



## CHAPTER 3

# From the Investigation to the Trial Stage

## Introduction

The previous section dealt with arrest. However, there are other procedural aspects that must be adhered to if fair trial norms are to be assured. These include:

1. Right to freedom from torture;
2. Right to respect for one's private life; and
3. Duty to keep records of investigation.

The manner in which a crime is investigated is not merely a matter for the police; it has an effect on the way the trial is conducted and its fair outcomes. This is the reason courts have independent powers to inquire into the manner of investigation.

Many of the rights implicated during the investigation stage emanate from Article 21 of the Constitution which states: "No person shall be deprived of his life or personal liberty except according to procedure established by law." Domestic statutory provisions and case law also protect these rights and Supreme Court decisions provide valuable instructions to judges on how to protect the rights of accused persons. International law reinforces these rights as well.

This section outlines the basic legal rules governing the investigation of an offence. It specifically examines some of the rights that belong to the accused from the stage of criminal investigations till the beginning of the trial. Arrest forms an integral part of the investigation stage and rights at the time of arrest are also relevant at this stage. These however, have been discussed in the previous chapter which is solely devoted to arrest and pre-trial detention.

In order to assure a fair trial, it is imperative to follow strict procedural safeguards embedded in the Constitution and the Criminal Procedure Code from the moment the police receive information about an offence and initiate criminal investigation to the first production of the accused at court. But in practice, police conduct, the prosecution's role and judicial oversight of fair trial norms are riddled with breaches which have become so routine, that they are no longer paid attention to as being vital elements that must not be disobeyed. Yet non-implementation of fair trial principles in these early stages of criminal proceedings can and does jeopardise the possibility of just outcomes. The courts provide the single most effective check on police malpractice. They are the first and most important means by which both victim and accused can be assured of a level playing field which is the essence of maintaining the balance between individual liberties and state power, to bring justice to people. It is for this reason that the independence of the judiciary is held sacred and judges and magistrates are expected

to follow every procedural safeguard and protect every assurance provided by the law to all parties. The police frequently overstep their role of marshalling evidence and apprehending the suspect by taking on the role of the judge. Judicial inclinations, especially amongst hard-pressed judges or those unsure of their role and power, can tend towards passive acceptance of police deprecations and versions without bothering to test their veracity by ensuring that procedural tests are followed. This abrogation of independence and role blurs the contours of independent adjudication and results in the possibility of bias which is fatal to fair trial.

It should be stressed that it is important for a fair trial that judges and magistrates personally examine the evidence brought forth by the prosecution. This does not follow from distrust vis-à-vis the police but it is essential that judges and magistrates receive a direct impression of all the relevant evidence, since they are the ones who decide the case. Furthermore, the examination by the judge or magistrate is an additional safeguard against violations of the fair trial principle.

## 3.1 Right to Freedom from Torture

*Torture is absolutely forbidden. The prohibition against it is total and unconditional. Though Indian law does not mention the word “torture” specifically, the Constitution, and criminal law absolutely forbid, in all circumstances, any actions amounting to torture.*

In the Indian context, torture and violence in custody is routine and widespread. Torture, violence and death in police custody are common everyday occurrences. This has been repeatedly noted by Law Commission Reports, a slew of Supreme Court decisions and reports of the National Police Commission as well as the National Human Rights Commission.

One reason for the continuance of this state of affairs is that its presence is often condoned and very often deliberately overlooked. The police hardly bother to deny it any longer; on the contrary, they excuse themselves by openly declaring that it is often their *only* method of solving crime. Yet the routine and widespread use of torture in the course of investigation has not reduced crime, helped solve it, led to increased convictions at court, nor contributed to the public’s perceptions of safety and security. The court turning a blind eye on this issue sends a strong signal to the police that they can get away with torture without fear of any consequences.

### 3.1.1 Domestic Law

In Indian law, torture is a violation of fundamental rights, a crime, and a civil wrong. As such, it attracts imprisonment, liability to compensate the victim, and contempt proceedings. In what has now become famously known as the *D.K. Basu*<sup>1</sup> case, the Supreme Court characterised torture as one of “the worst kind of crimes in a civilised society”. The Court was convinced that the increasing incidence of torture was “affecting the credibility of the rule of law and the administration of the criminal justice system”.



<sup>1</sup> AIR 1997 SC 610, para. 18.

Addressing the competing interests of individual liberty and society's need to police criminals, the Court stated: "Using any form of torture for extracting any kind of information would neither be right nor just nor fair and, therefore, would be impermissible, being offensive to Article 21."<sup>2</sup>

A slew of judicial decisions have made it abundantly clear the Article 21 articulates a strict prohibition of torture. Illustratively, in *Francis Coralie Mullin v Administrator, Union Territory of Delhi*,<sup>3</sup> the Supreme Court made it clear that any form of torture, cruel, inhuman or degrading treatment or punishment, offensive to human dignity, violates the all-important right to life and personal liberty under Article 21 of the Constitution and stated: "Obviously, any form of torture or cruel, inhuman or degrading treatment would be offensive to human dignity...and it would on this view be prohibited by Article 21."<sup>4</sup> The Supreme Court went on to say: "No law which authorises and no procedure which leads to such torture can ever stand the test of reasonableness and non-arbitrariness. It would plainly be unconstitutional and void as being violative of Articles 14 and 21."<sup>5</sup>

### 3.1.1.1 Procedural Safeguards Against torture

Section 163 of the Criminal Procedure Code prohibits investigating officers from obtaining statements from witnesses through threatening conduct. In order to reduce the possibility of torture and custodial violence and protect the rights of anyone who finds themselves in police custody, first the Supreme Court and now the statutory law has laid down a considerable set of procedural safeguards. These include:

- Immediately on arrest the arresting police officer has an obligation to give information about the arrest and the place of detention to any person nominated by the arrested person,<sup>6</sup> and make an entry of the same in the general diary maintained in every police station,<sup>7</sup> providing the details of the person who is informed.
- Draw up an "Arrest Memo" indicating the date, place and time of arrest; signed by two independent witnesses and countersigned by the arresting officer.<sup>8</sup>
- Draw up an "Inspection Memo" of all major and minor injuries on the body of the arrested person.<sup>9</sup>
- Conduct a medical examination of the arrested person at the time of arrest. This is to be repeated every 48 hours if the arrestee is in police custody.<sup>10</sup>
- It will also be the duty of the Magistrate before whom the accused is produced to check with the accused whether the police have complied with the above provisions.<sup>11</sup>

<sup>2</sup> Ibid., para. 34.

<sup>3</sup> AIR 1981 SC 746. The matter involved a British woman detained for attempting to smuggle hashish. She challenged the constitutionality of Clause 3 of the Conditions of Detention after prison authorities effectively prevented her from meeting her lawyer and only permitted her to meet her young daughter once a month.

<sup>4</sup> Ibid., para. 8.

<sup>5</sup> Ibid.

<sup>6</sup> Code of Criminal Procedure, 1973, Section 50(A)(1).

<sup>7</sup> Ibid., Section 50(A)(2).

<sup>8</sup> *D.K. Basu v State of West Bengal*.

<sup>9</sup> Ibid.

<sup>10</sup> Ibid.

<sup>11</sup> Code of Criminal Procedure, 1973, Section 50(A)(4).



- The Magistrate must inform the arrested person, when first produced, about the right to a medical examination and also inquire whether they have any complaints of torture or maltreatment in custody.<sup>12</sup>

These provisions along with the 24-hour production rule and the provisions that say that restraints must not be more than necessary to prevent escape, cumulatively create a procedural design aimed at ensuring that the dangers of torture and illegal detention are minimised.

### 3.1.1.2 Penalty for Torture

The Indian Penal Code makes clear that physical and psychological ill-treatment of the accused by law enforcement officials is impermissible and punishable. Causing of “hurt”<sup>13</sup> or “grievous hurt”<sup>14</sup> by public servants to obtain confessions or to compel restoration of property, carry sentences up to seven and ten years of imprisonment respectively.<sup>15</sup>

Disobedience of the law by a public servant with intent to cause “injury” (any harm illegally caused to any person in body, mind, reputation or property)<sup>16</sup> is punishable by imprisonment for up to one year for the disobedience<sup>17</sup> and criminal liability for the injury. Similarly, wrongful confinement to extort confessions, compel restoration of property or obtain information that could lead to detection of an offence, carries up to three years of imprisonment.<sup>18</sup> Moreover, Section 330 of the Indian Penal Code explicitly criminalises torture during interrogation and investigation for purposes of extracting a confession.

In addition to possible imprisonment for up to seven years for violating Section 330 of the Indian Penal Code,<sup>19</sup> any police officer failing to comply with the aforementioned court-mandated requirements intended to prevent torture is liable to be punished for contempt of court. These can be instituted in any High Court that has territorial jurisdiction over the matter.<sup>20</sup> Further, any police officer engaging in torture is liable for civil damages by the victim or victim’s family.<sup>21</sup>

<sup>12</sup> *Sheela Barse v State of Maharashtra* 1983 SCC 96.

<sup>13</sup> Under Section 319 of the Indian Penal Code, 1860, the scope of “hurt” includes causing bodily pain, disease or infirmity to any person.

<sup>14</sup> Section 320 of the Indian Penal Code, 1860 defines “grievous hurt” as emasculation (depriving a person of masculine vigour, castration); permanent privation of the sight of either eye; permanent privation of the hearing of either ear; privation of any member or joint; destruction or permanent impairing of the powers of any member or joint; permanent disfiguration of the head or face; fracture or dislocation of a bone or tooth; any hurt which endangers life or which causes the sufferer to be during the space of 20 days in severe bodily pain, or unable to follow his ordinary pursuits.

<sup>15</sup> Indian Penal Code, 1860, Sections 330, 331.

<sup>16</sup> *Ibid.*, Section 44.

<sup>17</sup> *Ibid.*, Section 166.

<sup>18</sup> *Ibid.*, Section 348.

<sup>19</sup> Section 330 of the Indian Penal Code holds criminally liable any person who “voluntarily causes hurt for the purpose of extorting from the sufferer or from any person interested in the sufferer, any confession or any information which may lead to the detection of an offence or misconduct”.

<sup>20</sup> *Basu* para. 37.

<sup>21</sup> *Ibid.*, para. 45.



The recognition that there is violence and coercion in custody led to Section 176 of the Code of Criminal Procedure being amended to provide that in the case of death or disappearance of a person, or rape of a woman while in the custody of the police, there shall be a mandatory judicial inquiry and in the case of death, an examination of the dead body shall be conducted within 24 hours of death. Whenever a person dies in police custody, Section 176 requires the Magistrate to investigate the cause of death.<sup>22</sup> An inquiry under this Section is to be conducted independently by the Magistrate and not jointly with the police (*Nilabati Behera*, para. 9). This inquiry confers the Magistrate with all powers he would normally have when investigating any of these offences. The inquiring Magistrate shall record all his evidence and, if considered necessary, examine the dead body. Wherever practicable, the Magistrate may inform and allow the family of the deceased to participate in the enquiry.<sup>23</sup>

### 3.1.1.3 Compensation for Torture

In addition to any civil remedy in tort, victims and families of tortured victims have a right to monetary compensation under public law. Articles 32 and 226 of the Constitution provide for compensation from the state for contravention of fundamental rights. In *Nilabati Behera v State of Orissa*,<sup>24</sup> the Supreme Court affirmed that Article 32 empowers courts to grant compensation for deprivation of a fundamental right. The Court explained that without this power to render compensation, the Court's role as a protector of constitutional rights is merely a mirage, and might even create an incentive to torture in certain circumstances.<sup>25</sup> Moreover, the Court dispelled the notion that the police were immune from such claims, stating that immunity only exists for liability in tort, and does not extend to the state's liability for contravention of fundamental rights.<sup>26</sup> Such a claim shall impose strict liability and a sovereign immunity defence is not available. The state will have the right to be indemnified by the wrongdoer.<sup>27</sup> This compensation for violation of fundamental rights by the state is in addition to the criminal penalties for injury and homicide that the individual public servant would be liable for.

#### *Nilabati Behera v State of Orissa* 1993 SCC 746

Nilabati Behera's 22-year-old son, Suman Behera, was taken into police custody in connection with the investigation of a theft. The next afternoon, Suman Behera was found dead on a railway track with multiple injuries to his body. Ms Behera filed a writ petition under the constitutional Article 32, alleging that her son died as a result of injuries inflicted while in police custody and requested that she be monetarily compensated for the death of her son. She said that her son was beaten to death at a police post after being detained in connection with a theft. The police defence asserted that Suman Behera had escaped from police custody the night before and was run over by a passing train during his escape. The Court first vigilantly scrutinised the asserted defence. Based on medical evidence, the lack of police effort

<sup>22</sup> Code of Criminal Procedure, 1973, Section 176.

<sup>23</sup> Code of Criminal Procedure, 1973, Section 176(4).

<sup>24</sup> 1993 SCC, para. 13.

<sup>25</sup> *Ibid.*, para. 22.

<sup>26</sup> *Ibid.*, para. 16.

<sup>27</sup> *Ibid.*, paras. 43-45



in locating the supposed escaped detainee, and the fact that Suman Behera's was still partially bound by rope, the Court ultimately held that his death was not a result of a train accident. On the contrary, Suma Behara had succumbed to injuries most likely inflicted by police-administered lathi blows. The Court then explained that the state was liable for compensation in these cases where police conduct during custodial detention results in the deprivation of a fundamental right, in this case, right to life in Article 21. Ms Behera was awarded Rs 150,000 from the State of Orissa and the state was also ordered to pay the Supreme Court Legal Services Committee Rs. 10,000.

### Defining Torture

The UN Convention Against Torture, which India has signed but not ratified, defines torture as: "Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." Pursuant to customary law as articulated by Article 18 of the Vienna Convention, India, as a signatory of the Torture Convention, is obliged to refrain from conduct which would defeat the object and intent of the Torture Convention.

The Rome Statute of the International Criminal Court also gives a comprehensive definition of torture. The Statute defines torture as: "The intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions."

### 3.1.2 International Law

No single human rights violation has been subject to more Conventions and Declarations than torture.<sup>28</sup> **The prohibition against torture is treated by all countries as being *jus cogens*.** In Latin the meaning of *jus cogens* is a higher or compelling law. **Article 53 of the Vienna Convention on the Law of Treaties describes *jus cogens* as:** "A norm accepted and recognised by the international community of states as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." **No country may permit any form of torture or create state or individual immunities for its practice; nor make any law that permits torture.**

Both Article 5 of the UDHR and Article 7 of the ICCPR stipulate: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." The United Nations Convention against Torture requires that: "Each State Party shall



<sup>28</sup> D.K. Basu v State of West Bengal, AIR 1997 SC 610.

take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.” Article 4 of the Convention against Torture requires that: “Each State Party shall ensure that all acts of torture are offences under its criminal law.”

### 3.1.3 Guide for Judicial Enforcement

*“Preventing torture is the greatest task facing India’s courts, and thus it is essential for courts to adopt a new outlook and attitude toward prosecuting torture. The Supreme Court urges both transparency of action and accountability for police officers. This is not the task of Parliament.”* In saying this, the Supreme Court cast a dual responsibility on magistrates who are the primary gatekeepers against torture. The first responsibility is to ensure adherence to all procedures designed to safeguard against torture and the second is to hold accountable and bring to justice any perpetrator of torture.

Torture is an illegal activity and any state actor such as the police who indulges in this engages in a criminal activity. Yet it is too often condoned by the courts. It persists as a common practice, in part, because courts turn a blind eye to police practices which they know to be common and also because they do not insist on going strictly by the law but tolerate the practice. In fact, by not being proactive in preventing and punishing the use of torture, courts become silent partners in the illegality. The Code of Criminal Procedure and Supreme Court guidelines require the courts to be proactive in ensuring that no torture takes place and no reliance is placed on torture to arrive at just outcomes. Judges and magistrates have a responsibility to ensure that they do not themselves, unintentionally collude with acts of torture while carrying out their official functions. This means total intolerance of any form of custodial violence and being vigilant and vocal when there is even the slightest likelihood of transgression. There are no circumstances in which even a “*little torture*” or “*some violence*” can be considered legal or justified.

Preventing torture requires magistrates to take account of the fact that it is common and very likely and therefore it is necessary to make it clear to police and prosecutor that the court is ever alert to the possibility that defendants and witnesses may have been subject to torture or other ill-treatment.

The Code of Criminal Procedure codifies the duties of the magistrate where it requires that at the time of production of an accused, the Magistrate:

- Asks the accused if he has been threatened, tortured or abused in custody;
- Checks to see if the Memo of Arrest has been filled and then cross checks the facts in the Memo of Arrest by questioning the accused. *If he suspects that the accused is intimidated by police presence he can question and record the statement of the accused in the absence of the police;*
- Checks to ensure that the medical examination was conducted and the medical certificate is attached with the case papers;
- Examines each of these documents to ensure that their contents include everything that needs to be included.



It is usual for magistrates to sometimes bypass these procedural “niceties” on the plea of being extraordinarily busy, or to avoid further tussles and wrangles in an already overburdened judicial system. However, such neglect destroys every possibility of a fair trial.

When magistrates observe breaches of procedure by the police and prosecution or repeated transgressions, they must treat these violations as serious disrespect for the court and take all steps to address the breach. These may include:

- Calling for explanations by superior officers about patterns of observed behaviour by subordinates;
- Seeking explanations from the Prosecutor whose duty it is to ensure that papers are in order before being submitted to court. Equally the magistrate can haul up the defence lawyer for not ensuring proper representation of his client;
- If there is no defence lawyer at this stage the Magistrate has the additional duty of ensuring that a lawyer is provided at state expense;

Magistrates also need to recognise that the arrested person, even in court, is in an extremely vulnerable position. It is his duty, not only to ascertain whether the arrested person can communicate freely to the court without any threat or intimidation, but also to create circumstances within the courtroom where the arrested person can feel less intimidated and freer to voice his concerns. He should be particularly attentive to the detainee’s condition. Where necessary, he should routinely carry out a visual inspection for any signs of physical injury – or order one to be carried out by a doctor. *Magistrates should also be alert to other clues, such as the individual’s physical and mental condition and overall demeanour, the behaviour of the police and guards involved in the case and the detainee’s attitude towards them. They should actively seek to demonstrate that they will take allegations of torture or ill-treatment seriously and will take action where necessary to protect those at risk.*

If the arrested person alleges before the Magistrate that he has been ill-treated in custody, it is incumbent on the magistrate to record the allegation in writing, immediately order a medical examination and take all necessary steps to ensure that the allegation is fully investigated. This should be done even in the absence of an express complaint or allegation, if the person concerned bears visible signs of physical or mental ill-treatment. The court can further safeguard the accused by ensuring that the accused is accompanied by a relative to any medical examination.

The primary role of judges in preventing acts of torture, therefore, is to ensure that the law is upheld at all times.

## 3.2 Right to Respect for One’s Private Life

*The right to privacy is essential and fundamental in an organised society. Without it, an individual would be unable to enjoy the privileges which belong to him as a member of society.<sup>29</sup> It is a cherished right. There must be strong, cogent and legally justifiable reasons for law enforcement agencies to interfere with this right. Here it is essential that proper procedure is always followed because intrusion into a person’s home, professional or family life in the name of investigation without any proper basis is not permitted.<sup>30</sup>*



<sup>29</sup> *Roberson v Rochester Folding-box Co.*, 171 N.Y. 538.

<sup>30</sup> *Kharak Singh v State of Uttar Pradesh and Others* 1 (1964) SCR 332.

### 3.2.1 Domestic Law

The right to privacy is now established in India, but as part of Article 21, and not as an independent right in itself. The Constitution does not grant in express terms any right to privacy. It is not enumerated as a Fundamental Right in the Indian Constitution. However, such a right has been culled from Article 21 by the Supreme Court.

Two cases decided by the Supreme Court of India laid the foundations for the right. These concerned the intrusion into a home by the police under state regulations, by way of “domiciliary visits”. Such visits could be conducted at any time of the night or day, to keep a tag on persons to unearth suspicious criminal activity, if any, on their part. The validity of these regulations came under challenge. In the first case, *Kharak Singh v State of Uttar Pradesh*,<sup>31</sup> the Uttar Pradesh (UP) Police Regulations regarding domiciliary visits were in question and the majority of the Judges held that though the Constitution did not refer to the right to privacy expressly, it could still be traced from the right to “life” in Article 21.

According to the majority, Clause 236 of the relevant regulations in UP, was bad in law; it offended Article 21 in that there was no law permitting interference by such visits. The majority did not question whether these visits violated the “right to privacy”. But, the minority view while concurring that the fundamental right to privacy was part of the right to liberty in Article 21, part of the right to freedom of speech and expression in Article 19(1)(a), and also of the right to movement in Article 19(1)(d), held that the Regulations permitting surveillance violated the fundamental right of privacy. In effect, all the seven learned Judges held that the “right to privacy” was part of the right to “life” in Article 21.

The second case which laid the foundation of this right was that of *Govind v State of Madhya Pradesh*,<sup>32</sup> in which the Court developed the privacy law from the point it was left in *Kharak Singh*. The Court stated that, though, the “right to privacy was not absolute” and as the makers of our Constitution wanted to ensure conditions favourable to the pursuit of happiness, the privacy right can be denied only when an “important countervailing interest is shown to be superior”, or “where a compelling state interest is shown.” Any right to privacy “must encompass and protect the personal intimacies of the home, the family, marriage, motherhood, procreation and child bearing”. The Court explained that, if there was state intrusion, there must be “a reasonable basis for intrusion”. The right to privacy, in any event, would necessarily have to undergo a process of case-by-case development.

The Court examined the validity of the particular Regulations 855 and 856. These, according to the Court, gave immense powers to the police and, thus needed to be read down so as to be in tune with the Constitution. “Our founding fathers were thoroughly opposed to a Police Raj! Therefore, the Court must draw boundaries upon these police powers so as to avoid breach of constitutional freedoms. While it could not be said that all domiciliary visits were unreasonable, still while interpreting them, one had to keep the character and antecedents of the person who was under watch as



<sup>31</sup> Ibid.

<sup>32</sup> AIR 1975 SC 1378.

also the objects and limitations under which the surveillance could be made. The right to privacy could be restricted on the basis of compelling public interest.”<sup>33</sup>

The Court observed that unlike the non-statutory regulations in *Kharak Singh*, in this case, Regulation 856 was “law” (being a piece of subordinate legislation) and hence it could not be said in this case that Article 21 was violated for lack of legislative sanction. The law was present in the form of these regulations. Regulations 853(1) and 857 prescribed a procedure that was “reasonable”. Regulation 856 only imposed reasonable restrictions within Article 19(5) and there was, even otherwise, a compelling state interest. Regulations 853(1) and 857 referred to a class of persons who were suspected as being habitual criminals, while Regulation 857 classified persons who could reasonably be held to have criminal tendencies. Further, Regulation 855, empowered surveillance only of those persons against whom reasonable material existed for the purpose of inducing an opinion that they show a determination to lead a life of crime. The Court thus read down the regulations and upheld them for these reasons. In other words, the regulations were upheld because they were bound by reasonable restrictions which could be examined against objective criteria.

Thereafter, in *Malak Singh*<sup>34</sup> the Supreme Court added another dimension to protections against invasion of privacy. *Malak Singh* reiterated that serious encroachments into privacy can infringe on an individual’s right to personal liberty guaranteed by Article 21. Not only is police surveillance of particular individuals permitted under the limited circumstances articulated in Chapter 23.4 of the Punjab Police Act, 1861,<sup>35</sup> but such surveillance must be unobtrusive and within bounds.<sup>36</sup>

Several years later in 1991, the Supreme Court observed in *People’s Union for Civil Liberties*<sup>37</sup> that the right to privacy is part of the right to life and personal liberty under

<sup>33</sup> *Ibid.*, para. 31.

<sup>34</sup> *Malak Singh and Ors. v State of Punjab & Haryana and Ors.* AIR 1981 SC 760, para. 6.

<sup>35</sup> The Police Act permits police to enter the following types of individuals into the Surveillance Register:  
(a) All persons who have been proclaimed under Section 87 and Section 82 of the Criminal Procedure Code of 1973;

(b) All released convicts in regard to whom an order under Section 565 of the Criminal Procedure Code, (old Code) has been made (Section 356 of the Criminal Procedure Code, 1973);

(c) All convicts the execution of whose sentence is suspended in the whole, or any part of whose punishment has been remitted conditionally under Section 401 of the old Criminal Procedure Code (Section 432 of the Criminal Procedure Code, 1973);

(d) All persons restricted under Rules of Government made under Section 16 of the Restriction of Habitual Offenders (Punjab) Act, 1918;

(e) Persons who have been convicted twice, or (more than twice), of offences mentioned in Rule 27.29;

(f) Persons who are reasonably believed to be habitual offenders or receivers of stolen property, whether they have been convicted or not;

(g) Persons under security under Sections 109 or 110, Code of Criminal Procedure;

(h) Convicts released before the expiration of their sentences under the Prisons Act and Remission Rules without the imposition of any conditions.

<sup>36</sup> *Malak Singh*, para. 9



Article 21 of the Constitution and once the facts in any given case constitute the right to privacy, Article 21 is attracted.

***Malak Singh and Ors. v State of Punjab & Haryana AIR 1981 SC 760***

A Punjab police station entered two brothers into the Surveillance Register pursuant to Chapter 23.4(3)(b) of the Police Act, alleging that the brothers were habitual opium smugglers. The brothers were given no justification for this action, nor the opportunity to challenge the decision. They then filed a writ petition requesting the removal of their names from the Surveillance Register.

The Supreme Court first explained that the surveillance of habitual and potential criminals may be necessary to prevent crime, and given the necessary confidential nature of such surveillance, it is contrary to public interest to require the police to publicly reveal their reasoning for the surveillance of a particular individual. The court then privately reviewed the police's reasoning concerning the surveillance of the two brothers and was satisfied that there existed reasonable grounds for the police to believe that surveillance was necessary. However, the Court also stated that surveillance can never be conducted in a manner that inhibits the fundamental freedoms guaranteed to all citizens, nor offend the dignity of the individual. Thus, courts must eagerly protect citizens from excessive surveillance not in compliance with Chapter 23.4 of the Police Act, which casts a duty on the police to confine entries in the register strictly to the class of persons enumerated therein.

***People's Union for Civil Liberties (PUCL) v Union of India & Anr. AIR 1997 SC 568***

PUCL filed a writ petition in the Supreme Court challenging the constitutional validity of Section 5(2) of the Indian Telegraph Act, 1882, which authorises the government to intercept messages "on the occurrence of any public emergency or in the interest of public safety" if it is satisfied that it is "necessary or expedient to do so" in five given situations.<sup>38</sup> PUCL approached the Court on the basis of a report on tapping of politicians' telephones by the Central Bureau of Investigation (CBI). It asked for the provision of Section 5(2) to be interpreted in the light of fundamental rights and read down to include procedural safeguards that would discount arbitrariness and prevent indiscriminate phone tapping by the law enforcement or investigating agencies.

The Court's Observations:

The right to have a telephone conversation in the privacy of one's home or office is part of the Right to Life and Personal Liberty enshrined in Article 21 of the Constitution, which cannot be curtailed except according to procedure established by law. The Court asserted that telephone tapping amounts to an invasion of privacy in violation of this core right.

<sup>37</sup> *People's Union for Civil Liberties v Union of India* AIR 1991 SC 207.

<sup>38</sup> In the interests of: (i) the sovereignty and integrity of India; (ii) the security of the state; (iii) friendly relations with foreign states; (iv) public order; and (v) preventing incitement to the commission of an offence.



Elaborating on the scope of Section 5(2) of the Telegraph Act, the Court clarified that this Section “does not confer unguided and unbridled power” on the investigating agencies to invade a person’s privacy. Telephone tapping is only permitted in the following two circumstances:

1. “On the occurrence of a Public Emergency”: This means the prevalence of a sudden condition or state of affairs affecting the people; and
2. “In the interest of Public Safety”: This means “the state or condition of freedom from danger for the people at large”.

The test of whether these circumstances exist would be “apparent to a reasonable person”. The Court strongly asserted that if the two circumstances are not in existence the central or state governments or their duly authorised officers cannot resort to phone tapping.<sup>39</sup>

### 3.2.2 International Law

Article 17 of the ICCPR states: “No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.” However, Article 4 permits this right to be derogated in a “time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed” as long as the measures taken “are not inconsistent with [India’s]<sup>40</sup> other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin”.

### 3.2.3 Guide for Judicial Enforcement

The Supreme Court in *Kharak Singh* said that the right to privacy is a sacred and cherished right. There must be strong, cogent and legally justifiable reasons for law enforcement agencies to interfere with this right. Even then, the proper procedure must be followed, as intrusion into a person’s home, professional or family life in the name of investigation or domiciliary visits – without a proper basis – is not permitted.<sup>41</sup> *People’s Union for Civil Liberties (PUCL) v Union of India*<sup>42</sup> illustrates these principles. Here the Supreme Court laid down the following directives for telephone tapping: Tapping of telephones is prohibited without an authorising order from the Home Secretary, Government of India or the Home Secretary of the concerned state government.

The order, unless it is renewed, shall cease to have authority at the end of two months from the date of issue. Though the order may be renewed, it cannot remain in operation beyond six months.

<sup>39</sup> In the five given situations allowed by Section 5(2) of the Indian Telegraph Act, 1882.

<sup>40</sup> Author’s parenthesis.

<sup>41</sup> *Kharak Singh v State of Uttar Pradesh and others* 1 (1964) SCR 332.

<sup>42</sup> AIR 1997 SC 568.



Telephone tapping or interception of communications must be limited to the addresses specified in the order or to those likely to be used by a person specified in the order.

All copies of the intercepted material must be destroyed as soon as their retention is not necessary under the terms of Section 5(2) of the Telegraph Act.

In other words, where state action is challenged for violating the right to privacy, the intrusion into privacy will be struck down or read down if the legislation is not itself bound with reasonable criteria for making that inroad into the right to privacy. State actions will also be struck down as unconstitutional if the manner of surveillance, whether through observation, tapping, cameras or inquiry into private financial or other circumstances, is conducted without sufficient reason or in a manner that is abusive of the powers that have been given. Both the ambit of the legislation and the procedure to be followed are subservient to constitutional mandate and must be within the limits of permissible restrictions.

### 3.3 Duty to Keep Records of Investigation Without Unnecessary Delay

*The necessity to discover the truth in every case demands that police records must be kept with scrupulous completeness, and investigations carried out with promptness, urgency, and efficiency.*<sup>43</sup>

#### 3.3.1 Domestic Law

##### 3.3.1.1 Diary of Proceedings in an Investigation

The Code of Criminal Procedure, Section 172 requires the police to conduct investigations expediently, while keeping thorough records of their methods and findings. Section 172(1) requires a police officer to keep a day-to-day case diary of his investigation “setting forth the time at which the information reached him, the time at which he began and closed his investigation, the place or places visited by him, and a statement of the circumstances ascertained through his investigation.”<sup>44</sup> Underlining the vital importance of executive record keeping, the Supreme Court has repeatedly reiterated that the **case diary should be maintained with scrupulous completeness and efficiency.**<sup>45</sup>

##### 3.3.1.2 The Police Officer’s Report on the Completion of Investigation

Section 173 of the Code of Criminal Procedure imposes further record-keeping duties on the police. The police must present a police report to the magistrate containing the



<sup>43</sup> *Bhagwant Singh v Commissioner of Police, Delhi*, (1983) CriLJ 1081.

<sup>44</sup> Code of Criminal Procedure, 1973, Section 172(1).

<sup>45</sup> *Bhagwant Singh v Commissioner of Police, Delhi*, (1983) CriLJ 1081, para. 16.

following information:

1. The names of the parties;
2. The nature of the information;
3. The names of the persons who appear to be acquainted with the circumstances of the case;
4. Whether any offence appears to have been committed and, if so, by whom;
5. Whether the accused has been arrested;
6. Whether the accused is released on his bond and, if so, with or without sureties; and
7. Whether he has been forwarded in custody under Section 170.

In cases tried before a Magistrate, the police must give the Magistrate all relevant supporting documents as well as the statements of all witness on which the prosecution intends to rely. Section 173 places a continuous duty on the investigating officer to forward to the Magistrate any additional reports that may be necessary to keep the court updated of further facts that may have come to light or further evidence that the police may have obtained.<sup>46</sup>

The Supreme Court has held that such investigation standards require police to question and record statements from parties who may possibly possess relevant information, to quickly take into custody hard evidence, and have experts file an urgent forensic report so that no valuable clues are lost.<sup>47</sup> Police failure to swiftly prepare such records of investigation, resulting in undue delay at trial, might violate Article 21 of the Constitution, as the procedure prescribed by law for denying a person's liberty is not reasonable, fair and just, if the accused is not afforded a speedy trial.<sup>48</sup>

#### *Bhagwant Singh v Commissioner of Police, Delhi (1985) SC 1285*

Bhagwant Singh brought claim against his local police department, alleging that they did not adequately investigate the death of his daughter by burning. The Supreme Court found the police's investigation deficient in the following ways: The police did not take into custody the blanket with which the fire was said to have been doused; They waited for over five weeks before attempting to obtain a fingerprint analysis of a mirror located in the vicinity of the burning; They allowed a material witness to return to his village without ever examining him; The police did not question the victim about the incident before she died, despite being informed by her doctors that she was capable of responding to questioning; They did not record the statement of the taxi driver who drove the victim to the hospital; and They did not record the statement of an important local witness.

### 3.3.3 Guide for Judicial Enforcement

The value of scrupulously following record-keeping procedures laid down at law in a complete and timely manner cannot be over-emphasised. Complete, detailed and consistent police records indicate the sequence of police actions in investigations that



<sup>46</sup> Code of Criminal Procedure, 1973, Section 173.

<sup>47</sup> *Bhagwant*, paras. 10 and 14.

<sup>48</sup> *Mihir Kumar Ghosh v State of West Bengal and Ors*, (1990) CriLJ 26.

eventually lead to the specific charges being laid against the accused before the court. The papers accompanying the charge sheet reveal the logic that grounds the charges. These documents are the only aid available to the judge when applying his mind as to whether or not the accused has a case to answer. Incomplete, illogical, records full of inconsistencies and incoherencies mean that the judge has nothing substantial against which to measure whether to go ahead with the trial.

The requirement that accurate records be kept and produced before the court has a dual purpose. On the one hand, it is aimed at ensuring that no person is subjected to police action and perhaps even custody without there being some reasonable basis for limiting his freedom. On the other hand, it is a check to ensure that the court's time and manpower, and the taxpayer money is not wasted on ill-prepared and shoddy cases which will not stand the test of judicial scrutiny and eventually come to naught. Most importantly, the court's scrutiny of the records is designed as a check on police bias, manipulation or negligence.

The judge's signature on each page of the case diary at the time of remand before filing the charge sheet also operates as a safeguard against interpolation, embellishment and manipulation. Any mechanical attestation of the case diary vitiates the high standards of fair trial and can materially affect the life and liberty of the accused. This depends considerably on the exercise of the protective role of the court.

What is true for the police is also true for the judge. Absence of timely attention by the judge to the quantity and quality of basic material and procedural safeguards relating to record keeping, which will ground the charge, increases pendency and breaches the safeguards built into the procedure that requires judicial scrutiny at this very juncture of the process.

To be able to say that there is indeed a rational basis for his decision to proceed with or discharge the case, the judge must ensure that all the required papers accompany the charge sheet. He must subsequently examine each paper carefully for chronological and factual consistency and detail. This must be done with absolute objectivity<sup>49</sup> with the sole purpose of assessing that the alleged actions do ground the charges made against the accused.



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<sup>49</sup> *Bhagwant* para. 16.