Chapter – VII

CONTROL OF POLICE
A COMPARATIVE OVERVIEW

Introduction

Every legal system envisages mechanism for the Control of law enforcement agencies. Such a mechanism is indispensable in order to ensure fairness in their action as well as to preserve the liberty of the persons caught in the web of criminal law. The methods and mechanisms adopted for the same varies from one system to another. In the accusatorial system there is no immediate control from the judiciary or any other institution over the police. This may sometimes lead to abuses. Since wide powers have been conferred on the police the absence of immediate control and remedy in case of abuse ultimately result in violation of the rights of the citizens.

Sanders and Young propounded a new model of criminal justice, viz., freedom model,\(^1\) which suggests that police powers are intended to further conflicting values, aims and interests in the criminal process such as convicting the guilty, protecting the innocent from wrongful conviction; protecting human rights by guarding against arbitrary and oppressive treatments; protecting victims, maintaining order and securing public confidence and support in policing and prosecution. There must be a balance between guarding against error and injustice on the one hand and facilitating efficiency on the other. The way that balance is to be struck is a widely debated theme in all the democratic countries. Control of the cops is one important component in this

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process of balancing. Generally this duty is being carried out by the judiciary. Judiciary takes initiative in this regard by filling the vacuum left in the statutes. The control measures adopted in various legal systems\textsuperscript{2} could be divided into two viz., judicial control and statutory control. France stands apart since the pre-trial and trial procedures are different from U.S.A and U.K., which are common law countries. The following are the control measures adopted in the common law system.

**A. Judicial Control**

Control of law enforcement machinery under the common law system is obviously a matter of public interest.\textsuperscript{3} The common law system places high value on individual rights. The society expects law enforcement agencies to protect the same by adopting humane methods and mechanisms. It is the judiciary which assures that the law enforcement machinery is not abusing or exceeding the power given to them.

Discretion is given to the enforcement agencies from initiation of criminal case to the stage of trial of the case. This discretionary power ensures functional freedom. The police exercises discretion in matters of arrest, detention, interrogation, search and seizure, and filing of final report before the court. Though all the powers given to the police clearly spelt out and limited by law there are complaints from all corners that the powers are misused. This aspect of the police behaviour is indirectly being checked by the courts by interpreting and clarifying the limits of the power granted by law. Very often the judiciary comes out with open criticism against the abuse of the power by the police. Of course this power of the judiciary has got limitations. It begins and ends

\textsuperscript{2} This study confined to the control measures adopted in U.S.A, U.K, and France.

\textsuperscript{3} Herman Goldstein; “Administrative Problems in controlling the Exercise of Police Authority”, 58 J.Crim.L,C & P.S.160(1967)
with criticism and not assumes to the level of immediate supervision of the police actions. Lord Justice Patrick Devlin observed:

...the only power that the judges have is the power of public criticism of any police action of which they disapprove and the power to reject evidence which has been obtained in breach of the rules.\textsuperscript{4}

The frequent criticisms and the mandates from the judiciary have definite impact on the practice and it often act as a control mechanism. The rejection of a piece of evidence, obtained in breach of prevailing norms, is an indication that the court is not happy with the practice. This will act as a check against such a course of conduct in future. Non-observances of legal norms by the law enforcement agencies make the interference by the courts inevitable. When the law enforcement agencies break law it puts the rule of law in jeopardy. Maintenance of rule of law mandates that these kinds of deviations are to be effectively controlled, though difficult in practice. The judiciary feeling the need of the hour accepts this responsibility. It denounces the police lawlessness and imposes sanctions thereby controls the police. Thus the courts through judicial process ‘police’ the ‘police’.

High incidence of ‘excesses of police’ justifies judicial intervention in the troublesome areas of investigation. The police are obliged to obey the law. The courts through its timely intervention remind them that the same rules of conduct that are commands to the citizens are applicable to them also. Police lawlessness will result in collapse of the system. The court is the more appropriate agency to check the abuses and to resolve the contest between public power and

\textsuperscript{4} Patrick Devlin, \textit{The criminal Prosecution in England}, Oxford University Press, 1960, at pp.35,36
personal immunity. Mr. Justice Brandeis dissent in 1928 has become the central theme of modern judicial policy. He observed:

Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizens. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our government is the potent, omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites everyman to become a law himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means – to declare that government may commit crimes in order to secure the conviction of a private criminal— would bring terrible retribution. Against that pernicious doctrine this court should be resolutely set its face.\(^5\)

The police procedures and methods for the law enforcement were evolved in common law system and originally there was no legal or administrative control /supervision. This vacuum is being filled by the courts. This was achieved by the judiciary through asserting control over police conduct. The control exercised by the judiciary is now expanding rapidly.

Mr. Justice Brennen observed:

Plainly, there is no stage of that administration about which judges may say it is not their concern… the judicial supervisory role like other

aspects of legal regulation, is changing, and the trend certainly is one towards enlargement.\(^6\)

The criminal justice system doesn’t place any responsibility, whatever; on the judiciary in the control of crime or in ensuring that the offender is penalized. But it carries an important responsibility for the fair, efficient and effective operation of the criminal justice system. The supervisory role of the judiciary in the administration of criminal justice, it seems, enlarging. The result is the advent of many judge made laws and rules like exclusionary rules of U.S., judges rules of UK and arrest rules of India. The trend shows that judiciary is playing grater role in both making and reviewing the law enforcement decisions. The effectiveness of the law enforcement decision depends upon three things,\(^7\) viz., (1) tolerance of the people (2) power and position of the judge who excludes the evidence prejudicial to the accused, and (3) expectation of the public. People are the immediate sufferers of the law enforcement decisions. Their tolerance level is the deciding factor of the effectiveness of the decisions. People expected a good and efficient police organization so as to make sure that their life and liberty are safely protected. The judges, in a democracy, play an important role in implementing the law enforcement decision. They have to decide whether the evidence is admissible or not and they have the power to reject the evidence as the ‘fruit of the poisonous tree’\(^8\) as mandated by

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\(^8\) The evidence initially obtained illegally, becomes the poisonous tree and if this evidence leads to other evidence, then the secondary evidence becomes the fruit of the poisonous tree. The ‘fruit of the poisonous tree’ doctrine was first enunciated in Silverthorne Lumber Company v. United States, 251 U.S. 385 (1920). In this case the federal agents seized certain books and documents illegally and photographed necessary informations which they wanted, before returning the originals. Court rejected those evidences as
the exclusionary rule of U.S. or under the discretion vested in the court as in the case of English law.

The admissibility of the evidence collected by the police is determined by the judiciary under various criminal legislations and the Constitution. The court interprets the provisions while dealing with such situations and adjudges whether the police are right in adopting certain course of conduct. By adopting different procedures court analyses the police work and ensures that the police carried out law enforcement procedure as per the dictates of law.

a. Judicial Review of Law Enforcement Decision

Law enforcement is not an end in itself. It is a means by which enjoyment of liberty⁹ becomes possible for each person. Hence, it is incumbent upon the law enforcement machinery, the police, to order their activities in such a way that it would not violate the rights of the people or unduly curtail the liberty of common man. But in practice, it is clear that, all law enforcement activities impinge, to certain extent, upon individual liberty. It is justified on the ground that, the activities are necessary to ensure liberty to all and so for the common good, some may suffer. But, we may strike a balance between the corporate interest of the society and the individual interest, so that both interests are protected. At the same time a democratic society cannot allow its law enforcement machinery to violate the rights of an individual on the ground of common interest. If it is allowed, the violations will continue and that will create feeling of insecurity among people. This will affect the very fabric of the society. So, the judiciary must review the law

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enforcement decisions of the police frequently, so as to deter the police from doing abuses or excesses. Whenever a case come before the court for further proceedings, the court will review all pre-trial process in order to ensure that the justice system works properly and fairly.

The devising of rule that advances efficiency, rationality and fairness in the investigation has traditionally been a function of the judiciary. It is, in fact, a supervisory or controlling function. To check whether the law enforcement process is in conformity with the constitutional mandate and, if not, what are the implications of violations of statutes by the law enforcement officers have been said to represent an exercise of the supervisory power. As Alfred Hill rightly pointed out, “as the supervisory power seeks to promote judicial fairness and to curb executive excesses, it serves ends that are at least minimally posited by the Constitution, particularly the Bill of Rights”.  

Judicial review is the power of the court to review the actions of the governmental agencies. It was first done in Marbury v. Madison, where the court held that an act of Congress was null and void. Chief Justice John Marshal, in this case, observed that Constitution is supreme law of the land and it is the duty of the judiciary to interpret the law and hence judicial review is inevitable and necessary. Why do we need judicial review in law enforcement decisions? When it is found that the law enforcement agencies violate the bill of rights and thereby the personal liberty of the common man, the only effective weapon the court can make use to protect the rights of the persons is judicial review of the law enforcement decision. In fact, the before-the-fact judicial control is not exercised properly by most of the judges. Judges issue

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11 2 L.Ed. 60 (1803).
search warrants and arrest warrants without giving detailed consideration as to whether sufficient ground exists.\textsuperscript{12} Serious consideration of the warrant occurs only when issue is raised by a motion to suppress the evidence obtained on the ground of illegality.\textsuperscript{13}

In the common law system, the judiciary is considered as competent to adopt measures to regulate and improve the quality of the judicial process. Whenever the court found that the law enforcement process is not according to law it should rise to the occasion to protect the rights of the common man, irrespective of the fact that whether the violation affect the quality of the judicial process or not. In \textit{Mc Nabb v. United States},\textsuperscript{14} the court resolved the question, whether the confession obtained from poorly educated prisoners in the course of prolonged questioning prior to arraignment is to be admitted in evidence. While rejecting the confession as it is obtained in violation of a statute, court observed:

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...to permit such evidence to be made the basis of a conviction… would stultify the policy which Congress has enacted into law.\textsuperscript{15}
\end{quote}

‘Miranda warning’, which is the aftermath of \textit{Miranda v. Arizona},\textsuperscript{16} is intended to protect the suspect from coerced confessions. In 1963, Earnesto Miranda was arrested for robbery, kidnapping and rape. The police interrogated him and he confessed. At the trial, prosecutors offered only his confession as evidence and he was convicted. But, in the appeal, Supreme Court excluded this evidence on

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\item \textsuperscript{12} Wayne R. LaFave and Frank J. Remington, “Controlling the Police: The Judge’s Role in Making and Reviewing Law Enforcement Decisions”, 63 Mich. L.R 987, 992.
\item \textsuperscript{13} \textit{Id.} at p. 993.
\item \textsuperscript{14} 318 U.S. 332 (1943).
\item \textsuperscript{15} \textit{Id.} at p. 345.
\item \textsuperscript{16} 384 U.S. 436 (1966).
\end{itemize}
the ground that *Miranda* was intimidated by the interrogation and that he did not understand his rights not to incriminate himself. *Miranda* decision helped to professionalize the police conduct, as the way law suggests. It is not to exclude legitimate confessions on the ground of the non-adherence of the legal measures but to correct the police behaviour towards the suspect and to recognize the rights of the suspects. So, as long as the police observe the *Miranda* requirements, the presumption today is clearly in favour of admitting confessions as evidence. The court has made certain exceptions to *Miranda* warning. *New York v. Quarles* depicted how the court avoided the Miranda warning when public safety is in danger. In this case two police officers were approached by a woman who claimed that she had been raped and the assailant, who was having a gun with him, had gone to a nearby shop. Officers went to the store and spotted the respondent, who matched the description given by the women. On seeing the police he turned and ran but, police was able to catch him. He was asked about the gun and he showed an empty box and said, ‘the gun is over there’. Then he was arrested and given the *Miranda* warning. He wanted to exclude the statement given prior to the *Miranda* warning. But, the Supreme Court accepted all the evidences and recognized what the officers have done by creating a public safety exception to *Miranda*. Similarly, the inevitable discovery of material object is admissible in evidence.

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18 *Nix v. Williams*, 467 U.S. 431, 81 L. Ed. 2d 377 (1984). In this case the suspect indicated his desire to remain silent until he meet with his lawyer. One of the police officers emphasized the need for giving a decent burial to the victim, then the suspect led the police to the body of a young girl he had kidnapped and murdered. Court considered it as an inevitable discovery and considered the evidence in the trial.
In some other cases also Supreme Court delimited the scope of Miranda rule and hesitated to accept deception of police as a ground for excluding the evidence.19

In *Mallory v. United States*20 court held that an arrested person must be produced before a judicial officer as quickly as possible. It is an important safeguard in the criminal justice system, as prompt appearance before a magistrate not only gives certain benefits – accused can learn of the charge against him, can make contact with counsel, in custody investigation is not possible, less chance for coercion of a confession – to the accused but also insures immediate review of the grounds of arrest by a magistrate. In *Mallory*, court asserted that the arrested person should be produced ‘before a magistrate as quickly as possible… so that the issue of probable cause may be promptly determined’.21 During preliminary hearing also Court will get an opportunity to review the pre-trial law enforcement decisions taken by the police in the case.

The Fourth Amendment,22 in U.S., protects the citizens from arbitrary arrests. In *Payton v. New York*23 Court observed:

…the Fourth Amendment to the United States constitution, made applicable to the States by

19 *Oregon v. Mathiason* 429 U.S. 492, 50 L. Ed. 2d 714 (1977). Where court allowed the use of confession obtained by police during interrogation who was not arrested at that time. Before obtaining confession, police officer lied to the suspect that his finger prints were found at the scene of occurrence. *Moran v. Burbine*, 475 U.S. 412, 89 L. Ed. 2d. 410 (1986). Here the police arrested the person for burglary and later obtained information from her which linked her with a murder.


21 *Id.* p. 454.

22 Amendment IV-“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be searched”.

Fourteenth amendment, prohibits the police from making a warrant less and non-consensual entry into a suspect’s home, in order to make a routine felony arrest.24

The U.S. Supreme court is very cautious in protecting the rights of the citizens. They sometimes literally interpret the amendments to control the law enforcement machinery. In *Mallory v. United States*25 the court observed the law generally and said:

The police may not arrest upon mere suspicion but only on ‘probable cause’. The next step in the proceeding is to arraign the arrested person before a judicial officer as quickly as possible, so that he may be advised of his rights and so that the issue of probable cause may be promptly determined. The arrested person may of course, be ‘booked’ by the police. But he is not to be taken to police head quarters in order to carry out a process of inquiry that lends itself, even if not so designed, to eliciting damaging statements to support the arrest and ultimately his guilt.26

The decision to take a suspect into custody is made by the police and the main part of the investigation, the interrogation of the suspect, takes places after taking him into custody. The police may take this opportunity to violate the rights of the persons and the constitutional norms. The judicial attitude in this respect shows that the court will never permit the police to make arrest, a vehicle for the investigation of the crime.27 It is not for the suspect to assist the police in collecting evidence, but the police have to gather evidence independently.

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24 *Ibid* p. 644  
25 *Supra* n. 20.  
26 *Id.* at p. 454  
The requirement of a warrant for effecting an arrest is a legal safeguard against the probable abuse. This safeguard is very often defeated because of the laxity shown by the concerned authorities. But in many cases, in some States, warrant is issued after the arrest without involving the prosecutor and without any significant decision by a judicial officer. Some magistrates have taken it as a mere clerical task and absent in conducting any inquiry into the existence of probable cause. Prof. LaFave pointed out that even in the adversary system there is judicial reluctance to consider the legality of the initial law enforcement decision.

Right to liberty and security of the person is guaranteed under Article 5 of the European Convention on Human Rights. This right could be denied only on the grounds specified in the convention. Lawful arrest and detention for the purpose of bringing him before a competent legal authority on reasonable suspicion of having committed an offence is permitted. Arrest could also be resorted to for preventing a person from absconding after committing a crime. In tune with this international norm safeguards have been set out in various legislations

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28 Wayne R. LaFave & Frank J. Remington, “Controlling the Police: The Judges Role in Making and Reviewing Law Enforcement Decisions”, 63 Mich.L.R.987, 1001 (1965) An arrest warrant is generally needed to arrest a person unless there is grounds to believe that he committed a felony or in the case of misdemeanor, committed in the presence of the police. See, Remington, “The law Relating to ‘On Street’ Detention, Questioning and Frisking of Suspected Persons and Police Arrest Privileges in General”, 51 J.Crim.L., C. & P.S. 386. But there are cases where warrants are issued after arrest neither hearing the prosecutor nor having better judicial scrutiny. This is happened, generally, when the custody of an arrested person is to be transferred from one law enforcement agency to another. The person will be produced before the Magistrate prior to the charging of a case in order to enable the Magistrate to effect the transfer. The Magistrate will undertake the task as only a clerical one and consequently may not make any enquiry into the existence of probable cause. For general discussion see Wayne R. LaFave.

29 Ibid.

30 Id. at p.1002

of U.K. against arbitrary arrest. Police and Criminal Evidence Act of England, permits a police officer to arrest a person who is in the act of committing an arrestable offence, or who is guilty of an offence or who is about to commit an offence. The only condition is that the offence must be an arrestable one as per the Act.\textsuperscript{32} The Court will never allow the police to curtail the liberty of a person without probable cause.\textsuperscript{33}

In England various procedural laws give ample power to the judiciary to review the pre-trial actions of the police. The House of Lords in \textit{International Trader’s Ferry}\textsuperscript{34} case suggested that the courts might take a more robust approach to judicial review of police action. The chief constable was entitled to exercise a margin of discretion; it is one that is susceptible to review by the courts. It is true that significant degree of discretion is granted to the law enforcement agencies along with the duty of law enforcement.\textsuperscript{35} This discretion is granted by statute and cannot be taken away by superior officers or courts. At the same time, they must realize that, the discretion is granted is to exercise it in the lawful manner and not to exercise it in different ways in similar cases. The exercise of the discretion should not be arbitrary and fanciful. It must be exercised in good faith, must have regard to all relevant considerations and must not be swayed by irrelevant considerations. At the time of exercising the discretion, the police should not do what is forbidden. Use of power for the purpose other

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\textsuperscript{32} Sec.24 PACE describes arrestable offence as i. offences, which are punishable for more than five years imprisonment ii. Other offences when police thought that it are essential to arrest the suspect, in order to avoid danger to individuals.
\textsuperscript{34} \textit{R v. Chief Constable of Sussex, ex parte International Trader‘s Ferry Ltd.} [1999]1 All.E.R 129.
\textsuperscript{35} \textit{R v. Metropolitan Police Commissioner, ex parte Blackburn} [1968]2 Q.B.118.
\end{flushleft}
than the one for which the power is conferred, is *malafide* use of that power.\(^{36}\)

In *R v. Howell*\(^ {37}\) while accepting the power of police to arrest, the court opined:

> The common law, we believe, whilst recognizing that a wrongful arrest is a serious invasion of a persons liberty, provides the police with this power in the public interest. In those instances of the exercise of this power which depend on a belief that a breach of the peace is imminent is must, we think we should emphasize, be established that it is not only an honest, albeit mistaken, belief but a belief which is founded on reasonable grounds.\(^ {38}\)

The objective nature of suspicion required for arrest is clearly mentioned in several decisions. In *Dallison v. caffrey*\(^ {39}\) it is observed that it is not enough for a police officer to have a hunch that a person has committed or is about to commit an offence; there must be a concrete basis for this suspicion which relates to the particular person in question and could be evaluated by an objective observer.


\(^{37}\) [1981]3 All. E. R. 383. In this case the appellant, together with others, had been making disturbance on the street after a party. On receiving complaints from neighbours the police arrived at the scene and told the appellant and his friends to leave the place or be arrested for breach of the peace. But, they did not obey the directions of the police, who again warned them. Since they did not accept the warning, police took hold of the appellant and before the police could explain why he was arresting the appellant, the appellant struck him in the face. He was charge sheeted for assaulting the police man and convicted. He appealed against conviction on the ground that, his arrest was unlawful because no breach of peace had been proved against him and he had been acting lawfully in escaping from a wrongful arrest. Appeal was dismissed.

\(^{38}\) *Id.* at p.388.

\(^{39}\) [1965] Q B 348. A theft was occurred in the prosecutors office at Dunstable. Dallison was arrested and charged with the offence. At the trial prosecution offered no evidence against him and according to the solicitor it was a case of mistaken identity. Accordingly Dallison was found not guilty and discharged. Dallison sues the defendant, the police officers for false imprisonment and malicious prosecution. The judge dismissed the claim. He filed appeal.
Existence of power to arrest alone is not sufficient to justify the arrest. The law enjoins that the exercise of the power shall be strictly in accordance with the procedure prescribed therein. Procedural requirements are crucial and must be complied with. In *D.P.P. v. Hawkins*, a police officer arrested the defendant, but did not give reasons. The defendant struggled and was later charged for assaulting the police officer in the exercise of his duty. The question which arose was whether the officer was in the execution of his duty as he had failed to give the reason for the arrest. The court observed:

… is a police officer acting in the execution of his duty during the period of time between his arresting a person and it first thereafter becoming practicable for him to inform that person of the ground of arrest, given that, at this later time, he in fact gives the wrong ground or no ground at all? If so, then clearly an assault on him by the person arrested during that period of time would constitute a criminal offence. Otherwise not.

In this case the court found that the arrest became unlawful when it became practicable to inform the defendant of the reason of his arrest and he was not so informed. As per the dictum of this case police definitely got certain leeway as to informing the arrestee, the reason for his arrest, until the time when it would be practicable to inform him the reason. In some other cases also court had taken same view just to justify the police action. But, court clearly showed that judicial review is possible in the pre-trial decisions of the police. In *Austin and another*

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40 [1988]3 All. E. R 673. In this case the respondent who committed an offence was intercepted by the police. A struggle was ensued and in the course of the struggle, constables were attacked by the respondent. Eventually they were able to put the respondent in the car and taken to police station. At the time of arrest or till the arrival at the station, the respondent was not informed of the grounds of arrest. Hence, his contention that the arrest was not lawful was accepted by the magistrate.

41 *Id.* at p.675

v. Metropolitan Police Commissioner$^{43}$ court observed that, “where a breach of the peace was taking place, or was reasonably thought to be imminent, before the police could take any steps which interfered with or curtailed in any way the lawful exercise of rights by innocent third parties they had to ensure that all possible steps have taken to ensure that the breach or imminent breach, was obviated and that the rights of the third parties were protected”. $^{44}$ However, the court justified the police action stating that, the police had no other option but to confine the persons as they did. So, court has taken a stand that the police can act as per the exigencies of the situation. But, in other areas of procedural violations court's attitude is different. In R v. Samuel$^{45}$ where the arrestee’s request for consulting his solicitor was rejected on the grounds that other suspects might be warned and the recovery of stolen money will be prevented. The arrestee subsequently confessed and was convicted. On appeal, the defence argued that the refusal of access to solicitor was not justifiable and so the confession should not have been admitted into evidence. Court observed:

Therefore, inadvertent or unwitting conduct apart, the officer must believe that a solicitor will, if allowed to consult with a detained person, there after commit a criminal offence. Solicitors are officers of the court. We think that the number of times that a police officer could genuinely be in that state of belief will be rare… $^{46}$

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$^{43}$ Supra n. 42. It was a case of false imprisonment. The police, on receiving information about a demonstration on 1 May at the Oxford Circus, prevented the persons who assembled there by putting a police cordon. Many including persons who were not demonstrators were caught up within the police cordon and were forced to remain there for about seven hours.

$^{44}$ Id. at p.576

$^{45}$ Supra n. 42.

$^{46}$ Id. at p. 143.
The common law practice states that, a confession obtained by oppression is not admissible in evidence.\textsuperscript{47} In \textit{R. v. Paris} \textsuperscript{48} confession was given by one of the accused who was a man of limited intelligence after thirteen hours of high-pressured and hostile interrogation. It was excluded on the ground that the questioning was oppressive even with a suspect of normal intelligence.

It is impossible to close the hiatus between ‘suspicion’ and ‘proof’ without police interrogation of suspects in custody. If not recognized, it will have an adverse impact on criminal justice process. That is why Justice Frankfurter and Stewart observed that, “the fourteenth amendment does not prohibit a State from detention and examination of a suspect, if it is not coercive”.\textsuperscript{49}

In order to make the constitutional guarantees a reality some check and balance is necessary in the area of enforcement. The US Supreme Court responded to this concern effectively through judicial review, which is proved to be a success. In \textit{Roe v. Wade}\textsuperscript{50}, the Supreme Court struck down the Texas criminal abortion statute. The prayer in this case was to restrain the prosecutor from enforcing the law against the petitioner, who was an unmarried pregnant woman. She contended that, if the police take action against her it will be an unwarranted


\textsuperscript{48} [1994] Crim. L. R 361. The appellants were convicted for the murder of one lady who was the girl friend of one of the appellants. Prosecution relied upon the interviews with one accused and admission made to two women who had visited him in prison. The interviews with police lasted for 13 hours over five days. Nineteen tapes were used to record the interviews. On the first seven tapes he denied his participation and presence at the scene. On tapes 8 and 9 he began to accept that he was present. There after he was pressed to say who had stabbed the victim and eventually to admit that he did. He denied his involvement over 300 times and made 3 admissions. His appeal was allowed ruling that, the case indicated a combination of human errors. The technique of interrogation were wholly contrary to the spirit and in many respects the letter of the Codes laid down under the PACE Act..


\textsuperscript{50} 35 L.Ed. 2d 147 (1973); 410 U.S. 113.
usurpation into her personal life. Similarly in *Texas v. Johnson*\textsuperscript{51} the court affirmed the personal liberty and the supremacy of the bill of rights. In this case as part of public protest, Johnson burned the American flag and was convicted of desecrating a flag in violation of Texas laws. The court held that the law under which Johnson was convicted was unconstitutional, so as to deter the police from taking action similar to this in future. Whenever the police deviate from the legal norms, court will come to the rescue of common man by using the judicial review technique. In such situation, the court may strike down the law which prompted the police to initiate criminal prosecution against the persons denying their rights enunciated by the Constitution.

The process, judicial review will act as a deterrent against the abuse of police discretionary power. Moreover it will create a sense of fear in the police that the highest judicial authority is vigilant always to oversee their exercise of power. Hence it is clear that, in order to maintain a balance between the discretionary power and the proper use of it, judicial review is an effective tool.

**b. Exclusionary Rule**

Exclusionary rule in U.S. means the exclusion of the evidence, which is collected illegally. The law enforcement machinery must adhere to the terms of the rule of law and recognize the protection granted to the citizens by the rule of law. The police must honour the civil liberties of the people and must refrain from activities, which will violate the rights of the people. A statute must have an object and the law enforcement machinery have to accept it in letter and spirit. If the evidence illegally collected is admitted into evidence at trial, police are encouraged to violate the statute. To admit evidence collected in

\textsuperscript{51} 105 L.Ed. 2d 342 (1989); 491 U.S. 397
violation of the rights guaranteed to the citizens would be in effect, ‘to grant the right but in reality withhold its privilege and enjoyment’.\textsuperscript{52} Hence exclusionary rule is a legal principle holding that evidence collected in violation of the United States Constitution is not admissible in a criminal prosecution.

The exclusionary rule is a natural consequence of the restrictive principle by which the police is restricted from behaving in a forbidden fashion. The rule makes the statutory and Constitutional safeguards something real. In 1938, in the New York State Constitutional convention, Senator Robert F. Wagner opined:

\begin{quote}
I profoundly believe that a search and seizure guarantee which does not carry with it the exclusion of evidence obtained by its violation is an empty gesture; it is an amendment which will be wholly ineffective in protecting the Constitutional right of privacy which we seek to confer.\textsuperscript{53}
\end{quote}

Exclusion of evidence as a remedy for Fourth Amendment violations found its beginning in \textit{Boyd v. United States}.\textsuperscript{54} The rule as

\textsuperscript{52} \textit{Mapp v. Ohio}, 367 U.S. 643, 656 (1961). In this case Dollree Mapp was convicted by the Common Pleas Court, Ohio, for possessing obscene literature. The conviction was affirmed by the Ohio Court of Appeal. It was again affirmed in appeal by the Supreme Court of Ohio and stated that, the obscene materials were discovered in the course of a search of the defendant’s residence and so warrant is not necessary. Evidence obtained by unlawful search and seizure is admissible in a criminal prosecution in Ohio State. On appeal the US Supreme Court reversed the judgment, over ruling \textit{Wolf v. Colorado}, 338 US 25, ruling that a State was not prevented by the Federal Constitution from adopting the rule prevailed in the State.

\textsuperscript{53} New York State Constitutional Convention Revised Record 559 (1938) quoted in supra n.28 p.259

\textsuperscript{54} 116 U.S. 616, (1886). The charge in this case was that, plates and glasses were imported into United States in violation of the Customs and Revenue Laws. On trial the court required the owner of the merchandise to produce the invoice of the goods. In obedience to the notice, they produced the invoice with protest. When it was offered in evidence by the district attorney, they objected its reception on the ground that in a suit for forfeiture no evidence can be compelled from the claimants and the use of it is unconstitutional and void. The evidence received in evidence and the goods were forfeited.
such was propounded in *Weeks v. United States*. In this case the U.S. Supreme Court observed:

the tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful searches and enforced confessions …should find no sanctions in the judgment of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.

Justice William R. Day suggested in this case that, “to sanction such proceedings would be to affirm by judicial decision a manifest neglect, if not an open defiance, of the prohibition of the Constitution, intended for the protection of the people against such unauthorized action”.

The *Mapp v. Ohio* made it applicable to all the states based on the Fourteenth Amendment, which guarantees ‘due process’. The rule acts as a caution to the police and prosecutors who illegally gather evidence in violation of the Fourth and Fifth Amendments which

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55 232 U.S. 383 (1914). The defendant, in this case, was arrested by a police officer without warrant. Some other police officers went to his house obtained the key and entered the house, searched the rooms and took possession of various articles and papers found there. In the same day the marshal and some other police officers again searched the house and carried away certain letters and envelope. For both search there was no warrant. The defendant filed a petition to get back the private papers and letters.

56 Id. at p.392

57 Id. at p.395

58 Supra n.53.

59 Amendment XIV, Section 1 states: “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws”.

60 Supra n.22.

61 Amendment Five, “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War
provides for protection from unreasonable searches and seizures and compelled Self-incrimination.

The purpose of the exclusionary rule is to prevent police misconduct. The rule has three elements. First, there must be an illegal action by the police or someone acting as the agent of the police. Second, there must be evidence collected. Third, there must be connection between the illegal act and the evidence collected. The judiciary in United States is very keen to protect the rights of the citizen, which is guaranteed by the constitution. They will never consider the gravity of the offence, but will reject the evidence if it is collected, violating the rights of the citizen.

The critics argued that, it encourages law violators and they will go free because of the failure of the policeman in observing the law\textsuperscript{62}. But others justified it on two grounds\textsuperscript{63}. First, it reminds the government of the evil of government participation in illegal conduct. In a welfare state it is the duty of the government to protect the rights of the citizen. It is unfair on the part of the government to violate the constitutional and statutory rights of the citizens. Secondly, even if the suspect is responsible for the crime, if his rights are violated while collecting the evidence, the evidence collected should not be admitted.

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evidence, the evidences should not be considered at the time of trial. If not, it will be an encouragement for the Law enforcement agencies to violate the rights of the citizen. If the ‘fruits of the poisonous tree’ is accepted, the police will take advantage of it, if not accepted, the culprits will be in an advantageous position. The courts in U.S. have no doubt as to which has to be accepted. They will exclude such evidence in order to avoid violations of the rights of common man by the police. This is emphasized by Justice Clark, when stating that exclusionary rule is the only effective deterrent against lawless police action.\(^{64}\) In *Terry v. Ohio*\(^{65}\), one police officer was observing the unusual conduct of Terry and two others, and after concluding that, they are going to commit robbery, stopped and frisked them and seized guns from them. On a charge of carrying concealed weapon, the court convicted them. While affirming the conviction and sentence, the court observed that:

> Courts which sit under our Constitution cannot and will not be made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions. Thus in our system evidentiary rulings provide the context in which the judicial process of inclusion and exclusion approves some conduct as comporting with constitutional guarantees and disapproves other actions by State agents. A ruling admitting evidence in a criminal trial, we recognize, has the necessary effect of legitimizing the conduct which produced the evidence, while

\(^{64}\) *Linkletter v. Walker*, 14 L.Ed. 2d. 601; 381 U.S. 618 (1965). In this case the petitioner was prosecuted for burglary. He was in surveillance for two days as a suspect in connection with another burglary case. He was taken to police station, searched and keys were taken from his possession. After he was arrested, police took his keys, entered and searched his home, and seized certain property and papers. His place of business was also searched and seizures were effected. Both searches were conducted without warrant. He was convicted prior to the *Mapp v. Ohio* decision. He filed a habeas corpus petition on the ground that the evidence used against him at his trial was obtained by unlawful search and seizure. The court rejected the contention stating that the *Mapp* rule did not operate retrospectively upon cases finally decided prior to *Mapp*.

\(^{65}\) 392 U.S.1,(1968)
an application of the exclusionary rule withholds the constitutional imprimatur.\textsuperscript{66}

The major thrust of the exclusionary rule is that it is a principal mode of discouraging lawless police conduct. The court went on saying that, the rule is a principal mode of discouraging lawless police conduct and observed:

Thus its major thrust is a deterrent one, and experience has taught that it is the only effective deterrent to police misconduct in the criminal context, and that without it the constitutional guarantee against unreasonable searches and seizures would be a mere form of words.\textsuperscript{67}

\textbf{Drawbacks}

Even though the courts accepted the efficacy of the rule, it is not free from criticism. Many argue that it is a failure and it should be abolished.\textsuperscript{68} According to them the court is not allowing the government to take benefits from the poisonous tree, but allowed the accused to take benefit out of it. Under the rule, many obviously guilty people were acquitted. Acquitting the guilty on this ground is in fact equivalent to punishing the innocent persons.\textsuperscript{69} Both, the guilty defendant and the law-breaking police officer go unpunished. As Justice Cardozo once put it, “the criminal is to go free because the constable blundered”.\textsuperscript{70} In no other common law country, the modus operandi of collection of evidence will taint the evidence. Because of the above said reasons, it

\textsuperscript{66} Id. at p. 13.
\textsuperscript{67} Id. at p.12.
seems that, the court has changed its approach towards the exclusionary rule in a limited way.\textsuperscript{71} The suppression of otherwise valid evidence have extracted high price from the society. Hence, the Supreme Court evolved a limited good-faith exception to the exclusionary rule and allowed the use of evidence seized under the authority of a defective warrant, if the police officers acting in good faith that the warrant was valid. So, it is an exception with a condition. The courts current approach is to weigh the perceived costs of the rule’s application against the potential benefits of deterring police misconduct\textsuperscript{72}. 

The exclusionary rule does not provide an answer to the query of means to control the law enforcement machinery. By excluding evidence, U.S experience shows, neither crime nor the police be controlled. At the same time law enforcement machinery should not be allowed to violate the rights of the common man. Hence, a balance must be kept all the time to achieve the ultimate object of the criminal justice system. While excluding the evidence the erring police officer must also be penalized. This may have a deterrent effect on the police.

\textsuperscript{71} \textit{United States v Calandra} 38 L Ed 2d 561 (1974). The question here was whether a witness summoned to appear and testify before a grand jury may refuse to answer questions on the ground that they are based on evidence obtained from an unlawful search and seizure. Court observed that a witness cannot refuse to answer questions on this ground; \textit{Massachusetts v. Sheppard} 468 U.S. 981(1984). In this case police seized certain articles pursuant to a warrant subsequently invalidated because of a technical error on the part of the issuing judge. While rejecting the argument for the application of exclusionary rule court observed that, exclusionary rule is not applicable, because there was an objectively reasonable basis for the police officers’ mistaken belief that the warrant authorized a search; \textit{U.S. v. Leon} 82 L Ed 2d 677 (1984) Here the question was whether the exclusionary rule should be modified so as not to bar the use in the prosecution’s case, evidence obtained by officers acting on a search warrant issued by a magistrate but ultimately found to be unsupported by probable cause. Court observed that exclusionary rule cannot be applied to deter objectively reasonable law enforcement activity; \textit{Arizona v. Evans} 131 L Ed 2d 34 (1995), In this case the evidence was seized on the basis of an arrest warrant which later proved to be erroneous. The error had been committed by the clerk of the court. The court rejected the argument of the accused saying that, the exclusionary rule is applicable only when the error is attributable to the police.

\textsuperscript{72} Otis H. Stephens, Jr. and John M. Scheb II, \textit{American Constitutional law}, Thomson West, Belmont, USA, 2003 at p. 582.
Exclusionary rule intends to ensure two things. One is to protect the suspect from conviction based on illegally procured evidence and secondly, to control the police from violating the rights of the suspects. Though to a certain extent the rule is successful in achieving these two things, definitely, it is a failure in protecting the rights of the society i.e., to free the society from criminal activities.

Controlling the cops does not mean that the accused should be acquitted. In U.S.A, the court is very much concerned about the question as to how the evidence is obtained rather than how much it is relevant to the matters in issue. The result will be the acquittal of the accused. So, the _bonafide_ or _malafide_ blunders of the cops will become an encouragement for the criminals.

By controlling the cops two things are expected to be achieved. One, control the cops from violating the rights of the common man including suspects. Second, control the cops to do their duty properly so that the criminals shall be booked and prosecuted effectively and efficiently. Both purposes cannot be achieved by excluding the evidences which otherwise can be accepted. Instead, the policeman who violated the Constitutional norms should be punished for which there is no statutory clearance. Hence, excluding the admissible evidence by the fact that it is illegally obtained defeats the very purpose of criminal justice.

c. Due Process

The framers of the American Constitution derived the word, due process from the expression, ‘by the law of the land’, in Article 39 of the Magna Carta, which stated that, “No free man shall be taken or imprisoned or disseised or out-lawed or exiled or in any way ruined, nor will we go or send against him, except by the lawful judgment of his
peers or by the law of the land". In fact this provision created limitation on the Kings police power. It also extends protection to the citizens from arbitrary orders of the King. More over in all such situations, there will be a judicial scrutiny as per the law of the land. Similarly, due process of law operates as a limitation upon the powers of the legislature of what constitutes proper exercise of police power is not final or conclusive, but is subject to supervision by the courts.

The Fourteenth Amendment of the U.S. Constitution, which deals with due process, is a restraint on state action to infringe the privileges and immunities of citizens of the United States. Procedural due process is the means by which an accused exercises his or her rights of confrontation, to present witnesses, to be represented by counsel and related rights. All the criminal procedure guarantees are to be enforced in its strict sense by the government and the denial of one or the other resulted in the denial of due process of law to a suspect or a defendant. The due process clause not only contains those specific guarantees spelled out in the bill of rights but also includes protection against the practices and policies which is against fundamental fairness of the law of enforcement.

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75 Supra n.60.
77 *Duncan v. Louisiana*, 391 U.S. 145,149 (1968). In this case Duncan was charged for battery, a misdemeanor, punishable by a fine not more than $ 300 or imprisonment for not more than two years or with both. Duncan’s demand for jury trial was denied by the court pursuant to a provision in the Louisiana Constitution authorizing a trial by jury only in cases in which the punishment is hard labour or capital. Duncan was convicted. Supreme Court of Louisiana denied review. US Supreme Court reversed this judgment.
78 *In re Winship*,397 U.S. 358 (1970). Appellant a twelve year boy, entered a locker and stolen $ 112 from a women’s pocket book. He was charged for larceny. The judge acknowledged that the proof might not establish guilt beyond a reasonable doubt, but rejected the appellant’s contention that such proof was required by the fourteenth
One of the fundamental requirements of the due process clause is that the statutes relating to crime and criminal procedure must be written legibly to allow all citizens to read and understand them. The statute must be able to give an adequate guidance to those law-abiding citizens, to advice the suspects of the nature of the offence with which he is charged and to guide the court to reach a sensible conclusion. So, the law must be definite, unless, the law enforcement agency may misinterpret it and violate the rights of the citizens. In *Papachristow v. City of Jackson Ville,*\(^7^9\) the defendant and seven others were convicted in the Jacksonville Municipal Court for violating the Jacksonville Vagrancy Ordinance. U.S. Supreme Court while acquitting the accused on a charge of violating the Vagrancy Ordinance of Jackson Ville, observed:

> The Jacksonville ordinance is void for vagueness, both in the sense that it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute and because it encouraged arbitrary and erratic arrests and conviction.\(^8^0\)

If the wording of the statute is not definite, it will result in the deprivation of common man’s freedom and the police will get unwanted freedom to book any one in the net of law.\(^8^1\) If the purpose of law is to protect the law-abiding citizens, it must be definite and specific, but not vague. Court has taken such a stand in order to protect the common man from the excesses of the police and there by to control the law amendment. The judge relied on the New York Family Court Act, which provides that, “any determination at the conclusion of an adjudicatory hearing that a juvenile did an act or acts must be based on a preponderance of the evidence”. Appellant was ordered to be placed in a training school till his 18th birth day. US Supreme Court reversed the judgment.

\(^7^9\) 31 L.Ed 2d 110
\(^8^0\) *Id.* at p.115
\(^8^1\) Riech, “Police Questioning of Law Abiding Citizens”, 75 Yale.L.J. 1161, 1172 (1966)
enforcement agency. Statutes that create criminal liability will not get constitutional validity, if the criminal conduct is vaguely defined. That is why in *Lanzetta v. New Jersey*[^82] court observed:

> Living under a rule of law entails various suppositions, one of which is that all persons are entitled to be informed as to what the state command or forbids.^[83]

This observation presupposes that, if all people are aware of the law properly the law enforcement agencies will never by-pass it and it will provide a guarantee that the activities of the agency will be fair and reasonable. Hence, due process is a concept, which place limitations on laws as well as the law enforcement agency to guarantee fundamental fairness, justice and liberty.

Due process of law aims at the prevalence of ‘rule of law’ so as to keep the streams of justice pure, to see that trials and inquiries are fairly conducted: that arrests and searches are properly made: those lawful remedies are readily available: and that unnecessary delay is eliminated.^[84] The idea is that, the enforcement of the police power by the state should neither be arbitrary nor oppressive. It defines certain standard of conduct for the law enforcement agencies so that convictions cannot be brought about by methods which offend the sense of justice. In *Rochin v. California*[^85], the court observed;

[^82]: 83 L Ed 888 (1939). In this case the appellants were accused of violating certain provisions of the Anti-gangster Laws of New Jersey. They were convicted. In the appeal the US Supreme Court was called on to decide whether, by reason of a vagueness and uncertainty an enactment will become repugnant to the due process clause of the Fourteenth Amendment. Court answered in the affirmative and reversed the decision of the trial court.

[^83]: Id. at. p.890


[^85]: 96 L.Ed.183 (1952); 342 U.S. 165.
Use of involuntary verbal confessions in State criminal trial is constitutionally obnoxious not only because of their unreliability. They are inadmissible under the due process clause even though statements contained in them may be independently established as true.

So, it is clear that the Fourteenth Amendment denies the State the power to deprive any person of life and liberty without due process of law.

d. Judge’s Rules*

Prior to 1912, the problems of investigation and interrogation were not as profound as they are today. There were no rules relating to the conduct of investigations by the police in England. During the early years of the twentieth century the situation was almost the same and many objections were raised in courts about the police procedure. The Home Secretary requested the judges to explain how an investigation should be conducted in order to avoid the consequence of exclusion of evidence in court. In 1912 the judges formulated four rules which were later followed by five more rules in 1930. New rules were formulated in 1964, superseding the rules framed earlier.

In *R. v. Voisin*86, court observed that:

In 1912 the judges, at the request of the Home Secretary, drew up some rules as guidance for

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86 [1918-19] All E. R. Rep.491. In this case the trunk of the body of a woman was found in a parcel along with a piece of paper with the words, “Bladie Belgium”, upon it. On getting suspicion, Voisin was asked to go to the police station and at the station he made a statement which was taken down in writing. He was then asked, if he had any objection to write the words “Bloody Belgian”. He had no objection and he wrote the words in a paper as “Bladie Belgium”. No caution ws given to the accused by the police either before he made the statement or wrote the words. He was prosecuted for murder and convicted and sentenced to capital punishment. He appealed on the ground that evidence had been wrongly admitted since the collection of evidence violated the judge’s rules.

* See annexure 1
police officers. These rules have not the force of law; they are administrative directions the observance of which the police authorities should enforce upon their subordinates as tending to the fair administration of justice. It is important that they should do so, for statements obtained from prisoners, contrary to the spirit of these rules, may be rejected as evidence by the judge presiding at the trial.  

The judge’s rules are framed on five principles, which deal with the duties and rights of the citizens. The first principle states that, the citizens have a duty to help the police in the investigation. Second, third and fourth deals with the rights of the citizens. Fifth one deals with the exclusion of evidence. The 1964 rules were framed giving effect to these principles as a guide to police officers conducting investigations. Non-conformity with these rules may render answers and statements from the accused, liable to be excluded from evidence in subsequent criminal proceedings.

How effective?

The English experience suggests that Judges’ Rules though provided certain guidelines to the police in the process of investigation; it failed in protecting the rights of the citizens. The major reason is that they are not rules of law. They are not governed by the statute and are not to be found in any legal work as part of English criminal law. They are merely rules for the guidance of the police. No one can be

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87 Id. at p. 494.
89 Id. at p.86
punished for breach of these rules and the only penalty may be the rejection of evidence in the trial.\textsuperscript{90}

Following the first Judge’s Rules of 1912, several times the rules were amended or modified because of its ambiguity. Since these rules were not rigid and had no statutory backing police did not consider this rule always in their investigative activities. The rules were left open and at the same time allowed the police to continue the use of wide discretion in the investigation process. As a result of this, comments and criticisms came from judges, lawyers and even from the public. The 1964 rules was, in fact, new wine in the old bottle. The principles of the new rules are the same as that of the old rules and interpreted in different ways and misinterpreted by the police. Though the new rules clear up some points they leave others unresolved, and they clearly raise new problems of their own.\textsuperscript{91}

The caption, ‘Judges’ Rules’ clearly shows that, these are certain guidelines fixed by the judges for the police. But, experience shows as Glanville Williams say, ‘judges had given up enforcing their own rules’.\textsuperscript{92} Moreover the rules have been criticized for alleged lack of clarity and of efficacy for the protection of persons who are questioned.

\textsuperscript{90} R. v. Voison [1918]1K.B.531. this case was one of the first cases after the formulation of Judge’s Rules where the rules were in effect ignored by both police and the judges. But, this decision was justified by Glanville Williams on the ground that it was a lesser evil than that a dangerous murderer should be left at large in the society. See infra n. 93 at p. 352.


\textsuperscript{92} Glanville Williams, “Questioning by the Police: Some Practical Considerations”, [1960] Crim. L.R. 325. According to the author reasons for the defeat of Judge’s Rules are i. it is easy for the police to deny that interrogation took place, ii. Judges do not take the breach of the Rules seriously iii. It would not operate as a substantial check on police questioning even if the judges made a firm practice of excluding all evidence of confession obtained by this means, because either the police may persuade the culprit to plead guilty after obtaining a confession or the confession will lead the police to other evidences.
by the police officers. As one police officer thinks, it hampers the detection and punishment of crime.\textsuperscript{93}

So, when considering all the aspects of investigation and protection of the rights of the suspects, judges’ rule is a failure. But, why the English people do not want to make it legal and place it on the statute book. “The answer lies in the Englishman’s tolerance and he has a natural instinct to act according to what he believes to be right and not to be fettered with permitted or prohibited rules. They expected that the police will act fairly”.\textsuperscript{94} But, in the course of time people of England experienced bias in policing and criminal activities were increased either due to the lack of proper statutes or due to the ill motives of the police.

\textbf{B. Statutory Control}

Unfettered power granted to the police in the investigation process by the accusatorial system paved way for bias in policing in the earlier period. The modern democratically elected governments had taken steps to curb this unfettered power of the police by prescribing constitutional norms protecting rights of man. This created an atmosphere favourable to the people by controlling the cops. United States of America through the Bill of Rights incorporated protective measures to safeguard the rights of the common man. Through this process the police stands controlled in the process of investigation. Thus the constitutionalisation of the criminal justice administration put the rights of the people in a better footing.

In spite of the existence of several statutes, intending to regulate powers of police, human rights violations and police bias continues to

\textsuperscript{94} Supra n.89 at p.86.
exist in English system. The studies on this topic revealed that there was considerable bias in policing in U.K.\textsuperscript{95} Hence the Philips Commission recommended for a ‘fair, open, workable and efficient system’.\textsuperscript{96} In order to fill the lacunae, in U.K., New legislations were passed. Police and Criminal Evidence Act 1984, Criminal Justice and Public Order Act 1994, Terrorism Act 2000, Criminal Justice and Police Act 2001 aiming to control crime by avoiding failure in the trial process. Criminal Justice and Public Order Act which is the aftermath of Lord Runciman Commission\textsuperscript{97} report increased police powers significantly while removing certain safeguards of the suspects. The other two legislations are also continued the same trend.

\textbf{a. Police and Criminal Evidence Act, 1984}

Exclusion of improperly obtained evidence arose in UK as part of common law power of the judges. There was no statutory backing for the same. This judicially created filter imposes a ‘quality control’ on the police actions during the investigation of a crime. The court refuses to accept covertly collected confession in order to avoid police excesses there by protects the common man. Introduction of new statutes after 1980 fundamentally changed the criminal justice system and the rules of evidence. These legislations provided new basis for the exercise of police powers and for the exercise of judicial discretion in relation to the admissibility of evidence. The major statute relevant to such


\textsuperscript{97} After the acquittal of accused in \textit{R v. McIlkenny and others} [1992]2 All.E.R. Royal Commission was appointed under Lord Runciman to recommend measures which could be introduced to avoid unpleasant consequences in the trial process due to the failure of police in observing provisions of the concerned Acts.
matters is the Police and Criminal Evidence Act, 1984, which was passed on the basis of the report of the Royal Commission on Criminal Procedure, 1977 (Phillips Commission)\footnote{The Philips Commission was appointed as a consequence to the recommendations of two commissions, viz, Criminal Law Revision committee 11th report on Evidence, cmnd.4991 (1972) quoted in Sybil Sharpe, Judicial Discretion and Criminal Investigation, Sweet & Maxwell, London, 1998, p. 60 and the Fisher Report, [SE 6.HMSO (1977)] The first report suggested that, the refusal to answer questions by a suspect should expose him to the risk of an adverse inference and the exceptions to the admissibility of evidence should be reduced and Judge’s Rules shall be given statutory status. [Id at p. 20] The second report was concerned in particular with confession and they concluded that, at the time of codification of the criminal procedure, the subject of interrogation of the accused and the protection of the individual must be given due consideration. [Id at para 15.6] The first report favoured the crime control aspect and the second report was in favour of the maintenance of due process values. This reflected the conflict between due process and crime control values in the criminal justice system of U.K. As a result, the Royal Commission was appointed in 1977 with two objectives. First, to reconcile the conflicting values within the system. Secondly, to establish clarity and certainty within the law. [Id at p.62] The outcome is the Police and Criminal Evidence Act, 1984 (PACE).}

Before the inception of PACE Act, police had no general and clear powers of arrest, stop and search or entry to premises. PACE actually gave a statutory basis for the police investigation. Adequate and clear powers were given to the police to conduct the fight against crime on behalf of the public. At the same time proper safeguards to protect the common man against abuse of these powers were also introduced. Hence, the aim of PACE Act is to establish a balance between the powers of the British police and the rights of members of the public.\footnote{Police and Criminal Evidence Act, 1984., \url{http://en.wikipedia.org/wiki/Police_and_Criminal_Evidence_Act_1984}, dtd. 16-09-2008.} Though ample powers have been conferred to the police sufficient control measures also included in the Act in the form of criminal liability\footnote{See, Helen Fenwick, Civil Liberties and Human Rights, Cavendish Publishing Limited, London, 2002, p.923.} and exclusion of evidence\footnote{PACE Act, s.78, “(1) In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was}.
The PACE Code contain eight codes, each deals with separate powers of the police. Each and every code is associated with the procedure to be followed by the police while exercising the power. The object behind such provisions is to ensure that the police are not misusing the power. The code is composed of provisions relating to what police must and must not do, to comply with PACE Act. It confers wide powers on the police to conduct search, seizure, detention and interrogation but the Codes of Practice makes clear that these powers are to be exercised with restraint.

If there is ‘reasonable suspicion’ that the suspect is carrying ‘stolen’ or prohibited articles, he may be stopped and searched on the street. This power did not exist previously in England. Police officers may only stop and search if they have reasonable grounds for suspecting that relevant evidences will be found from the person. Section 2 of the PACE Act stipulates that a police officer must provide certain information to suspects before searching a person, including the

> obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

> (2) Nothing in this section shall prejudice any rule of law requiring a court to exclude it.”

102 Supra n. 100.

PACE Code A: deals with the powers of a police officer to search a person or a vehicle without making an arrest.
Code B: deals with powers to search premises and to seize and retain property found on premises and persons.
Code C: deals with detention and interrogation of people in police custody.
Code D: concerns the methods adopted by the police to identify the person in connection with an investigation.
Code E: deals with the tape recording of interviews with suspects in the police station.
Code F: deals with the visual recording with sound of interviews with suspects in the police station.
Code G: deals with statutory powers of arrest.
Code H: deals with detention and interrogation of people related to terrorism in police custody.

103 Codes of Practice are guide lines attached to the PACE Act for the exercise of powers by the police, mentioned in the Act.
officer’s name and the police station, the object of the proposed search and the grounds for proposing to make it. Officers must make the record of the search and a copy must be supplied to the suspect. If the search is illegal, the suspect can approach the Police Complaints Authority.

Under the Act, Police have the right to question and the suspect have the right to remain silent. Extensive powers of detention enable the police to question the suspect at their own convenience. The detention can be for up to 24 hours, but it can be extended up to 36 hours by a police officer of the rank of superintendent or above. The magistrate can authorize detention up to 96 hours if the conditions are satisfied. PACE Act allows detention for questioning but seeks to regulate the conditions under which questioning may take place. After PACE Act, the suspects have the right to consult a solicitor privately at any time and they can require that the solicitor be present in the interrogation and may consult with during interrogation.

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104 PACE Act, s. 2(2) b; s.2(3); s.3(1), 3(7)
105 Police Act, 1996 s. 67(2). Police Complaints Authority was formed under the Police Act, 1996, replacing the Police Complaints Board set up by the PACE Act.
106 PACE Act, s.42(2) “Where an officer such as is mentioned in sub-section (1) above has authorized the keeping of a person in police detention for a period expiring less than 36 hours after the relevant time, such an officer may authorize the keeping of that person in police detention for a further period expiring not more than 36 hours after that time if the conditions specified in sub-section (1) above are still satisfied when he gives the authorization”.
107 PACE Act, s.44(1) “On an application on oath made by a constable and supported by information, a magistrates’ court may extend a warrant of further detention issued under section 43 above if it is satisfied that there are reasonable grounds for believing that the further detention of the person to whom the application relates is justified. …(3) The period shall not-
(a) be longer than 36 hours; or
(b) end later than 96 hours after the relevant time”.
109 PACE Act, s. 58 (1) A person arrested and held in custody in a police station or other premises shall be entitled, if he so requests, to consult a solicitor privately at any time. Andrew Sanders, “Rights, Remedies, and the Police and Criminal Evidence Act”, [1988] Crim.L.R 802 at p. 808; PACE s.58
Redress for Police Abuse of Power

PACE Act set out certain standards for the conduct of criminal investigation. The object of these standards is to balance two conflicting issues, viz., the exercise of powers of police in the conduct of an investigation and safeguards for the suspect against abuse of power. But, in certain cases the investigation does not reach those standards. In order to meet such circumstances certain means of redress are also made available in the Act itself.

i. Exclusion of Evidence

Common law conferred discretion to the judge to exclude relevant evidence. It has two forms. One is the discretion to exclude evidence if its prejudicial effect is more than the probative value. Second is the power of the court to exclude the unfairly obtained evidence, but only if it was committed after the commission of the offence.¹¹¹ These discretions are also preserved in the PACE Act, 1984 through sections 78 and 82(3).¹¹²

As per section 78 the court has to consider all the circumstances in which the evidence was obtained and if found that the admission of the evidence would have an adverse effect on the fairness of the proceedings, it should be excluded. In Jit Singh Matto v. D.P.P¹¹³ police officers acting in excess of their authority and malafide requested

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¹¹¹ Section 78 provides: “(1) In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

(2) Nothing in this section shall prejudice any rule of law requiring a court to exclude it."

¹¹² Section 82(3) provides: “Nothing in this Part of this Act shall prejudice any power of a court to exclude evidence (whether by preventing questions from being put or otherwise) at its discretion.

¹¹³ [1987] Crim.L.R.641
the defendant to take a breath test. The court held that the evidence should be excluded under section 78. In *R v. Samuel*[^114], the police officer without sufficient cause denied the solicitor access to the accused. The court opined that, the defendant would not have made incriminating statements, if the solicitor access would have been allowed. The court excluded the confession under section 78.

PACE Act give emphasis upon the fairness of the proceedings and not on any other matter. If there is substantial breach of the provisions has been identified, the court will exclude the evidence on the basis that it is impossible to ascertain its reliability[^115] and therefore its prejudicial quality may outweigh its probative value. The discretion granted to the court under sec.78 is very wide in order to ensure fairness in every aspect of the criminal justice process. The purpose of PACE is not only to make the trial a fair one but also to discipline the police from misbehaviour or exceeding their powers. The exercise of the courts’ powers may have a deterrent effect upon the police in the sense that they may be deterred from conduct which may lead to the exclusion of evidence.

The present narrow interpretation of s.78 of PACE Act indicated that improperly obtained non-confessional evidence is unlikely to be excluded. In *R. v. Chalkley*[^116] the defendants were charged with conspiracy to commit robbery. At the trial prosecution proposed to adduce evidence of covertly obtained tape recordings of conversations

[^114]: [1988]2 W.L.R.934
[^115]: *R v. Keenan* [1990]2 QB 54. in this case the appellant was found guilty of being in possession of an offensive weapon. He appealed against the conviction on the ground that the trial judge had wrongly exercised his discretion by admitting into evidence, the record of a conversation between the appellant and police officers. Court held that there was plain breach of the Code C of the PACE Act and the appeal was allowed.
between the defendants. The defence made an application under section 78(1) of the PACE Act, 1984 to exclude the evidence of tape recording, which was rejected. The court observed:

...there was no dispute as to the authenticity, content or effect: it was relevant, highly probative of the appellants’ involvement in the conspiracy and otherwise admissible; it did not result from incitement, entrapment or inducement or any other conduct of that sort; and none of the unlawful conduct of the police or other of their conduct of which complaint is made affects the quality of the evidence.  

The quality of evidence is the crucial factor in deciding the admissibility. If it causes serious prejudice to the accused, then only it will be excluded. The decision in Attorney-General’s Reference(No 3 of 1999) makes it clear that court has only a narrow discretion under s.78 to exclude physical and non-confessional evidence. This is only a recent development. Earlier view was that non-confessional evidence can also be excluded under s.78.

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117 Id. at p.180
118 [2000] 4 All.E.R.36. in this case a women was raped by an unknown assailant. Swab were taken from the victim and DNA profile was obtained from semen found on the swab. The profile was then placed on the National DNA Database. After one year the defendant was arrested on a charge of burglary. A saliva sample was taken from him and submitted to the Database for profiling. He was acquitted of the burglary and accordingly the samples should have been destroyed u/s.64 (1) PACE Act. Instead a full DNA profile was obtained from the sample and that was matched with the profile of the rape assailant. Defendant was arrested and a sample of hair was taken from him and DNA profile obtained. This was also matched with the profile of the rape assailant. He was charged with rape. The trial judge ruled that the evidence was inadmissible since those are required to be destroyed and shall not be used for the purpose of any investigation of an offence as per sec. 64(1) of PACE Act. Court of Appeal confirmed this decision.
119 R v. Quinn [1990 Crim.L.R 581, where identification evidence were excluded due to the reason of delay; R v. Ladlow [1989]Crim.L.R 219, where evidence excluded due to the failure to hold an identification parade where one was practicable.
ii. **Tortious Remedies**

Though there are provisions in the PACE which sets limits to police powers no specifics enforcement mechanism is provided. Moreover s.67 (10) provides that the failure of the police officer to comply with any of the provisions shall not render him liable to any criminal or civil proceedings. But, tort remedies which are available even before the introduction of PACE Act. The courts are now applying this principle to the violations of provisions by the police to ensure justice to the common man and to protect his rights.

a. **False imprisonment**

If a police officer arrests a person without reasonable suspicion an action for false imprisonment is available. In *Roberts v. Chief Constable of Cheshire Police*[^120], where the review of detention of a suspect took two hours and the court though confirmed the detention awarded compensation for two hours false imprisonment. If the time limit on detention is breached, the suspect in custody will get adequate compensation[^121].

b. **Malicious prosecution**

If the prosecution is initiated without prima facie evidence, the police officer can be sued for malicious prosecution. But, the claimant carries a heavy burden to prove that there was no probable cause for his prosecution.

[^120]: [1999]1 WLR 662

[^121]: *Edwards v. Chief Constable of Aron and Somerset*, 1992 (unreported) quoted in *Public Law And Human Rights*, where the plaintiff was detained for about nine hours following a lawful arrest. The detention was held as wrongful since it was unnecessary. Compensation was awarded.
c. **Trespass**

An action for trespass can be initiated against the police officer if he enters the premises without lawful authority. This is possible when the arrest warrant is invalid, or when the search is conducted without authority or in violation of the provisions.

d. **Assault**

Assault or intimidation is another area where tort action is possible. This can be occurred in the course of arrest. In *White v. Metropolitan Police Commissioner*\(^ {122}\) police officers unlawfully entered a house and attacked one of the plaintiffs. Police charged various offences against both plaintiffs in order to cover up their conduct. Plaintiffs were awarded with £20000 each as exemplary damages and £6500 and £4500 respectively as aggravated damages. In this context court observed that anything in excess of ‘reasonable force’ to effect an arrest is an assault and threat of an unlawful act is intimidation\(^ {123}\). *Hsu v. Metropolitan Police Commissioner*\(^ {124}\) is another case where court allowed damages for assault. In this case, two police officers demanded entry into Hsu’s home for a search. He refused entry as the police had no search warrant with them. But police forced their way and assaulted and abused Hsu. He was arrested and detained in the station for over an hour. Court awarded £15000 as damages.

\(^ {122}\) The Times 24 April,1982, quoted in Public Law and Human Rights at p. 1054.

\(^ {123}\) *Allen v. Metropolitan Police Commissioner* [1980] Crim.L.R 441. in this case the plaintiff and his wife , while driving home in the early hours of the morning, two police officers stopped them and asked the plaintiff to take a breath test. He hesitated. On blood test it was revealed that the level of alcohol in the plaintiff’s blood was slightly over the legal limit. Police officer told the plaintiff that he was arresting him as being unfit to drive. Two police officers, bigger than the plaintiff tried to take him to the police car; he resisted. The police officers called for the assistance of others and several police officers came to the scene. Four of them carried the plaintiff to the van by his arms and legs. He was put face upon the floor of the van. He was admitted in the hospital and doctor noticed bruises on his body. He was tried and acquitted. He claimed compensation from the police on the ground that the police used excessive and unnecessary force while arresting him.

\(^ {124}\) [1997]2 All.E.R 762
iii. **Police Complaints and Disciplinary Proceedings**

The 1964 Police Act introduced a uniform system for the investigation of complaints against the police. As per this Act, all complaints against the police would be recorded and investigated by either a senior officer in the force or from a different force. The investigation report will then send to the deputy chief constable whom will take a decision either to prosecute or not. The Police Act, 1976 established a civilian Police Complaints Board. When the deputy chief constable decided that there was no evidence for any proceedings, the file was passed on to the Board. This Board was failed in establishing their credibility and the people lost confidence in the system. During their tenure (1976-1985), they recommended actions only in 210 cases. This Board was replaced by the present Police Complaints Authority by the PACE Act to deal with the complaints and disciplinary proceedings against the police.

In the present system also the investigation is conducted by a senior officer and the report is submitted to the deputy chief constable. If no action is proposed the file will be passed to the PCA. The Authority can order either disciplinary proceedings or send the file to DPP for criminal proceedings. In the case of serious offences the police must refer the complaint to the Authority to begin with and the investigation will be conducted under the supervision of PCA. The police can refer any complaint to the Authority as they wish. The PCA can direct the police to refer any complaint to the Authority.

The PCA neither investigate complaints itself nor has a body of investigators under its own control. It exercises only a ‘distanced supervision’ in small number of complaints.

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125 [Andrew Sanders & Richard Young, Criminal Justice, 2nd edn. Butterworths, p.683.](#)
Effectiveness

Police can stop and search a person provided he has reasonable suspicion that the suspect is carrying stolen or prohibitory goods. But this has no great inhibitory effect since the word ‘reasonable suspicion’ is too vague to act as a standard. As a result the police still act according to their assumptions based on suspicion. Since crime control norms got precedence, the actions of the police will be justified on that ground. The duty cast upon the police to record and provide information to the suspect is difficult to be enforced. The remedies available for unlawful search and seizure are uncertain in scope and not stringent enough to contain such activities.

Section 24 of the act defines arrestable offence as any offence punishable by imprisonment for a term of five years or more. Police can arrest without warrant any one who is suspected of committing or about to commit or has committed an arrestable offence. If the arrest is wrongful, a complaint can be made to the Police Complaints Authority, who will investigate the matter with another policeman. The Philips Commission actually wanted to restrict arrest to situations where it is necessary. But, police, now use arrest to facilitate investigation, rather than as a mechanism to bring alleged offenders before the courts. The act gives wide powers to police to arrest a suspect without providing adequate remedies.

Police have enormous powers to detain a person in the police station after the implementation of PACE Act. In the case of an arrestable offence, the initial detention period is 36 hours. It can be extended up to 60 hours but with an authorization from a police officer

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126 *Id. at* p. 184
127 PACE Act, s.42(1)
of the rank of superintendent or above, and the police must apply to the magistrates’ court for a warrant of further detention.\textsuperscript{128} The detention in the police station is very crucial since most of the evidences are secured in the police station. Hence, the police station becomes the primary site of criminal investigation which is not expected in the accusatorial system.

The inclusion of section 78 in the act raised hopes among people who favoured the exclusion of illegally obtained evidence. But the wording of the section precludes its broad application to cases. The court’s focus may be on the effect of admission of the evidence on the fairness of the proceedings and not on the fairness of the method by which the police obtained the evidence. Richard May has argued that the words of the section preclude the view that improper behaviour have no effect on the fairness of the trial.\textsuperscript{129} That may be true, because a harsh and unyielding inclusionary rule for improperly obtained evidence has been a part of English culture for a considerable time.\textsuperscript{130} The courts attitude regarding the admissibility of evidence is best described by Crompton, J in \textit{R v. Leatham}\textsuperscript{131} as that “it matters not how you get it, if you steal it even, it would be admissible in evidence”. So, section 78 is an infertile ground for the accused and his rights.

The traditional way of protecting the freedom and rights of the people is by providing them with remedies for breach of rights and freedom. But, one thing is sure that, the rights and freedom of the suspects are hardly protected under PACE Act.

\textsuperscript{128} \textit{Id.} s.43


\textsuperscript{130} Mark A. Gelowitz, “Section 78 of the Police and Criminal Evidence Act 1984: Middle Ground or No Man’s Land?” 106 LQR 327,342 (1990)

\textsuperscript{131} (1861)8 Cox.C.C.498 at p. 501 quoted in ibid.
b. Bill of Rights

Protecting people against crime is one of the important obligations of a democratic government. In the United States, crime control function was performed by the government by strictly complying with the constitutional mandate to protect the rights of individuals. The people of U.S. perceived that even the democratic governments are capable of violating individual rights. They expanded the Constitution, incorporating several immutable rights, which no government could ever ignore. Many provisions of the Bill of Rights directly related to the administration of criminal justice in the United States. In order to block the threat of governmental abuse of law enforcement power, which is delegated to the police, several ideas are embodied in the Fourth, Fifth, Sixth and Eighth amendments. Most of the provisions pertain to criminal justice administration, in the Bill of Rights, are incorporated in the Due Process Clause of the Fourteenth amendment. These provisions guard against the abuses of police power.

132 The first ten amendments to the Constitution were introduced in 1791, which is known as ‘Bills of Rights. These amendments were designed to protect religious liberty, free speech, personal privacy, private property and procedural fairness against the power of the democratic majority. After civil war in 1861-65, again the Constitution was amended to include protection of equality by outlawing slavery, guaranteeing equal protection of the laws and assuring the right to vote to members of racial minorities. In 1919 right to vote was assured to women and in 1970 the same rights were extended to youths of 18 years or more.

133 Supra n.22.

134 Supra n.62

135 Amendment VI.-“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favour, and to have the Assistance of Counsel for his defence”.

136 Amendment VIII.- “Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishments imposed”.

137 Supra n.60
i. Search and Seizure

The Fourth Amendment\textsuperscript{138}, prevent the police from intruding into the privacy of a man in the absence of probable cause. This recognizes two conflicting views. First, it recognizes the right of a common man to live in his house peacefully without any interruption. Second, it accepts the power of the police to conduct search and seizure as part of evidence collection. In order to make the search and seizure legal the amendment requires the compliance of three conditions\textsuperscript{139}. The first condition is that, for conducting search, the police have to obtain a warrant. Second, probable cause for the search must be shown in the application supported by oath or affirmation. Third, the place to be searched and the person or thing to be seized must be specifically stated in the application for the warrant. If these requirements are not complied with, the search will be illegal and the evidence will be excluded. The provisions of Fourth Amendment come into play when the investigating activity intrudes upon an individual’s privacy by subjecting him to a search of his property or a restraint of his freedom of movement. So, in order to conduct a search, when ever possible,\textsuperscript{140} police should obtain a warrant before carrying out a search or seizure. Failure to obtain a warrant may render a search or seizure unlawful, even if police possessed clear probable cause, except on a few specially established circumstances.\textsuperscript{141}

\textsuperscript{138} Supra n.22
\textsuperscript{139} Supra n. 20
\textsuperscript{140} Spinelli v. United States, 393 U.S. 410. William Spinelli was arrested and charge sheeted for traveling to St.Louis from Illinois suburb with the intention of conducting gambling activities. The petitioner challenged the constitutional validity of the search warrant on the ground that it was issued without probable cause, which authorized the FBI to conduct search. The search uncovered the evidence necessary for his conviction. Court rejected the contention and convicted him. US Supreme court reversed and remanded the case.
In *Olmstead v. United States*\(^\text{142}\), court had taken a strict and narrow view of the scope of Fourth Amendment, when the question whether the telephone conversation obtained through a wiretap placed outside his house without a warrant authorizing the wiretap can be considered as relevant evidence. The court acted up on that evidence ignoring the spirit of the constitutional norm. After 39 years, in 1967 the US Supreme court overruled Olmstead in *Katz v. United States*\(^\text{143}\). In this case the police without a warrant from a court attached a listening device to the outside of the telephone booth from where the appellant often made calls. At trial, the government was permitted to introduce petitioner’s telephonic conversations as evidence, which was overheard by the police through the listening device. Reversing the conviction of the appellant, the court observed;

Fourth Amendment protects the people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But, what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.\(^\text{144}\)

In another interesting case court was confronted with a problem created by the changing and developing technology\(^\text{145}\). Here the police used a thermal imager without obtaining a warrant to scan a home they suspected to be housing an indoor marijuana growing operation. Having

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\(^{142}\) 72 L.Ed. 944 (1928); 277 U.S. 438.

\(^{143}\) 19 L.Ed. 2d. 576 (1967).

\(^{144}\) Id. at p. 582.

\(^{145}\) *Kyllo v. United States*, L.Ed. 2d. 94 (2001); 533 U.S. 27. in this case the question was whether the use of thermal imaging device aimed at a private home from a public street to detect relative amounts of heat within the home constitutes a ‘search’ within the meaning of the Fourth Amendment.
obtained corroborating evidence, police obtained a search warrant to search the premises, and found more than 100 cannabis plants. Prosecution took the view that thermal scan is not a search within the meaning of the fourth amendment, since it merely collects data on heat that is being released into the public space. But, the Supreme Court disagreed with this argument and opined:

Whereas here the Government uses a device that is not in general public use, to explore details of the house that would previously have been unknowable without physical intrusion, the surveillance is a search and is presumptively unreasonable without a warrant.\textsuperscript{146}

The fourth amendment is required that the search must be reasonable and will be authorized by a warrant, which is issued on probable cause. The objective satisfaction of the police officer that the search will produce evidence of crime is the precondition for issuing a warrant. The warrant must be issued by a judge or a magistrate who is a neutral or detached officer as far as the case is concerned.\textsuperscript{147} Hence it is clear that, courts are giving priority to maintain the importance and role of fourth amendment in protecting the rights of the individual in the criminal justice administration.

ii. Arrest

Arrests are also subject to Fourth Amendment\textsuperscript{148} requirements. Any restraint on freedom of movement constitutes a seizure.\textsuperscript{149} The warrant requirement is important in connection with arrests, especially, arrests carried out at night in a persons dwelling. If a person is arrested

\textsuperscript{146} Id. at p. 106.
\textsuperscript{147} In \textit{Coolidge v. New Hampshire}, 403 U.S. 43; 29 L.Ed. 2d 564 (1971). The warrant issued by the state attorney General was invalidated by the court in this case.
\textsuperscript{148} \textit{Supra} n.22
without a warrant, he must be brought before a judicial officer for a ‘probable cause’ hearing. The purpose of this requirement is that no innocent will be left in jail violating his rights. The present law is that, if a policeman makes even a good faith error in carrying out a warrant less arrest, either because probable cause did not exist or because no warrant was obtained, the evidence uncovered will be excluded, because the action is unlawful.

iii. Interrogation and Confession

The legal maxim “nemo tenetur seipsum accusare”- no man is bound to accuse himself- is given importance in the criminal justice system of accusatorial countries. So, provisions have been incorporated in the legislations to protect citizens from ‘inherently coercive’ police interrogation. The Fifth Amendment provides that, ‘no person shall be compelled in any criminal case to be a witness against himself’. This privilege against self-incrimination is protected by the Fourteenth amendment, due process clause. In Ashcraft v. Tennessee the court reversed the murder conviction on the ground that, the alleged confession was coerced because the confession was the result of thirty-six hours continuous police interrogation. This shows that, the Fifth Amendment prohibit the prosecutorial authorities from using the compelled testimony in any respect.

150 Gerstein v. Pugh, 43 L Ed. 2d 54; 420 U.S. 103. The issue in this case was whether a person arrested and held for trial under a prosecutor’s information is constitutionally entitled to a judicial determination of probable cause for pre-trial restraint of liberty. Court held that probable cause must be ascertained but the person may not get other rights.

151 Supra n.62.

152 Supra n.60.

153 327 U.S.274 (1946); 90 L Ed. 667. In this case Ashcraft and Ware were convicted for the murder of Zelma Ashcraft. The US Supreme Court reversed the judgment and remanded back to the trial court for further proceedings, on the ground that the acceptance of the confession was in violation of due process of law. The trial court again convicted them. In appeal the conviction is reversed and again sent back to the Supreme Court of Tennessee.
Voluntariness is the rule for admitting confessional evidence. If the confession is the product of a free and unconstrained choice of the maker, it is admissible. But, if his will is overborne and if his capacity for self-determination is critically impaired, the confession should not be used as it offends due process.\textsuperscript{154} The court observed:

Coercing the supposed State’s criminals into confessions and using such confessions so coerced from them against them in trials has been the curse of all countries. … The duty of maintaining Constitutional rights of person on trial for his life rises above mere rules of procedure and wherever the court is clearly satisfied that such violations exist, it will refuse to sanction such violations and will apply the corrective.\textsuperscript{155}

In \textit{Escobedo v. Illinois}\textsuperscript{156}, court adopted an exclusionary rule since the interrogation process violated the Fifth Amendment. Court observed that once the process of interrogation is started and, if the suspect has been denied an opportunity to consult his lawyer and if the police have not warned him of his right to remain silent, no statement elicited by the police during the interrogation may be used against him in the criminal trial.

The reason for putting restrictions on police interrogation and the use of such evidence is that, the conditions in the police stations encourage the suspect to confess rather than to stifle it. Such an environment is created with a purpose to subjugate the individual to the

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\footnote{154} \textit{Brown v. Mississippi}, 297 U.S 278 (1936); 80 L Ed. 682. Petitioners were the accused in a murder case. They were found guilty and sentenced to death. There was no evidence to warrant a conviction except the confession of the accused. The defence objected the acceptance of the confession since it is obtained by exerting physical torture. The question in this appeal was whether convictions, which solely rest upon confessions shown to have extorted by officers of the State by brutality and violence, are consistent with the due process of law required by the Fourteenth Amendment of the Constitution of United States.

\footnote{155} \textit{Id} at p. 687.

\footnote{156} 378 U.S. 478; 12 L.Ed. 2d 977 (1964).
\end{footnotes}
will of the police officer who examines him. So, in most cases the confession may be coercive. The interrogation environment should be free and solemn so that the suspect shall be relieved of any tension and fear to open his mind voluntarily. This will eliminate extraction of confession so as to protect the suspect and also to protect legitimate confessions from later challenges. In *Miranda v. Arizona*, the court hesitated to accept the confession as voluntary since it violates the privileges of the suspect under the Fifth Amendment. For the same reason the U.S. Supreme court, hesitated to over rule *Miranda*. Chief Justice Rehnquist observed that, *Miranda* had become embedded in routine police practice to the point where the warnings have become part of U.S national culture. In *Westover v. United States*, the court after analysing the confession and the procedure adopted by the local police and the FBI to obtain the confession, hesitated to accept the confession, stating that, “the federal officers were the beneficiaries of the pressure applied by the local-in-custody interrogation”. So, it is clear that, if the confession violate *Miranda*, it is inadmissible.

iv. **Right to Counsel and Bail**

Right to counsel is an accepted right of the accused in criminal trial in the accusatorial system. The Sixth Amendment placed an obligation on the government to appoint a lawyer for the needy, poor

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157 16 L.Ed. 2d.694 (1966); 384 U.S. 436.
158 *Dickerson v. United States*, 147 L.Ed. 2d. 405 (2000); 520 U.S.428
159 Ibid
160 384 U.S. 436 (1966)
161 *Id* at p.497. In this case the accused was interrogated by the local police for fourteen hours without informing him about his rights. The FBI interrogated him, after warning him of his rights in the same local police station. Accused confessed.
persons. In *Gideon v. Wainright*\(^{163}\), court recognized the Sixth Amendment right and observed;

“…in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him”.

The Eighth Amendment prohibits excessive bail and the consequent prolonged pre-trial detention.

**Weakness**

The authors of the Bill of Rights intended to put some legal restraints on the law enforcement machinery to protect the rights and freedom of the people. But to a certain extent it placed a hurdle on the society’s ability to control crime. That is why Stephens and Scheb pointed out that, ‘what we as a society lose in our ability to control crime, we gain in increased liberty and privacy’.\(^{164}\) In most of the times searches and seizures take place in the absence of a warrant due to the need for immediate action. The police determine the immediacy. Some searches are incidental to arrest, conducted under exigent circumstances. Some fall within the judicially recognized exceptions. In all these cases probable cause is tested after the fact and that too in the context of a petition by the accused to exclude the evidence. Under the present situation, if the magistrate makes a good faith mistake in issuing a warrant, exclusionary rule is not applicable, but, if a police man makes a good faith error in carrying out a warrant less search or seizure exclusionary rule is applicable.\(^{165}\)

\(^{163}\) 372 U.S. 335; 9 L.Ed. 2d 799 (1963)


All the machineries of the government in a criminal justice system have the responsibility for effectively implementing the Constitution. But, the U.S. experience shows that, sometimes, the law enforcement machinery is failing in implementing the Bill of Rights and the duty to ensure efficiency and fairness in the judicial process is left with the judiciary.

The US Supreme Court by using the Bill of Rights trying to balance the legitimate interests of public safety and public order with equally legitimate interests in individual liberty and privacy. Whenever the law enforcement machinery is failed in protecting the rights of the suspects, the court will exclude the evidence. No other remedy is provided to the victim of police abuses and the consequence of the statutory violation is not determined properly.

Position in France

The situation in France is quite different. From the beginning, they adopted inquisitorial system in which the investigation process is supervised and controlled by the judiciary. All the police work, concerning investigation is exercised either with the consent of the judicial officer or on behalf of him. Hence there is no scope for police bias. Even then, the French incorporated several provisions in their Code to ensure the rights of the suspect and also to prevent the investigating agencies from crossing the specified barriers. The Code of Criminal Procedure contains several provisions to safeguard the rights of the suspect and the common man.

i. Nullity of evidence

The French distinguish in principle, ‘administrative’ and ‘judicial’ police functions. Executive authorities direct the administrative police and their role is to prevent crime and maintain public order. On the other hand, the judicial police, acting on their own initiative or at the direction of the judicial authorities or the prosecutor engage in the investigation and prosecution of the known or suspected offence. Primarily, the law enforcement process is entrusted with the administrative police. But they don’t have any authority to investigate a crime. Hence, that part of the law enforcement is earmarked for the investigating authorities.

In general, a formal judicial investigation is mandatory when the prosecution intends to charge a felony and is optional when delit or contravention charges are filed. The judges have wide discretion to issue arrest and detention orders and to undertake all acts of investigation that are useful to the manifestation of truth. But some of the rules, which enable the examining magistrate to conduct investigation, are explicitly covered by an exclusionary rule, which is known as ‘nullity of evidence’. In the continental system, since the examining magistrate conducts the investigation, there arises no question of controlling the cops. But, whoever may be the investigators, they have to adopt certain procedures, which they cannot brush aside. In the French law, proofs are admissible in the criminal trial only if they have been legally secured and legally adduced. Any proof illegally obtained must be dismissed from judicial proceedings. The principle of legality of the proof should be considered not in view of the nature of the proof, but of the means used to obtain it167.

The safeguards are generally, applicable to interrogation of the suspect\textsuperscript{168} and domicile searches\textsuperscript{169}. In all other cases, the exclusion is applicable only if they violate ‘substantial’ provisions of the code, especially the right of the defense\textsuperscript{170}. The last article of the French code states that, generally, exclusion is applicable only when the irregularity has caused harm to the interest of the party that it concerns\textsuperscript{171}.

ii. Search and seizure

There is no counterpart of accusatorial search warrant in France. The examining magistrate has the full discretion to conduct search anywhere and seize anything\textsuperscript{172} with one exception. If the search is conducted in the domicile of a person, the magistrate must conform to the provisions of Art.57\textsuperscript{173} and 59\textsuperscript{174}. Article 57 deals with three

\begin{itemize}
\item [\textsuperscript{168}] Code of Criminal Procedure, Art.170[1]
\item [\textsuperscript{169}] CCP, Art.59
\item [\textsuperscript{170}] French Criminal Procedure Code, Art.172[1] states, “There is also nullity in case of violation of the substantial provisions of the present title, other than those envisaged in Article 170, especially in case of violation of the rights of the defense”.
\item [\textsuperscript{171}] Art.802 states, “In case of violation of the forms prescribed by the law upon pain of nullity or the inobservation of substantial formalities, excluding, however, those provided in Article 105, any court, including the Court of Cassation, which is seized by a petition for annulment or which raises such an irregularity on its own motion may only pronounce a nullity when the irregularity has had the effect of causing harm to the interests of the party that it concerns”.
\item [\textsuperscript{172}] CCP, Art.92[1] states that, “The examining magistrate may go anywhere in order there to effectuate all useful determinations or to conduct searches. He shall advise the prosecuting attorney, who may accompany him”.
\item [\textsuperscript{173}] CCP, Art. 57[1] “Subject to the reservation provided in the preceding article [Art.56] concerning the respect for professional secrets and the rights of the defense, the operations prescribed by the said article shall be made in the presence of the person at whose domicile the search was made.
\item [\textsuperscript{2}] In the case of impossibility, the Officer of the judicial police shall have the obligation of inviting him to designate a representative of his choice; should he fail to do so the Officer of the judicial police shall choose two witnesses, not including persons subject to his administrative authority, summoned for that purpose by him.
\item [\textsuperscript{3}] The official report of these operations, prepared as is provided in article 66, shall be signed by the persons envisaged in the present article; in case of their refusal, mention of that shall be included in the official report.
\item [\textsuperscript{174}] CCP, Art.59[1] “In the absence of a demand made from the interior of a house or the exceptions provided by law, searches and domiciliary visits may not be begun before six o’clock in the morning or after nine o’clock at night.
safeguards, viz, i. the search must be conducted in the presence of the resident, ii. in the case of impossibility, the search may be conducted in the presence of two witnesses and iii. An official report of the operation must be prepared which shall be signed by all concerned or in the case of refusal, with a mention of that. Article 59 states that, in the absence of a demand from the resident, or on the exception provided by law, search in a domicile may not be conducted between nine o’clock in the night and six o’clock in the morning. If these formalities are not observed the proceedings will be met with ‘pain of nullity’. But, the consent of the concerned person will validate the search as per Art.76. The consent must be given by the person who knows he has a right to object search.

iii. Interrogation

As per Article 114 of the Code of Criminal Procedure, the investigating authority is duty bound to advise the accused, even at the

[2] However, visits, searches and seizures may be undertaken at any time of the day or night with a view to establishing thereby any breaches of Articles 334, 334-1, and 335 of the Penal Code within any hotel, rooming house, boarding house, drinking establishment, association, club, dance-hall, places of entertainment or properties connected to any of the above or in any other place frequented by the public when it has been established that persons who engage in prostitution are habitually received there.

[3] The formalities mentioned in Articles 56, 57 and the present article are imposed upon pain of nullity.

175 CCP, Art.172[1] “there is also nullity in case of violation of the substantial provisions of the present title, other than those envisaged in Article 170, especially in case of violation of the rights of the defense.

[2] The indicting chamber shall decide if the annulment ought to be limited to the void act or extend to all or part of the subsequent proceedings”.

176 CCP, Art. 76 [1] “Searches, domiciliary visits and seizures of evidence to be used against the defendant may not be effected without the express consent of the person on whose property the operation takes place.”

177 CCP, 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.

[2] If the accused desires to make a statement, it shall be received immediately by the examining magistrate.
first appearance itself, of his right to have a counsel and that he is free to make no statement. Moreover in all subsequent hearings, the counsel of both accused and the civil party must be duly called, unless the parties expressly waive this right. The procedural file also must be made available to the defendant’s counsel at least two days before each interrogation.\footnote{178} If these procedures are not followed, the proceedings are null and void as per Art. 170[1].\footnote{179} Similarly confession, which has been obtained illegally, will never be used in the trial.

iv. Violation of the Rights of the Accused

Article 172\footnote{180} of the Code extends the pain of nullity to all violations of substantial provisions especially in case of violation of the rights of the defence. The annulled act of the investigator will be stricken from the dossier and no conclusion can be drawn on the basis of the annulled evidence.

Control – How?

All these provisions are applicable to police, prosecutors and the examining magistrates, who are engaged in the investigation process. Since the judicial police are also conducting the investigation, the nullity provision helps the court in controlling the behaviour of the police and to ensure that they do not cross the limits of their power. It is well established that, in French penal law, no person will be convicted

\footnote{[3] The magistrate shall advise the accused of his right to choose counsel from among the attorneys inscribed on the roster of the local bar or an apprentice, or from among the solicitors, and in the absence of choice he shall designate one for him, if the accused requests it. The designation shall be made by the President of the Order of Advocates if an association of the Order exists, and, if not, by the president of the court”.}
\footnote{[4] Mention of that formality shall be made in the official report.}
\footnote{178 CCP, Art.118[3]. “The procedural file must be put at the disposition of defendant’s counsel at the latest two working days before each interrogation. It must also be put at the disposition of the civil party two working days before the hearings of such party”.}
\footnote{179 CCP, Art.170[1] “The provisions of Articles 114 and 118 must be observed on pain of nullity of that act itself as well as of subsequent proceedings”.}
\footnote{180 Supra n.176.}
upon an illegal proof, because any proof illegally or irregularly obtained must be rejected from the proceedings in court.

But generally, all violations in the investigative process do not lead to exclusion of all the fruits of violations. Only, if the substantial provisions of the code especially the rights of the accused is violated, then only exclusion will become applicable. The annulment can be limited to certain evidences or all as is decided by the Indicting Chamber. Moreover, the Indicting Chamber can, after annulment, remand the proceeding to the same or another examining magistrate for a continuation of the investigation.¹⁸¹ In the further investigation, the investigating authority can correct it, if possible or collect some other evidence against the defence. In such case, the nullity of evidence provision may not protect the rights of the suspect.

Conclusion

In order to ensure that the criminal trial is a just process of ascertaining guilt and inflicting punishment, law has woven some principles in the criminal process. These principles of criminal evidence are, first, the innocent must be protected from conviction and punishment. Second, the accused must be protected from prejudice, and third, the machinery of justice should not be contaminated by malpractice.¹⁸² The first two principles can be preserved only by keeping a high standard in the investigation of crime for which specific rules are necessary. If the rules fail to implement the principles, in the long run the system will lead to injustice. Now a day, much of the

¹⁸¹ CCP, Art.206[3]. “After annulment it may either call for the file and proceed under the conditions provided in Articles 201, 202 and 204 or remand the dossier of the proceedings to the same or another examining magistrate for a continuation of the investigation”.

blame for miscarriage of justice has been attributed to the police. The reason is that, they are the starters of the prosecution process. All the prosecution process begins with the work of the police and the success or failure of prosecution heavily depend on the police work.

The accusatorial countries in order to make their system flawless, made legislations and their courts are also contributing much to this. But, the complaints against the police are increasing and the public confidence in the criminal justice system is reducing day by day. The police are employing deceptive means to detect crime and thereby violate the rights of the suspects.

The judicial and statutory controls over police employed in U.S and U.K to a certain extent, are a failure in safeguarding the principles of criminal justice. The reasons are manifold. First is the inadvertent attitude of the courts in dealing with the problems of human rights violations by the police. Whenever the courts found that the evidences are obtained by deceitful manner or by violating the suspect’s rights, the courts may not take any action against the police. Moreover the complaints of the accused will get only a flippant consideration from the courts. All are prejudiced towards the accused. The society always wants to convict the accused and for which they will support the police misdoings.

Secondly, there is no mechanism to investigate complaints against police. The police themselves investigate the complaints against them. Consequently, most of the complaints will fail in the court due to defective investigation or want of clear evidence. Lord Scarman in one of his reports concluded that, there was a widespread dangerous lack of public confidence in the existing system for handling complaints against the police and that confidence would not be restored unless there was a
strengthening of the independent non-police element in the system.\textsuperscript{183} Police Complaints Authority in U.K., which is formed as a result of this report, is not working properly. Prof. Andrew Sanders pointed out three reasons for the failure of complaints mechanism.\textsuperscript{184} First, no compensation or damages will be awarded even to the successful complainants. Secondly, the burden of proof in police complaints proceedings is higher providing disadvantages to the complainants, and three, in such complaints, the question of discipline, rather than the complainant’s rights \textit{per se} is the moot point. Third, in most of the cases, the courts’ intervention seems to be in relation to procedures rather than substance. In U.S. if the procedure adopted by the police in obtaining evidence is against the constitutional norms they will reject the evidence. In U.K. even if there is violation of the rights of the suspect, they will admit the evidence. In both countries, no accused will be compensated for the violation of his rights and no institution is bothered about the illegal sufferings of the suspect in police custody. In England and India, the courts will never consider the way in which the police obtained the evidence. If the evidence is otherwise admissible, it will not be rendered inadmissible by the fact that it was illegally obtained. So, the end will justify the means is the motto of the courts in these countries. Fourth is the lack of political will to tackle the problems of police excesses and indiscipline. Instead the governments hope for a better future with the present set up. Sometimes, they fail in passing better legislation with stringent measures so as to control the police and to avoid human rights violations. Sometimes, government may not take, even disciplinary action against policeman stating that, it


\textsuperscript{184} Andrew Sanders, “Rights, Remedies, and the Police and Criminal Evidence Act”, [1988] Crim.L.R. 802 at p. 810
will demoralize the police force. Very often it has an encouraging effect.

The U.S. experience shows that, none of the measures adopted by the judiciary to control the police has been implemented in a completely meaningful manner.\textsuperscript{185} The consequence of this failure reflects in the effectiveness of criminal justice. In all accusatorial systems judiciary is entrusted with insuring fairness in the law enforcement decisions. Hence, the judge may be made a person responsible for the review of the policies, just like the courts relationship with other administrative agencies.\textsuperscript{186}

The exclusionary rule is not an adequate technique to induce the police to comply with the requirements of law. Moreover, the rule may bring about unanticipated and undesired consequences. It proves that, negative sanctions are not sufficient to protect the ideals of the criminal justice system.

What is the way out? The imposition of controls on the police such as restrictions on the use of powers, recording of events, complaints mechanism and specific provision of rights to suspect are to a certain extent to safeguard justice. But these measures alone are not successful. Exclusionary rule uphold the integrity of the system and remove incentive for the police to violate the rules. Collapse of the prosecution following exclusion of evidence adversely affects the morale of the police. Police Complaints Authority’s work is also not as

\textsuperscript{185} Wayne R. LaFave and Frank J. Remington, “Controlling the police: The Judges Role in Making and Reviewing Law Enforcement Decision”, 63 Mich. L.R.,987 (1965) at p. 1011

\textsuperscript{186} Ibid.
expected. They neither investigate complaints itself nor has a body of investigators under its control.\textsuperscript{187}

None of the control measures provide adequate protection for the most central rights in the criminal justice system. Some of the rights have no effective remedies; some other remedies are not given adequate protection. Right without a remedy is a command without a sanction. The criminal justice process must be made meaningful so as to protect the rights of the suspects as well as the society. Hence, it feels that it is high time to find out more effective and equitable ways of coordinating and controlling the police activities.

\textsuperscript{187} Andrew Sanders and Richard Young, \textit{Criminal Justice}, 2\textsuperscript{nd} edn. Butterworths, London (2000) at p. 686