor, (1993)1 K.L.T 454. Wherein one Babukuttan was taken into custody by sub-Inspector of police, Aroor at 1.30 p.m. on 22-01-1993 and was locked him up in the station. Several persons intervened and offered sureties. But the respondent did not pay any heed to that. On 01-02-1993 an habeas corpus petition was filed before the High Court. The government pleader submitted that a case against Babukuttan was registered on 01-02-1993 and on finding that he was the real culprit, he was arrested on the same day and produced before the Magistrate and the court remanded him to judicial custody. It also stated that, when producing before the Magistrate he did not make any complaint against the police.

191 PACE Act s.36
the safeguards in connection with arrest.\(^\text{192}\) The Magistrate has to satisfy himself that the investigating officer has complied with all the provisions intended to safeguard the rights of the arrested persons.\(^\text{193}\) But, so far this suggestion could not find a place in the Code. In the existing scheme, the Magistrates are seen to be not serious in safeguarding the rights of the accused. In many occasions, complaints raised against the police by the accused produced from custody are not taken seriously by the Magistrate and thereby silently allows the perpetration of the mistake. Probably they may also be sharing the hostile attitude of the police and the public towards the accused. Probably the situation might undergo a change if the rights of the accused are spelt out in the statute book making it compulsory on the part of the police to comply with it. To ensure compliance with the legal requirements by the police the judicial officer should be conferred with a mandatory duty to verify it on production of the accused and shall record the finding in the proceedings. The violation of this duty either by the police or the concerned judicial officer shall be viewed seriously.

Several guidelines are given by the courts regarding the power of arrest, which has to be complied with while arresting a person and keeping him in custody. The law is not adequate enough to protect the life and liberty of common man from police abuses. The Supreme Court in *Joginder Kumar*\(^\text{194}\) referred the Royal Commission guidelines, which states as follows:

“We recommend that detention upon arrest for an offence should continue only on one or more of the following criteria:


\(^{193}\) *Id.* paras 14.4 -14.6, pp. 165-167

\(^{194}\) A.I.R. 1994 SC 1349.
a. the person’s unwillingness to identify himself so that a summons may be served upon him;
b. the need to prevent the continuation or repetition of that offence;
c. the need to protect the arrested person himself or other persons or property;
d. the need to secure or preserve evidence of or relating to that offence or to obtain ‘such’ evidence from the suspect by questioning him; and
e. the likelihood of the person failing to appear in the court to answer any charge made against him.”

So, the arrest will be confined only to persons whose arrest is absolutely essential. At present, as per the Code, the police officer can arrest a person only when he is satisfied\textsuperscript{196} that the person involved in the commission of a cognizable offence. The same is the power when the police receive a reasonable complaint or credible information with regard to the commission of a cognizable offence. The police could arrest a person when he entertained a reasonable suspicion of a crime. In cases where arrest is resorted to by the police nobody bothers to ascertain whether the factual situations of the case in hand justify the action. Whenever a person is arrested by the police, two inferences can be drawn. One is that, the person arrested has committed a cognizable offence and the police have received reasonable information regarding it. Secondly, that the person arresting reasonably believes that some violence or harm is likely to cause in the immediate future, which cannot be prevented unless, the arrest is made. In the first case, the

\begin{footnotesize}
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\item[195] Third Report NPC, p.32.
\item[196] Cr.P.C s.41(a), “Any police officer may without an order from a magistrate and without a warrant, arrest any person-

(a) who has been concerned in any cognizable offence, or against whom a reasonable complaint has been made, or credible information has been received or a reasonable suspicion exists, of his having been so concerned, or …”.
\end{itemize}
\end{footnotesize}
arrested person must be produced before the Magistrate with in twenty-four hours of the arrest. In the second instance, the person will be released after due warning if he is not otherwise required. In either case police has to make necessary entry in the records kept for evidencing arrest. Without this, the police have no authority to keep the person in custody, which is illegal. The twenty-four hour is reckoned with from the time of arrest mentioned in the arrest memo produced by the police.

Power to arrest gives ample opportunity to the police to abuse it. But, if the police are required to inform the arrest to the Taluk Legal Aid Board immediately after the arrest, we can control the police from abusing their power. Moreover, the relatives of the arrested person can also approach the Legal Aid Board with their grievance. The police shall not be allowed to keep a person in custody overnight whose arrest is not recorded and who is taken into custody on suspicion or for questioning. The arrested person must be entrusted with the detention centre, which is constituted for the purpose under the direct supervision of an officer.

It is necessary to compile the powers, functions and duties of police so that they can be incorporated in a single statute. Thus, the regulations will have the authority of the Parliament. Lord Devlin aptly observed that, “it is quite extraordinary that, in a country which prides itself on individual liberty the definition of police powers should be so obscure and ill defined. It is useless to complain of police overstepping the mark if it takes a day’s research to find out where the mark is”. In 1983, Police and Criminal Evidence Act was passed in England.

incorporating all the police powers. In India, a comprehensive legislation in this regard is highly necessary.

ii. Heavy Work load and varying nature of Work

Sometimes the police are unable to comply with all the requirements of law because of the nature of their duty. It is a mixture of several duties and in certain times, they may not be able to concentrate on one duty. Maintenance of law and order, VIP security, traffic control, other security duties, are some of them apart from the major duty of investigation, which needs time and concentration. At any time, the executive can withdraw police from one duty and entrust them with another. The casualty will be the administration of criminal justice. This can be overcome by constituting two independent police agencies: one is entrusted with crime investigation and the other with maintenance of law and order and other duties.

iii. Absence of Criminal Sanctions

What if the provisions of the Act are not complied with? The police officer is not proceeded against departmentally for perpetration of an illegal act. Unless the aggrieved person proceeds against the erring official either criminally or civilly, the situation goes unnoticed and unremedied. This state of affairs goes in favour of the violations for the reason that the moving of legal machinery at the instance of the accused/aggrieved person in the Indian context is only a pious wish. Though, a civil suit for damages for false imprisonment is available in law it does not work in practice mainly because of the material conditions of an average Indian. In normal circumstances, the aggrieved person would be satisfied with release from custody through an order from the Magistrate. Due to the complexities of the legal process, action against the police is not generally resorted to. This is mainly due to the
fact that in most of the cases the common man involved, lacks the expertise and resources to fight out the case. It might also be feared that initiation of action against the police would lead to further arrest and prosecutions in the form of vengeance by the police. This being so, the safeguards should clearly be regarded as mandatory and the violations may be met with ‘appropriate reward’.

Control measures fail on the failure of enforcement. Machinery is yet to be instituted to enforce the rights of the arrested person strictly. Compensation awarded by the apex court for custodial violence/death and the consequential flouting of constitutional safeguards are ineffective in controlling the cops because the duty to compensate the victim is generally cast on the Government. Since the responsibility to compensate lies on the Government, the erring official goes free. Thus, the government is compelled to pay compensation on vicarious liability principle. In fact, the law-abiding citizens lose money, which he paid as tax to remedy the lawlessness of some officials. In short, the citizens are penalized for something, which is not of their fault. Penalty/remedial measure do not have an impact on the status and position of the erring officer. Thus, the legal system takes a double standard wherein violations of the law by common man are viewed seriously and the violations of law by police officers get a cold response.

The accused must have a ‘fair trial’. Admission of unfairly obtained evidence makes the trial unfair. This is unfortunately the position in India. An exclusionary rule similar to that of American law has to be inserted in the Evidence Act, allowing the judge to exclude evidence, which is unfairly obtained.

iv. Absence of Independent Authority to Investigate Cases
The best device to control discretion is that of sharing discretion by different agencies.\(^\text{198}\) Now the police in India are overburdened with duties and responsibilities. They have to perform different duties, which need different calibre, at the same time in different capacities. Duties like VIP security, traffic control, maintenance of law and order, investigation, court duties are though important, require separate skill and intelligence for each of them. If the policing work is divided into police for law and order and police for investigation, the duties can be shared between these two institutions. This will eliminate the need to rush in the process of investigation due to pressing needs of other duties. This would result in reducing the instances of shortcut methods being adopted at the cost of infringement of legal safeguards designed to protect the rights of the accused. Thus, such a measure would result in elimination of abuse of the discretion by the police and increase the efficiency.

There shall be a central supervisory authority to ensure enforcement of standards with regard to policing and prosecution. This authority should have a statewide jurisdiction and shall act as an administrative machinery to correlate the work of the police, prosecution, probation and correctional institutions. A senior judicial officer having expertise in criminal law could be an ideal choice to head such an institution.

v. Absence of Programmes to Review the Results

Though the credit goes to the police for the successful ending of prosecution, nobody bothers to bear the responsibility for the failure. There is no attempt to review the case to find out the flaws, which lead

to the failure of the case. It is a great mistake on the part of the department. Revision and review of the work is a good mechanism to avoid future mistakes. Moreover, it will be a good training programme for the officers. Discussion of decided cases with other colleagues and with legal officers of the State Prosecution Board will help the police officers to avoid mistakes in future. Therefore, training programme in this sense may be a continuous one.

vi. Absence of People’s Confidence and co-operation

Criminal process has to build public confidence in the administration of justice. Failure in achieving this would result in the failure of the system itself. A system, which is not capable of commanding respect, can hardly expect its citizens to observe the law. There is an intimate connection between confidence in the criminal process and public willingness to accept its results. “A system of criminal justice that safeguards the innocent from conviction, that screens the accused (even the guilty one) from prejudice and that achieves a high standard or propriety in the investigation of crime can expect to maintain the confidence of the community in its process”\(^\text{199}\)

So, the agency conducting the investigation must keep, integrity, honesty, and a high standard to capture the confidence of the people. Public confidence in police actions must conform to three important principal standards; fairness, openness and workability.\(^\text{200}\) The police-community relationship is very important for the effective, efficient and impartial law enforcement.

Conclusion


Provisions in the statute, which regulates police functions, are observed in breach. The reasons for this recalcitrant attitude of the police are manifold. Absence of sufficient control measures is the reason for this. In order to control the police and to prevent abuse of power by the police, strict measures have to be employed. Police are expected to do their duties effectively with maximum community support. If the police abuse their power or turn a blind eye to the prevailing laws, it will create contempt for the law enforcement process. We cannot blame the police alone for this predicament. If the laws are accurate and specific, there arises less chance for exercising discretion and can avoid consequent abuses.

The criminal justice administration should do justice to both the suspect and to the society. Collection of evidence must be in tune with the provisions of law. Under the guise of combating crime, no authority could violate the law with impunity. Violation from any quarter is violation and has to be dealt with accordingly. Indian law admits in trial all evidences collected irrespective of the modus operandi adopted by the police in collecting the same.\textsuperscript{201} This turns to be an encouragement for the police to violate the law. In order to control the police from violating the law necessary changes has to be incorporated in the statute. The law shall give ample power to the court to reject the evidence, admission of which will have an adverse effect on the fairness on the proceedings. Court can exercise this power when it found that the modus operandi adopted by the police in obtaining the evidence is tainted.

Complaints against police, in most cases, come to air only after investigation. If the investigation and law enforcement activity are

\textsuperscript{201} Paramjit Singh v. State of Punjab, A.I.R. 2008 SC 441.
controlled properly, problems regarding abuse of power can be resolved easily. Maintenance of discipline is one of the most important control mechanisms. Police must be above suspicion and corruption and at the same time community friendly. Imposition of strict punishment is highly needed to maintain discipline in the organization.

Human rights violations and crimes committed by police should be viewed seriously. Mechanism for investigating into the allegations of breach of life and liberty shall be constituted. The erring official if found guilty shall be removed from the service. Sufficient provisions have to be included in the Police Act to give effect to this.

There is a wide spread lack of public confidence in the existing system of handling complaints against the police. Only strengthening independent non-police element in the system can restore this. At present the complaints against the police officers are investigated exclusively by the police officers themselves. Police Complaints Board (PCB) shall be constituted to enquire into the complaints against police personnel. After the enquiry, PCB shall initiate prosecution against the erring official. The PCB’s enquiry report shall also be considered as administrative enquiry and departmental disciplinary proceedings can be initiated on the basis of it.

The Government is liable for injury to any of its subjects resulting from an act done by its servants if such act is done under the colour of the office. At the same time if the wrong done by the servants is not expressly authorized or ratified, Government is not liable to pay compensation. In almost all the cases of police atrocities, the
Government is ordered to pay compensation. Since the commission of crime, not being sovereign function instead of penalizing the government the concerned officer may also be ordered to shoulder the burden to pay compensation.

Adequate checks and controls over the criminal investigation are necessary to safeguard the interest of the society to combat lawlessness and to uphold the rule of law. The police force cannot disregard these provisions. If there were any deliberate disregard of the safeguards and its toleration by the courts would result in abrogation of individual liberties. Those who abuse the power are not fit for the police job, because policing is invariably connected with the day-to-day life of the common man. Charles D.Breital is correct in saying that, “Good men will use discretion wisely. Good men will control discretion wisely. Bad men will make a mess of discretion; they will also make a mess of rule of law”. One thing is sure, India does not want bad men in uniform.

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203 Supra n.198 at p.435.