

## CASE FOR A COMMON INVESTIGATIVE PROCEDURE FOR ALL AGENCIES

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### ABSTRACT

Investigation *inter alia* involves fact-finding through custodial interrogation. In the process of investigation, the fundamental rights of an arrested person are subjected to certain 'reasonable restrictions.' In order to ensure that the investigating agency does not abuse its powers, certain safeguards are provided under the Code of Criminal Procedure, 1973 (CrPC) as also certain evidentiary rules enacted into the Indian Evidence Act, 1872 (Evidence Act) which bar custodial confessions made in Police Custody.

Self-inculpatory statements made by arrested persons in the custody of agencies like Customs including the Directorate of Revenue Intelligence (DRI), Directorate of Enforcement (ED) which perform the work of enforcing revenue and anti-money laundering laws, are admissible in evidence and it has been held in a catena of judgments that Customs officers are not Police officers for the purpose of section 25 of the Evidence Act (which makes confessions made to a Police officer inadmissible in evidence), often on the ground that Customs officers do not maintain law and order.

Agencies like the DRI which collect intelligence also perform tasks of investigation and prosecution of offences under the Customs Act, 1962. The ED investigates and prosecutes for offences under the Prevention of Money Laundering Act, 2002 (PMLA). These agencies are exempted from disclosing information under Section 24 of the Right to Information Act, 2005 (RTI), which is meant to exempt 'intelligence and security' agencies.

Access to a lawyer while a person is in custody and protection against testimonial compulsion are recognised Constitutional safeguards. These safeguards have been modified in the case of

arrests by Revenue agencies. The justification for this found in many Supreme Court judgments is that the principal function of Revenue agencies is to prevent smuggling and to realise duties, and not to detect and prevent crime as the Police do.

The power to arrest is exercised by Revenue officers only when they suspect a person of having committed an offence under the respective Revenue statutes. The line between a ‘suspect’ and ‘accused’ is a thin one.

The Supreme Court has held in various judgments that Revenue Officers are not Police Officers for the purpose of evidentiary exclusion of statements recorded before the former. The ‘mischief’ that sections 25 and 26 of the Indian Evidence Act, 1872 seek to remedy is self-incrimination under duress. Duress does not depend upon the organisational function of the arresting agency, and emanates from the fact of being under coercive control.

This paper seeks to inquire into the concepts of procedural safeguards, the Police-Revenue binary and the distinctness of intelligence and investigation functions of agencies. It seeks to inquire into the umbrella intelligence-investigation concept. It seeks to inquire into the anomalies and shortcomings occasioned by the deficiencies in procedural safeguards and the desirability of a common investigative procedural Code across all agencies, and suggest legislative reforms to bring the area of investigation by any agency whatsoever, under the regime of the RTI Act.

**Keywords:** Custodial safeguards, Investigative Procedure, Police-Revenue Binary, Intelligence, Investigation, Revenue

## **POWERS OF INVESTIGATION AND ARREST AND AGENCIES CONCERNED WITH LAW ENFORCEMENT**

The commonly understood meaning of ‘draconian’<sup>i</sup> legislation is one where harsh punishment are prescribed with little or no balance in terms of procedural fairness. In many modern countries, emergent situations especially related to terror-related offences call for a harsher approach to enforcement of criminal law to eliminate terror, including terror-funding through the economy of the country which is the victim of terror. The responsibility for curbing terror-funding is almost always a multi-agency effort. Law enforcement in no country is confined to regular penal law enforcement alone, but takes within its sweep, law-enforcement related to the country’s penal, revenue including direct and indirect taxation, anti-laundering, corporate compliance laws, community standards etc. The enforcement mechanisms too, therefore vary with respect to the kind of law that is enforced. In a modern nation state, it is inconceivable for all sorts of laws to be enforced through a single law-enforcement agency. With diversity in the kind of law enforced comes specialisation and statutory differentiation. The greater the need for specialised service delivery, the greater is the necessity for statutory specialisation and variation. Some of the classical powers of arrest, detention, investigation and prosecution exercisable by law enforcers are extended by statute to agencies dealing in the enforcement of economic and revenue laws. Customs and Excise officers in India, for the purpose of investigation, may arrest persons u/s 104 of the Customs Act, 1962 and u/s 13 of the Central Excise Act, 1944<sup>ii</sup>. For the purpose of exercising these powers of arrest, the Customs Act u/s 104(4) and the Excise Act u/s 18 confers the same powers as a police officer under the Code of Criminal Procedure, 1898<sup>iii</sup>. Among other agencies implementing other statutes, officers of the Directorate of Enforcement implementing the Prevention of Money Laundering Act, 2002 (PMLA) have the power to arrest persons u/s 19 of the PMLA Act. The standard of satisfaction under all these Acts, is a suspicion of a person having committed an offence punishable under the constituting Act. The power to arrest conferred upon a Police officer u/s 41 of the CrPC is laid down u/s 41 of the CrPC and can be broadly said to extend to cases involving:

- a) committing a cognizable<sup>iv</sup> offence in the presence of a police officer,
- b) arresting a person against whom complaint is received or reasonable suspicion of having committed a cognizable offence exists and the Police officer is satisfied that

- such arrest is necessary to prevent such a person from committing any further offence,  
or  
c) for proper investigation of the offence or  
d) to prevent such person from causing the evidence of such offence to disappear or tampering with witnesses to the offence.

For obvious reasons, the discretion that a Police officer possesses under the CrPC is wider as such officer deals with general penal offences which have a bearing on the public peace and general law and order. In this respect, no other agency is charged with the maintenance of law and order and whose investigative actions may have as direct a bearing on the general peace and tranquillity as the Police. However, to use this distinction to make statements made before officers of other agencies admissible in evidence just because they are not Police officers, seems to ignore the principle laid down in Heydon's case, as far as the protection contained in s. 25 of the Indian Evidence Act, 1872 goes. It is true that officers from other agencies operating under Acts other than the CrPC cannot cause prosecution to commence by filing a final report under section 173 of the CrPC. However, that is only a technical test of the distinction between a Police officer and other officers for the purpose of criminal jurisprudence. The technical distinction does not really take away the mischief that a self-inculpatory statement made in custody can cause when it is made admissible in evidence, albeit upon proof beyond reasonable doubt in a criminal trial. The dissenting opinion of Justice Subba Rao (as His Lordship then was) in the case of *State of Punjab v. Barkat Ram*<sup>v</sup>, is relevant here, where he opines, '*I regret my inability to agree. I cannot bring myself to hold that, while a confession made by an accused to a police officer is not admissible in evidence in a Court of law, the same if made, under exactly similar circumstances, to a customs officer can be relied and acted upon. The reasons for excluding the one from evidence would equally apply to the other.*' In the humble view of the researcher this opinion takes into account the mischief sought to be remedied by the evidentiary bar u/s 25 of the Evidence Act and is a correct interpretation of the rule.

## PROCEDURAL SAFEGUARDS

Procedural safeguards are a necessary concomitant of any kind of law enforcement. The coercive powers of a law enforcement agency extend to using reasonable and sometimes deadly

force upon a violent or recalcitrant person (depending upon the extent of threat to life or body apprehended by law enforcers while trying to bring such persons under control), effecting the physical arrest of suspects, detaining and interrogating them for the purpose of fact-finding, and procuring the presence of accused persons to answer the process of Courts. Law enforcement is thus, one function of the civil government which must concern itself with using force and at rare times, the use of firearms. Law enforcers are the only ‘armed’ branch of the civil services. Procedural safeguards are necessary to exercise appropriate controls and curbs upon the misuse of the powers of coercion conferred upon law enforcers. The reason is that since law enforcement is a non-military function, the use of overwhelming force is kept out of its regular purview and is definitely not one of its defining features. Restraint and control define the civil side of governance.

It would be pertinent to study the evolution of procedural safeguards with respect to Criminal Procedure applicable to Police over the last two centuries. According to Percival Griffiths, ‘On 17<sup>th</sup> August 1860, the Court of Directors of the British East India Company appointed a Police Commission, composed of four members of the Civil Service (including Robinson, Inspector-General of Police, Madras, who had played an important part in drafting the Police Act, 1859)’<sup>vi</sup>. The terms of reference of the Commission were:

- i. *To ascertain the numbers and the cost of all Police and quasi-Police of every description at present serving in each province throughout the British Territories in India, who are paid by Government from the general revenue.*
- ii. *To suggest to Government any measure whereby expenditure may be economized or efficiency increased, in the existing Police forces.*<sup>vii</sup> –

One of the recommendations of the Commission was that ‘*the Police should not be used as an agency for the record of any evidence, confession, inquest or the like; but a system of keeping faithful, accurate and minute diaries should be maintained. These diaries should specify, concisely, but in detail, all duties in which any Police Officer may have been engaged, and every occurrence and information that may have required the attention of the Police within their respective ranges.*’<sup>viii</sup> Section 44 of the Indian Police Act, 1861 was enacted in accordance with this recommendation. It provides that ‘*It shall be the duty of every officer in charge of a police-station to keep a general diary in such form shall, from time to time, be prescribed by*

*the State Government and to record therein all complaints and charges preferred, the names of all persons arrested, the names of the complainants, the offences charged against them, the weapons or property that shall have been taken from their possession or otherwise, and the names of the witnesses who shall have been examined. The Magistrate of the district shall be at liberty to call for and inspect such diary.*’ Section 139 of the Code of Criminal Procedure, 1861 provides that *‘Every complaint or information preferred to an Officer in charge of a Police Station, shall be reduced into writing, and the substance thereof shall be entered in a diary to be kept by such Officer, in such form as shall be prescribed by the local Government.’*<sup>xix</sup> The purpose of a general diary thus seems to be the accurate recording of movements of Police officers and personnel so as to guard against creating false record<sup>x</sup>.

The maintenance of a case diary was also provided by the Code of Criminal Procedure, 1861 vide section 154<sup>xi</sup>, Section 126 of the Code of Criminal Procedure, 1872, Section 172 of the Code of Criminal Procedure, 1898. Section 172 of the present Code of Criminal Procedure, 1973 provides for a diary of proceedings in investigation.

It would thus be apparent that although the case diary is a document not generally disclosed to the accused, if it is used by the Police Officer who conducted the investigation to refresh his memory or used by the Court to contradict such Police Officer, it shall be produced and shown to such accused. The general non-transparency of disclosure of case diaries may be to protect the identities of informers and the methods and techniques of investigation relied upon by the investigating officers.

Besides the procedure of maintaining records to ensure fairness, another important aspect of procedural justice is non-admissibility of self-incriminating statements made to a Police Officer. According to Dr. Kavita Dhull, *‘The aim of the requirement of due process is not to exclude presumptively false evidence but to prevent fundamental unfairness in the use of evidence, whether true or false.’*<sup>xii</sup> The rules of exclusion included in the Code of Criminal Procedure, 1861 were replicated in the Indian Evidence Act, 1872 Section 25, 26 and 27 of the latter corresponding to Sections 148, 149 and 150 of the Code of 1861 respectively<sup>xiii</sup>. According to Dr. Dhull, the exclusions in the Indian Evidence Act were enacted at a time *‘when in England the principle of exclusion of confession from evidence had reached its peak’*<sup>xiv</sup>

Under the present Code of Criminal Procedure, 1973, section 163(1) provides the rule against making inducements, mentioned in s. 24 of the Indian Evidence Act.

It will be noteworthy that in both the above aspects of agency record (general and case diary) and evidentiary presumptions, agencies other than the Police either do not have special provisions for such record-related safeguards or have powers to record self-inculpatory statements of arrestees, which are also admissible in evidence. It is pertinent to note that the Preamble to the CrPC (1973) states that it is ‘*An Act to consolidate and amend the law relating to Criminal Procedure*’ and it nowhere states that it is meant to apply to Police agencies alone. The Police-specific procedure in the CrPC therefore, parts of which are also extended to other agencies by special statutes, should be taken to imply the general procedure of criminal investigation, modifiable in the case of special agencies, only by prescribed special procedure. It is submitted that as for the procedural safeguards that may be followed by agencies under the ‘special’ statutes, unless a different procedure is otherwise specifically provided or the procedure prescribed under the CrPC is specifically and unequivocally dispensed with, the salutary principles of the CrPC should not be completely ignored and should apply. E.g. Section 104(3) of the Customs Act confers upon a Customs Officer for the limited purpose of ‘releasing a person on bail or otherwise’ the same powers and responsibilities as an officer-in-charge of a Police Station under the provisions of the Code of Criminal Procedure, 1898. The applicability of the general provisions of the Code has been discussed in the case of *Directorate of Enforcement v. Deepak Mahajan*<sup>xv</sup> where the Supreme Court held that ‘*To sum up, Section 4 (of the CrPC) is comprehensive and that Section 5 is not in derogation of Section 4(2) and it only relates to the extent of application of the Code in the matter of territorial and other jurisdiction but does not nullify the effect of Section 4(2). In short, the provisions of this Code would be applicable to the extent in the absence of any contrary provision in the Special Act or any special provision excluding the jurisdiction or applicability of the Code. In fact, the second limb of Section 4(2) itself limits the application of the provisions of the Code reading, “... but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences.”*’<sup>xvi</sup>

Section 172 falls under Chapter XII of the CrPC which is titled ‘Information to the Police and their Powers to Investigate’. The distinction of what is a ‘Final Report’ under Chapter XII of the CrPC as against the investigative procedures provided for under other statutes implemented

by law enforcement agencies other than the Police, is also a technical difference limited to the definition of a 'Final Report' under the CrPC. This technical difference therefore, does not really discriminate or water down and render less effective, the powers exercised by such non-Police law enforcement agencies. Therefore, although technically, the non-Police agencies do not conduct a 'Police investigation' and they do not submit a 'Police report' of offences investigated by them, this distinction does not really undo the necessity for procedural safeguards that ought to be followed by such non-Police agencies as much as they are followed by the Police under the CrPC.

In *Deepak Mahajan* (supra), the Supreme Court has interpreted the term 'diary' for the purpose of s. 167 thus: *'The expression `diary' referred to in Section 167(1) of the Code is the special diary mentioned in Section 167(2) which should contain full and unabridged statements of persons examined by the police so as to give the Magistrates a perusal of the said diary, a satisfactory and complete source of information which would enable him to decide whether or not the accused person should be detained in custody but it is different from the general diary maintained under Section 44 of the Police Act.'* It is also laid down that *'Though an authorized officer of Enforcement or Customs is not undertaking an investigation as contemplated under Chapter XII of the Code, yet those officers are enjoying some analogous powers such as arrest, seizures, interrogation etc. Besides, a statutory duty is enjoined on them to inform the arrestee of the grounds for such arrest as contemplated under Article 22(1) of the Constitution and Section 50 of the Code. Therefore, they have necessarily to make records of their statutory functions showing the name of the informant, as well as the name of the person who violated any other provision of the Code and who has been guilty of an offence punishable under the Code, nature of information received by them, time of the arrest, seizure of the contraband, if any and the statements recorded during the course of the detection of the offence/offences.'*<sup>xvii</sup> The Supreme Court has also observed the powers of other agencies which are *in pari materia* with the powers of the Police to investigate and file a report about, and has held that *'all the powers vested on various authorities as given in the table are equipollent as being enjoyed by a police officer under the Code and exercised during investigation under Chapter XII because the investigation is nothing but an observation or inquiry into the allegations, circumstances or relationships in order to obtain factual information and make certain whether or not a violation of any law has been committed.....After taking cognizance of the offence either upon a police report or upon receiving a complaint of facts, the Magistrate*



has to proceed with the case as per the procedure prescribed under the Code or under the special procedure, if any, prescribed under the special Acts. Therefore, the word 'investigation' cannot be limited only to police investigation but on the other hand, the said word is with wider connotation and flexible so as to include the investigation carried on by any agency whether he be a police officer or empowered or authorised officer or a person not being a police officer under the direction of a Magistrate to make an investigation vested with the power of investigation.<sup>xviii</sup> (Emphasis supplied here) The Supreme Court held that a Magistrate would have the power to detain a person in further custody even of a special agency, thus extending by implication the provisions of the Code to the procedure to be applied in cases of arrests by non-police investigating agencies.

The issue of case diary and the power to arrest in the absence of such case diary evidencing the commencement of investigation by the Serious Frauds Investigation Office was discussed recently in the case of *Neeraj Singal v. Union of India and Ors.*<sup>xix</sup> by the Delhi High Court in its Order dated 29<sup>th</sup> August 2018. However, this matter has been withdrawn by the Supreme Court to be listed before itself, vide Order dated 4<sup>th</sup> September 2018 in Criminal Appeals Nos. 1114-1115 of 2018<sup>xx</sup> and the matter is pending final hearing and decision as of date and hence no comment is sought to be made herein on the merits of the case.

The Bombay High Court has held in the case of *Adani Enterprises Ltd. and Anr. v. Union of India and Ors.*<sup>xxi</sup> that since the DRI had not registered either a cognizable offence u/s 154 of the CrPC nor sought permission of the Magistrate to investigate a non-cognizable offence u/s 155(2) of the CrPC, a Letter Rogatory could not be got issued u/s 166A of the Code<sup>xxii</sup>. This judgment was challenged by the DRI before the Supreme Court in Special Leave Petition (Criminal) No. 10683 of 2019 and is, as of date stayed vide Order dated 8<sup>th</sup> January 2020 and the matter being sub-judice, no comment is offered herein on the merits of the case.

It is submitted that the salutary procedural safeguards under the CrPC should be expressly extended to all forms of investigation, as these safeguards have evolved over time after careful observation and insights into the abuse of coercive powers. Safeguards essentially exist to prevent abuse of coercive power, and not because only Police agencies are likely to abuse their powers. Coercive power is invested in agencies other than the ones dealing with law and order. Therefore, agencies other than the Police are equally likely to abuse powers if their exercise of

such powers remains unchecked<sup>xxiii</sup>. The procedure prescribed in statutes empowering such other agencies for ‘special’ purposes can be susceptible to excesses. A recent example is the case of *Nikesh Tarachand Shah v. Union of India and Anr.*<sup>xxiv</sup> wherein the Supreme Court of India declared s. 45(1) of the Prevention of Money Laundering Act, 2002 unconstitutional and violative of Arts. 14 and 21, as it imposed two further conditions before granting of bail under the Act, i.e. ‘no person accused of an offence punishable for a term of imprisonment of more than three years under Part A of the Schedule shall be released on bail or on his own bond unless - (i) the Public Prosecutor has been given an opportunity to oppose the application for such release; and (ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail...’<sup>xxv</sup>

The researcher strongly advocates a common code of procedural safeguards for all agencies that enforce the law and exercise coercive powers in aid of investigation including the ones to summon persons for the purpose of investigation, arrest, detain, collect evidence, record statements, file reports/complaints against persons and prosecute them through the prosecuting officers employed by Government etc. It may be seen that the lack of uniformity of procedure among the non-police investigating agencies deriving their powers from special statutes, which rely upon the procedure in the CrPC to make arrests as seen in *Neeraj Singhal* (supra) and to issue other processes like letters rogatory as seen in *Adani Enterprises* (supra) often leads to insistence on the part of Courts on the process prescribed under the CrPC, failing which the acts of such agencies relying only partially on the CrPC are set aside. This strengthens the case for a common code of procedure for all such agencies for smoother investigation.

## **CONCEPT OF PROCESSUAL JUSTICE AND PRESENCE OF A LAWYER DURING CUSTODIAL INTERROGATION**

The presence of a lawyer during custodial interrogation is a fundamental right enshrined under the 6<sup>th</sup> Amendment to the Constitution of the United States. Article 22 of the Constitution of India also provides for informing an arrested person as soon as possible of the reason of such arrest and recognises the right to consult a legal practitioner of his choice.

A lawyer may advise his/her client against self-incriminating statements that may be made either inadvertently or under duress in custody.

However, this right is modified in the case of arrests by Revenue agencies, whose task is to detect the importation of unauthorised contraband and to realise revenue on dutiable goods. In *Romesh Chandra Mehta v. State of West Bengal*<sup>xxvi</sup>, it was held by a 5 Judge Constitution Bench with respect to the Customs Act that:

“The expression "any person" includes a person who is suspected or believed to be concerned in the smuggling of goods. But a person arrested by a Customs Officer because he is found in possession of smuggled goods or on suspicion that he is concerned in smuggling is not when called upon by the Customs Officer to make a statement or to produce a document or thing, a person accused of an offence within the meaning of Article 20(3) of the Constitution. The steps taken by the Customs Officer are for the purpose of holding an enquiry under the Sea Customs Act and for adjudging confiscation of goods dutiable or prohibited and imposing penalties. **The Customs Officer does not at that stage accuse the person suspected of infringing the provisions of the Sea Customs Act with the commission of any offence.** His primary duty is to prevent smuggling and to recover duties of customs when collecting evidence in respect of smuggling against a person suspected of infringing the provisions of the Sea Customs Act, he is not accusing the person of any offence punishable at a trial before a Magistrate... a person examined under Section 171A of the Sea Customs Act, 1878 (equivalent to section 108 of the Customs Act, 1962), does not stand in the character of an accused person inasmuch as there is no formal accusation made against him by any person at that time are, in our judgment, substantially correct.” (emphasis supplied)

In *Nandini Satpathy v. P. L. Dani and Ors.*<sup>xxvii</sup> a 3 Judge Bench of the Supreme Court has held that:

“The prohibitive sweep of Art. 20(3) goes back to the stage of police interrogation-not, as contended, commencing in court only. In our judgment, the provisions of Art. 20(3) and section 161(1) substantially cover the same area, so far as police investigations are concerned. The ban on self-accusation and the right to silence, while one investigation or trial is under way, goes beyond that case and protects the accused in regard to other offences pending or imminent, which may deter him from voluntary disclosure of criminatory matter. We are disposed to read 'compelled testimony' as evidence procured not merely by physical threats or violence but by

psychic torture, atmospheric pressure, environmental coercion, tiring interrogative prolixity, overbearing and intimidatory methods and the like – not legal penalty for violation.”

In the case of *Poolpandi and Ors. v. Superintendent, Central Excise and Ors.*<sup>xxviii</sup> it was held by a Bench of 3 Judges that

“A perusal of the facts in *Nandini Satpathy v. Dani*, (Supra) would clearly indicate that the decision has no application in the present cases. The matter arose out of a complaint filed by the Deputy Superintendent of Police (Vigilance) against the appellant under section 179 of the Indian Penal Code before the Sub Divisional Judicial Magistrate, Cuttack. The Magistrate took the cognizance of the offence and issued summons for appearance against the appellants. It was contended unsuccessfully that the charge was unsustainable in view of the protection under Article 20 (3) of the Constitution and the immunity under section 161 (2) of the Criminal Procedure Code. In this background the observations relied upon by Mr. Salve and Mr. Lalit were made and they cannot be treated to have in any way diluted the ratio in *Romesh Chandra Mehta's* case. The question whether customs officials are police officers, and whether the statements recorded by the customs authorities under section 107 and 108 of the Customs Act were inadmissible in evidence were examined in *Illias v. Collector of Customs* (supra) and answered in the negative by a Bench of five Judges and it is, therefore, no use referring to the observations made in the judgment in a regular criminal case initiated by the police...

The purpose of the enquiry under the Customs Act and the other similar statutes will be completely frustrated if the whims of the persons in possession of useful information for the departments are allowed to prevail. For achieving the object of such an enquiry if the appropriate authorities be of the view that **such persons should be dissociated from the atmosphere and the company of persons who provide encouragement to them in adopting a non-cooperative attitude to the machineries of law**, there cannot be any legitimate objection in depriving them of such company. The relevant provisions of the Constitution in this regard have to be construed in the spirit they were made and the benefits thereunder should not be "expanded" to favour exploiters engaged in tax evasion at the cost of public exchequer. Applying the 'just, fair and reasonable test' we hold that there is no merit in the stand of appellant before us.” (emphasis supplied)

In the recent case of *Santosh s/o Dwarkadas Fafat v. State of Maharashtra*<sup>xxix</sup> a two Judge Bench has laid down that:

“It is a well settled position in view of the Constitution Bench decision in Selvi and others v. State of Karnataka, that Article 20(3) enjoys an “exalted status”. This provision is an essential safeguard in criminal procedure and is also meant to be a vital safeguard against torture and other coercive methods used by investigating authorities. **Therefore, merely because the appellant did not confess, it cannot be said that the appellant was not cooperating with the investigation.**” (Emphasis supplied here)

In *D. K. Basu v. State of West Bengal and Ors. etc.*<sup>xxx</sup>, a 2 Judge Bench of the Supreme Court observed that:

“30. Apart from the police, there are several other governmental authorities also like Directions of Revenue Intelligence, Directorate of Enforcement, Coastal Guard, Central Reserve Police Force (CRPF), Border Security Force (BSF), the Central Industrial Security Force (CISF), the State Armed Police, Intelligence Agencies like the Intelligence Bureau, R.A.W., Central Bureau of Investigation (CBI), CID, Traffic Police, Mounted Police and ITBP, which have the power to detain a person and to interrogate him in connection with the investigation of economic offences, offences under the Essential Commodities Act, Excise and Customs Act, Foreign Exchange Regulation Act etc. There are instances of torture and death in custody of these authorities as well. In *Re Death of Sawinder Singh Grover*, 1995 Supp (4) SCC 450, (to which *Kuldip Singh, J.* was a party) this Court took suo motu notice of the death of Sawinder Singh Grover during his custody with the Directorate of Enforcement. After getting an enquiry conducted by the Additional District Judge, which disclosed a prima facie case for investigation and prosecution, this Court directed the CBI to lodge a FIR and initiate criminal proceedings against all persons named in the report of the Additional Judge and proceed against them. The Union of India/Directorate of Enforcement was also directed to pay a sum of Rs. 2 lacs to the widow of the deceased by way of ex gratia payment at the interim stage. **Amendment of the relevant provisions of law to protect the interest of arrested persons in such cases too is a genuine need.**” (emphasis supplied)

In the said case, the Supreme Court laid down as under:

“35. We, therefore, consider it appropriate to issue the following requirements to be followed in all cases of arrest or detention till legal provisions are made in that behalf as preventive measures:

(1) The police personnel carrying out the arrest and handling the interrogation of the arrestee should bear accurate, visible and clear identification and name tags with their designations. The particulars of all such police personnel who handle interrogation of the arrestee must be recorded in a register.

(2) That the police officer carrying out the arrest of the arrestee shall prepare a memo of arrest at the time of arrest and such memo shall be attested by at least one witness, who may be either a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. It shall also be countersigned by the arrestee and shall contain the time and date of arrest.

(3) A person who has been arrested or detained and is being held in custody in a police station or interrogation centre or other lock-up, shall be entitled to have one friend or relative or other person known to him or having interest in his welfare being informed, as soon as practicable, that he has been arrested and is being detained at the particular place, unless the attesting witness of the memo of arrest is himself such a friend or a relative of the arrestee.

(4) The time, place of arrest and venue of custody of an arrestee must be notified by the police where the next friend or relative of the arrestee lives outside the district or and through the Legal Aid Organisation in the District and the police station of the area concerned telegraphically within a period of 8 to 12 hours after the arrest.

(5) The person arrested must be made aware of this right to have someone informed of his arrest or detention as soon as he is put under arrest or is detained.

(6) An entry must be made in the diary at the place of detention regarding the arrest of the person which shall also disclose the name of the next friend of the person who has been informed of the arrest and the names and particulars of the police officials in whose custody the arrestee is.

(7) The arrestee should, where he so requests, be also examined at the time of his arrest and major and minor injuries, if any, present on his/her body, must be recorded at that time. The "Inspection Memo" must be signed both by the arrestee and the police officer effecting the arrest and its copy provided to the arrestee.

(8) The arrestee should be subjected to medical examination by a trained doctor every 48 hours during his detention in custody by a doctor on the panel of approved doctors appointed by Director, Health Services of the concerned State or Union Territory, Director, Health Services should prepare such a panel for all Tehsils and Districts as well.

(9) Copies of all the documents including the memo of arrest, referred to above, should be sent to the Magistrate for his record.

**(10) The arrestee may be permitted to meet his lawyer during interrogation, though not throughout the interrogation.**

(11) A police control room should be provided at all district and State headquarters, where information regarding the arrest and the place of custody of the arrestee shall be communicated by the officer causing the arrest, within 12 hours of effecting the arrest and at the police control room it should be displayed on a conspicuous police board.

36. Failure to comply with the requirements hereinabove mentioned shall apart from rendering the concerned official liable for departmental action, also render him liable to be punished for contempt of court and the proceedings for contempt of Court may be instituted in any High Court of the country, having territorial jurisdiction over the matter.

**37. The requirements, referred to above flow from Articles 21 and 22 (1) of the Constitution and need to be strictly followed. These would apply with equal force to the other governmental agencies also to which a reference has been made earlier.”** (emphasis supplied)

The Supreme Court seems to have struck a balance between there being no inherent right to the presence of a lawyer in case of an investigation under the Customs Act and Foreign Exchange Regulation Act which meant keeping the lawyer completely out of the scene as held in *Poolpandi's* case (supra), and the right to legal counsel interpreted to be flowing from the fundamental Right to Life (Article 21) and that of Protection against Arrest and Detention which includes the Right to legal counsel (Article 22(1)) and allowing which was declared to be binding on all agencies that exercise the power to arrest and detain, in *D. K. Basu's* case (supra), in the case of *Senior Intelligence Officer v. Jugal Kishore Samra*<sup>xxxi</sup> decided by a 2 Judge Bench, where the order of the Ld. Metropolitan Sessions Judge directing that the Respondent be interrogated only in the presence of his lawyer, being challenged by the

Directorate of Revenue Intelligence (DRI) before the Andhra Pradesh High Court was upheld and was thereafter challenged before the Supreme Court. The Supreme Court took note of the distinction between a Police investigation and an investigation by the DRI under the Customs Act as laid down in *Poolpandi's* case (supra) but took note of the requirement of processual justice recognised in *D. K. Basu* (supra):

“25. It is seen above that the respondent applied for and got anticipatory bail on the premise that he was not an accused in the case. There was no change in his position or status since the grant of bail till he was summoned to appear before the DRI officers. On the facts of the case, therefore, it is futile to contend that the respondent is entitled, as of right, to the presence of his lawyer at the time of his interrogation in connection with the case. Moreover, the respondent's plea for the presence of his lawyer at the time of his interrogation clearly appears to be in teeth of the decision in *Poolpandi*. Nonetheless, Mr. Tulsi contended that the respondent's right was recognized by this Court and preserved in *Nandini Satpathy* and the decision in *Poolpandi* has no application to the present case. According to Mr. Tulsi, the respondent is summoned for interrogation in connection with a case registered under the NDPS<sup>xxxii</sup> Act, which Mr. Tulsi called a 'regular criminal' case, while *Poolpandi* was a case under the Customs Act and so were the two cases before the constitution bench in *Ramesh Chandra Mehta* and in *Ilias* that formed the basis of the decision in *Poolpandi*. In our view, the distinction sought to be drawn by Mr. Tulsi is illusory and non-existent. The decision in *Poolpandi* was in cases under the Customs Act, 1962 and the Foreign Exchange Regulation Act, 1973. Both these Acts have stringent provisions regarding search, seizure and arrest and some of the offences under each of these two Acts carry a punishment of imprisonment up to 7 years. We, therefore, fail to see, how a case registered under NDPS Act can be said to be a 'regular criminal' case and the cases under the Customs Act and the Foreign Exchange Regulation Act, not as criminal cases.

26. In view of the clear and direct decision in *Poolpandi*, we find the order of the High Court, affirming the direction given by the Sessions Judge clearly unsustainable.

27. We may, however, at this stage refer to another decision of this Court in *D.K. Basu v. State of West Bengal*, (1997) 1 SCC 416. In this case, the Court, extensively considered the issues of arrest or detention in the backdrop of Articles 21, 22 and 32 of the Constitution and made a number of directions to be followed as preventive measures in all cases of arrest or detention



till legal provisions are made in that behalf. The direction at serial number 10 in paragraph 35 is as follows:

'(10). The arrestee may be permitted to meet his lawyer during interrogation, though not throughout the interrogation.'

28. Strictly speaking the aforesaid direction does not apply to the case of the respondent, because he being on bail cannot be described as an arrestee. But, it is stated on behalf of the respondent that he suffers from heart disease and ongoing to the DRI office, in pursuance to the summons issued by the authorities, he had suffered a heart attack. It is also alleged that his brother was subjected to torture and the respondent himself was threatened with third degree methods. The medical condition of the respondent was accepted by the Metropolitan Sessions Judge and that forms one of the grounds for grant of anticipatory bail to him. Taking a cue, therefore, from the direction made in *DK Basu* and having regard to the special facts and circumstances of the case, we deem it appropriate to direct that the interrogation of the respondent may be held within the sight of his advocate or any other person duly authorized by him. The advocate or the person authorized by the respondent may watch the proceedings from a distance or from beyond a glass partition but he will not be within the hearing distance and it will not be open to the respondent to have consultations with him in course of the interrogation.”

In the case of *Rajinder Arora and Ors. v. Union of India and Ors.* (Civil Writ Petition No. 389 of 2010)<sup>xxxiii</sup>, an interim order was passed by the Supreme Court allowing the presence of a lawyer within a distance of visibility but not audibility and further directing the videographing of the recording of statement.

In the case of *Om Prakash and Anr. v. Union of India and Anr.*<sup>xxxiv</sup> it was held by a 3 Judge Bench of the Supreme Court that:

“In the circumstances, we are inclined to agree with Mr. Rohatgi that in view of the provisions of Sections 9 and 9A read with Section 20 of the 1944 Act, offences under the Central Excise Act, 1944, besides being non-cognizable, are also bailable, though not on the logic that all non-cognizable offences are bailable, but in view of the aforesaid provisions of the 1944 Act, which indicate that offences under the said Act are bailable in nature....

As in the case of offences under the Central Excise Act, 1944, it is held that offences under Section 135 of the Customs Act, 1962, are bailable and if the person arrested offers bail, he shall be released on bail in accordance with the provisions of sub-Section (3) of Section 104 of the Customs Act, 1962, if not wanted in connection with any other offence.”

Following the judgment in *Om Prakash*'s case and the directions in *Rajinder Arora*'s case, the Bombay High Court has directed in several cases that there shall be no arrest and that recording of statements under the Customs Act shall be vidographed<sup>xxxv</sup>.

### **THE DEEMING PROVISIONS, POWERS AND FREEDOM FROM THE SAFEGUARDS UNDER THE CODE OF CRIMINAL PROCEDURE, 1973**

The reasoning adopted in most judgments dealing with investigation under the Customs Act, 1962 for the suspension of the safeguards that Police investigation is subject to, is that:

- a) Customs/Revenue officers are not Police officers for the purpose of making self-incriminating statements recorded before them barred u/s 25 of the Indian Evidence Act, 1872<sup>xxxvi</sup>.
- b) The purpose of investigation under the Revenue statutes is not principally, to seek punishment of criminal offences, but to recover duties and prevent smuggling<sup>xxxvii</sup>.
- c) Arrest for proceedings under the Customs Act, 1962 and other Revenue legislation does not make the arrestee an 'accused' in a criminal case at the stage of being suspected of violating the prohibitions under the Customs Act<sup>xxxviii</sup>.
- d) Because investigation under the Customs Act is not one in a criminal case, the arrestee is not entitled to the presence of a legal practitioner of his choice during such investigation<sup>xxxix</sup>.
- e) Although Revenue officers are not Police officers, and thus statements recorded before them are admissible in evidence, they can avail of the provisions of the Code of Criminal Procedure, 1973 to get remand of arrestees extended<sup>xl</sup>.
- f) Revenue officers shall have all the powers of an officer in charge of a Police Station for the purpose of arresting persons suspected to have committed offences under the respective Revenue statutes<sup>xli</sup>.

- g) Revenue officers can also arrest under the respective Revenue statutes and are not restricted from arresting on account of the offences under the respective Revenue statutes being classified as 'non-cognizable' or 'bailable', as these classifications would apply to Police officers only qua the Code of Criminal Procedure, 1973 and not to Revenue officers<sup>xlii</sup>.
- h) Revenue officers shall have the power to record statements admissible in evidence, both for the purpose of adjudication, as well as when such statements are used in criminal matters against their makers<sup>xliii</sup>. The justification adopted for this is seen in *Romesh Mehta's* case, where the person making such a statement is technically deemed not to be an 'accused' but only a 'suspect' at the time of making such a statement. The persons recording such a statement which is self-inculpatory in nature are not technically 'Police officers'. The statement is made admissible by the use of these two principles and by providing for presumptions in the constituting statutes.
- i) The self-inculpatory statements recorded before Revenue officers can also be used against the person making them and shall be relevant, should the Revenue agency decide to charge such a person under the penal provisions of the respective statutes<sup>xliv</sup>, depending upon whether the statement is found to be made voluntarily<sup>xlv</sup>.
- j) There shall be a presumption of culpability in criminal cases prosecuted for offences under Revenue statutes<sup>xlvi</sup>.
- k) Even a retracted statement, if believed to be voluntary and true, can form the basis of conviction<sup>xlvii</sup>.
- l) One more lopsided feature of the Customs Act, 1962 is that a proceeding under section 108 is deemed to be a judicial proceeding under sections 193 and 228 of the Indian Penal Code, 1860 vide sub-section 4 thereof. These sections make it punishable to give false evidence<sup>xlviii</sup> and provide for punishment for causing intentional insult or interruption to a public servant sitting in a judicial proceeding<sup>xlix</sup>. However, the presence of a lawyer is not held to be necessary, and a lawyer may at the most, watch from a distance as seen in *Jugal Kishore Samra* (supra).

## THE THIN LINE BETWEEN ‘SUSPECT’ AND ‘ACCUSED’

A Revenue officer is empowered to arrest anybody that he/she suspects of having committed an offence punishable under the penal provisions of the particular Revenue statute<sup>1</sup>. Thus, the exercise of coercive powers of a Revenue officer does not begin before a person is suspected of having committed an offence punishable under the particular statute<sup>li</sup>.

Thus, a person in order to be arrested by a Customs or Excise Officer, is suspected of having committed an offence punishable under the relevant Act.

“Offence” is defined<sup>lii</sup> under the Code of Criminal Procedure, 1973 (CrPC):

“2(n) “offence” means any act or omission made punishable by any law for the time being in force and includes any act in respect of which a complaint may be made under section 20 of the Cattle-trespass Act, 1871 (1 of 1871).”

Neither the term ‘accused’ nor ‘suspect’ are defined either under the CrPC or under the Indian Penal Code, 1860 (IPC)<sup>liii</sup>. The construction, therefore ought to be made from the circumstances of every case.

A ‘suspect’ is defined as “*a person suspected of a crime also: a person apprehended for but not yet charged with an offence (sic)*”<sup>liv</sup>

An ‘accused’ is defined as “*one charged with an offence (sic)*”<sup>lv</sup>

Going by the logic adopted in *Romesh Chandra Mehta* (supra), not only a Customs officer, but even for a Police officer, a person arrested during the pendency of investigation is only a ‘suspect’ and not really an ‘accused’ in a criminal trial. A Police officer technically charges a person with the commission of an offence punishable under the law, only when he files a final report under section 173 of the CrPC upon the conclusion of investigation. There is a likelihood that at the end of investigation, the Police officer may not find a ‘suspect’ guilty of the offences investigated, and may file a ‘closure report’ u/s 169 of the CrPC. A ‘suspect’ therefore, does not technically stand in the character of an ‘accused’ in a criminal trial until the filing of a charge sheet or final report, concluding the investigative finding that such a person is indeed found to have committed an offence punishable under the law.

## UNIVERSALITY OF CUSTODIAL DURESS ON ACCOUNT OF CUSTODIAL SETTING

While it is true that a Revenue officer, principally exercises the power of arrest in order to realise recoverable duties as observed in *Romesh Mehta*, the same is not really divorced from the power to file a complaint against such a person suspected and formally accuse him of the commission of an offence under the empowering statute. In fact, the power of a Revenue officer to arrest a person comes into question only when such a person is suspected by a Revenue officer of having committed an offence under a Revenue statute, as seen *supra* vide the circulars of the Customs and Central Excise departments.

It is submitted that being suspected with the commission of an offence punishable under the law and being subjected to the coercive process of law should itself be sufficient to afford the arrested person the safeguards of Art. 22(1) of the Constitution of India, irrespective of the agency which exercises such powers. In this respect, the dissenting opinion of Justice Subba Rao (as His Lordship then was) in the case of *State of Punjab v. Barkat Ram*<sup>lvi</sup> needs to be reiterated:

“I cannot bring myself to hold that, while a confession made by an accused to a police officer is not admissible in evidence in a Court of law, the same if made, under exactly similar circumstances, to a customs officer can be relied and acted upon. The reasons for excluding the one from evidence would equally apply to the other.”

The 152<sup>nd</sup> Report of the Law Commission of India has also recommended the extension of the exclusionary clauses u/Ss. 25 and 26 of the Indian Evidence Act, 1872 (Evidence Act)<sup>lvii</sup> to all officers having the power to arrest and detain:

“11.7 Recommendation to extend Section 25 and 26 to other officers

We are further of the view that the exclusionary provisions contained in sections 25 and 26 of the Evidence Act which are, at present, confined to police officers, should be extended to all public servants having power to arrest and detain in persons in custody.”<sup>lviii</sup>

It is submitted that the ‘mischief’ that sections 25 and 26 of the Evidence Act seek to remedy is not that a particular act is done by an officer charged with maintenance of law and order, but that a confession made to a person having physical and spatial control over its maker and

exercising coercive powers over him/her cannot be trusted to be voluntary. The distinction therefore, as aptly observed by Justice Subba Rao does not lie in the general function of the agency in whose custody the arrestee makes a self-incriminating confession, whether it is to maintain law and order or to realise revenue. The similarity of duress lies in the fact of being in custody itself. The Bombay High Court has observed (pertinent because it dealt with arrest by the Customs department) in the case of *Ashak Hussain Allah Detha @ Siddique and Anr. v. Assistant Collector of Customs (P) Bombay and Anr*<sup>lix</sup>:

“The word "arrest" has not been defined in the Code of Criminal Procedure or in any other law. The true meaning needs to be understood. The word "arrest" is a term of art. It starts with the arrester taking a person into his custody by action or words restraining him from moving anywhere beyond the arrester's control and it continues until the person so restrained is either released from custody or, having been brought before a Magistrate, is remanded in custody by the Magistrate's Judicial Act. (*Christie v. Leachinsky*)<sup>1</sup>, 1947(1) All.E.R. 567. (*Holegate Mohammed v. Duke*)<sup>2</sup>, 1984(1) All.E.R. 1054. Both quoted in WORDS AND PHRASES LEGALLY DEFINED Vol. 1. Third Edition page 113. In substance, "arrest" is the restraint on a man's personal liberty by the power or colour of lawful authority (*The Law Lexicon*---P. Ramanath Aiyar Reprint Edition 1987, page 85). In its natural sense also "arrest" means the restraint on or deprivation of one's personal liberty.

It is thus clear that arrest being a restraint on the personal liberty, it is complete when such restraint by an authority, commences (*The Law Lexicon*---P. Ramanatha Aiyar Reprint Edition 1987, page 85). **Whether a person is arrested or not does not depend on the legality of the act. It is enough if an authority clothed with the power to arrest, actually imposes the restraint by physical act or words.** Whether a person is arrested depends on whether he has been deprived of his personal liberty to go where he pleases (*The Law Lexicon*---T.P. Mukherjee (1989) page 177-178). It stands to reason, therefore, that what label the Investigating Officer affixes to his act of restraint is irrelevant. For the same reason, the record of the time of arrest is not an index to the actual time of arrest. The arrest commences with the restraint placed on the liberty of the accused and not with the time of "arrest" recorded by the Arresting Officers.” (emphasis supplied)

Restraint upon a person's freedom and custodial duress, whether it is exercised by a Police officer or Customs officer or any other officer of the Revenue, consists in exercising control

over the arrestee and using coercive force against such arrestee. There is no qualitative difference between the duress experienced in the custody of a Police officer and that in the custody of a Customs, Central Excise, Directorate of Enforcement or in that of Special Frauds Investigation Officer.

What comprises 'duress' is the act of restraint itself and not the organisational function of the agency to which the arrester belongs. For that matter, even a private person exercising such compulsion upon an individual would yield the same effect.

## **PROCEDURAL TRANSPARENCY, EXCEPTIONS AND EXEMPTIONS**

Special statutes adopt extraordinary provisions in respect of:

1. ***Evidentiary safeguards*** – where statements made to authorities ordinarily inadmissible in evidence are made admissible in evidence, e.g. section 18 of the MCOCA and section 53A of the NDPS Act.
2. ***Custodial safeguards*** – where the ordinary period for granting of statutory bail upon failure to complete investigation is extended, e.g. section 36A of the NDPS Act.
3. ***Transparency of enforcement agency's record*** – Agencies which enjoy general immunity from disclosure u/s 24 of the RTI Act, which are listed under Schedule II of the Act. Some of these agencies like Directorate of Revenue Intelligence and Directorate of Enforcement also conduct investigation, have the power to arrest persons and prosecute them in Criminal Courts.

In any situation, the scales of justice must be balanced by the emergency of a particular situation under a 'special Act' in order to justify the adoption of the special procedure.

The Right to Information Act, 2005 (RTI Act) which came into force on 15<sup>th</sup> June 2005 in its preamble sets out that it is '*An Act to provide for setting out the practical regime of right to information for citizens to secure access to information under the control of public authorities, in order to promote transparency and accountability in the working of every public authority, the constitution of a Central Information Commission and State Information*

*Commissions and for matters connected therewith or incidental thereto.*' (emphasis supplied here). However, the Right to Information is subjected to certain exemptions from disclosure u/s 8 of the RTI Act, which are broadly as under:

- '(a) information, disclosure of which would prejudicially affect the sovereignty and integrity of India, the security, strategic, scientific or economic interests of the State, relation with foreign State or lead to incitement of an offence;*
- (b) information which has been expressly forbidden to be published by any court of law or tribunal or the disclosure of which may constitute contempt of court;*
- (c) information, the disclosure of which would cause a breach of privilege of Parliament or the State Legislature;*
- (d) information including commercial confidence, trade secrets or intellectual property, the disclosure of which would harm the competitive position of a third party, unless the competent authority is satisfied that larger public interest warrants the disclosure of such information;*
- (e) information available to a person in his fiduciary relationship, unless the competent authority is satisfied that the larger public interest warrants the disclosure of such information;*
- (f) information received in confidence from foreign Government;*
- (g) information, the disclosure of which would endanger the life or physical safety of any person or identify the source of information or assistance given in confidence for law enforcement or security purposes;*
- (h) information which would impede the process of investigation or apprehension or prosecution of offenders;*
- (i) cabinet papers including records of deliberations of the Council of Ministers, Secretaries and other officers;*
- (j) information which relates to personal information the disclosure of which has no relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual unless the Central Public Information Officer or the State Public Information Officer or the appellate authority, as the case may be, is satisfied that the larger public interest justifies the disclosure of such information'<sup>1x</sup>*



Section 24 of the RTI Act provides a general exception in the application of the Act to certain ‘intelligence and security organisations’<sup>lxi</sup> and provides that ‘*Nothing contained in this Act shall apply*’<sup>lxii</sup> to such organisations, with the exception of ‘*information pertaining to the allegations of corruption and human rights violations shall not be excluded...*’ and which ‘*shall only be provided after the approval of the Central Information Commission*’<sup>lxiii</sup> The organisations listed under Schedule II which are excepted from the application of the Act are:

1. Intelligence Bureau.
2. Research and Analysis Wing of the Cabinet Secretariat.
3. Directorate of Revenue Intelligence.
4. Central Economic Intelligence Bureau.
5. Directorate of Enforcement.
6. Narcotics Control Bureau.
7. Aviation Research Centre.
8. Special Frontier Force.
9. Border Security Force.
10. Central Reserve Police Force.
11. Indo-Tibetan Border Police.
12. Central Industrial Security Force.
13. National Security Guards.
14. Assam Rifles.
15. Sashastra Seema Bal.
16. Special Branch (CID), Andaman and Nicobar.
17. The Crime Branch-C.I.D.-C.B. Dadra and Nagar Haveli.
18. Special Branch, Lakshadweep Police.
19. Special Protection Group.
20. Defence Research and Development Board.
21. Border Road Development Board.
22. Financial Intelligence Unit, India<sup>lxiv</sup>
23. Central Bureau of Investigation
24. National Investigation Agency
25. National Intelligence Grid<sup>lxv</sup>.

The notification adding the CBI to the list of agencies excepted from the general application of the RTI Act is under challenge and pending before the Supreme Court of India<sup>lxvi</sup> as of date and hence no comment is sought to be made herein on the merits of the case.

Although agencies like the Directorate of Revenue Intelligence (DRI) and Directorate of Enforcement (ED) are listed among the 'intelligence and security agencies', these agencies also conduct investigation. In fact, the DRI conducts investigations under the Customs Act, 1962 just like any other Customs agency and also files complaints under the Customs Act. In doing this, the DRI acts as an investigating agency and not as an 'intelligence or security' agency. The same is the case with the ED conducting investigations under the Prevention of Money Laundering Act, 2002.

Investigations carried out by the DRI and ED in spite of being only investigations, are exempt from the general application of the RTI Act as these agencies are classified as 'intelligence and security agencies'. It is submitted that 'investigation' is not the same as 'intelligence and security' and at least in the aspect of investigation per se, there should be transparency. The transferability of investigation from a local Customs office to the DRI<sup>lxvii</sup> makes the exemption from the RTI Act granted to the latter a case-related and not subject-matter related exemption, and hence susceptible to arbitrariness.

The ED is even less of an intelligence agency than the DRI and its only function is to conduct investigation under and enforce various financial laws<sup>lxviii</sup>.

In the case of intelligence agencies which are mainly staffed by Police services, like the Intelligence Bureau (IB), there is no such fusion of the intelligence-gathering and investigative functions, at least on a regular basis<sup>lxix</sup>. It is not one of the primary functions of the IB to conduct investigations and this task is entrusted to the local Police formations.

The major question that arises here is therefore, why should revenue and anti-money laundering agencies, which may conduct certain intelligence-gathering functions but which also conduct investigations, perform this dual role and if they do, why should their investigative wing be exempted from the RTI Act? Would it not be sufficient to exempt only those aspects of their investigative side from disclosure, as would fall under the exemptions u/s 8(1) of the RTI Act?

A 'more serious' case where investigation is taken over by the DRI should not be exempt from disclosure of investigation-related information only because the agency investigating such case is different, thus making it subject to different procedure only because of its perceived seriousness, which is an arbitrary standard for deciding upon the applicable procedure.

This makes out a clear case for making certain investigation-related aspects of all investigations compulsorily subject to disclosure under the RTI Act, subject to the exemptions during pendency of investigation.

## **CASES OF CUSTODIAL VIOLENCE AND DEATH IN REVENUE OFFICERS' CUSTODY**

Incidentally, the jurisprudence evolved in the case of D. K. Basu on the backdrop of the death of Sawinder Singh Grover in the custody of the Directorate of Enforcement<sup>lxx</sup>. Other deaths reported in the recent times in the custody of the Directorate of Revenue Intelligence are those of Mayur Mehta<sup>lxxi</sup> and Gaurav Gupta<sup>lxxii</sup> show that violence in Revenue agencies' custody is a real phenomenon.

These two agencies, the Directorate of Enforcement<sup>lxxiii</sup> and Directorate of Revenue Intelligence<sup>lxxiv</sup> are ordinarily exempted from disclosure of information under section 24 the Right to Information Act, 2005<sup>lxxv</sup>.

The Crime Statistics Reports published by the National Crime Records Bureau do not record custodial deaths in respect of the non-police agencies<sup>lxxvi</sup> nor do the Annual Reports of the National Human Rights Commission publish any specific custodial torture-related data with respect to these Revenue Agencies, although they do make references to torture in Police custody<sup>lxxvii</sup>.

The above discussion necessitates the maintenance of custodial torture-related data with respect to Revenue agencies on the same lines as that in Police custody.

The logical inference to be drawn from deaths in the custody of Revenue agencies with powers to record statements on oath which are admissible in evidence, is clearly the attempt to either

get more information than what such arrestees were willing to render or to get recorded self-inculcating statements to be used against such persons.

It is also seen in practice that if an arrestee later disowns a self-inculcating statement recorded in the custody of a Customs officer which was recorded under section 108 of the Customs Act, 1962, such Customs officers re-summon such persons and make them disown their retraction and get recorded self-inculcating statements again. Every such instance of re-summoning ought to be viewed with circumspection, as a retraction by a person when out of the custodial restraint of the officer cannot be 'disowned' by summoning him/her and putting him/her under restraint again. It implies that the coercive process vested in such Revenue officers is abused for getting such statements disowning retractions recorded.

### **CASE OF REVENUE AND CUSTOMS IN UK: REVENUE OFFICIALS BOUND BY PROCEDURE APPLICABLE TO POLICE IN CONDUCTING ARRESTS AND RIGHT TO CONSULT A LAWYER**

In the case of Her Majesty's Revenue and Customs, the officers exercising powers of arrest and detention do so under the Police and Criminal Evidence Act (PACE)<sup>lxxviii</sup> which is a common code for all criminal investigations<sup>lxxix</sup>. In fact, one of the avowed advantages according to the UK Government is that:

**“The advantage of using PACE is that it provides a set of powers that are designed for use by law enforcement agencies. It means that tax crime is tackled in the same way as other crime.”<sup>lxxx</sup> (emphasis supplied)**

Thus, without creating special exceptions qua legal advisory in the case of Revenue agencies, the UK law provides for the use of one single procedural Code by all agencies that perform the task of law enforcement. In fact, the Police and Criminal Evidence Act 1984 (Application to Revenue and Customs) Order 2015<sup>lxxxi</sup> (PACE Revenue Order). Section 58 of the PACE<sup>lxxxii</sup>, which allows a person in custody to see his lawyer, is made specifically applicable to Revenue and Customs under Schedule 1 of the PACE Revenue Order<sup>lxxxiii</sup>.

The position under UK laws is in stark contrast to the reasoning adopted in India to justify keeping a person under Revenue custody away from effective legal advice during such custody

as seen *supra* in the cases of *Romesh Chandra Mehta* in which the principal role of the Customs officer was held to be not to charge a person criminally, *Poolpandi* in which the right to a lawyer under Article 22(1) of the Constitution was held to be inapplicable in view of the legal position that a Customs investigation is not a criminal investigation as also in *Jugal Kishore Samra* (*supra*) wherein a lawyer was allowed to only watch from a distance but not to hear the interrogation or to advise.

It is submitted that a mere ‘watching’ lawyer would not be able to render any advice against self-incrimination. The purpose of the presence of a lawyer while a suspect is in custody is to ensure that the suspect is not compelled to incriminate himself/herself. If a proceeding under the Customs Act, 1962 is a ‘judicial proceeding’ as seen *supra*, why should the presence of a lawyer be barred?

## **LATER BAR ON USE OF SELF-INCULPATING STATEMENTS IN CRIMINAL TRIALS**

In *Noor Aga v. State of Punjab*<sup>lxxxiv</sup> where the Appellant was prosecuted under the Narcotic Drugs and Psychotropic Substances by the Customs Department, a 2 Judge Bench of the Supreme Court has clearly laid down:

**“The enquiry contemplated under Section 108 is for the purpose of 1962 Act and not for the purpose of convicting an accused under any other statute including the provisions of the Act (NDPS Act)...**

Clause (3) of Article 20 of the Constitution provides that no person accused of any offence shall be compelled to be a witness against himself. Any confession made under Section 108 of the Customs Act must give way to Article 20(3) wherefor there is a conflict between the two...The burden of proving that such a confession was made voluntarily would, thus, be on the prosecution...

The extent of right to a fair trial of an accused must be determined keeping in view the fundamental rights as adumbrated under Article 21 of the Constitution of India as also the International Convention and Covenants chartered in Human Rights. We cannot lose sight of

the fact that criminal justice delivery system prevailing in our country lacks mechanisms to remedy systemic violations of the accused's core constitutional rights which include the right to effective assistance of counsel, the right to have exculpatory evidence disclosed, and the right to be free from suggestive eyewitness identifications, coerced custodial interrogation and the fabrication of evidence...

**Section 25 of the Evidence Act was enacted in the words of Mehmood J in Queen Empress v. Babulal [ILR (1884) 6 All. 509] to put a stop to the extortion of confession, by taking away from the police officers as the advantage of proving such extorted confession during the trial of accused persons.** It was, therefore, enacted to sub serve a high purpose. The Act (NDPS Act)<sup>lxxxv</sup> is a complete code by itself. The customs officers have been clothed with the powers of police officers under the Act. It does not, therefore, deal only with a matter of imposition of penalty or an order of confiscation of the properties under the Act but also with the offences having serious consequences. Section 53 of the Act empowers the customs officers with the powers of the Station House Officers. **An officer invested with the power of a police officer by reason of a special statute in terms of sub-section (2) of Section 53 would, thus, be deemed to be police officers and for the said purposes of Section 25 of the Act shall be applicable. A legal fiction as is well known must be given its full effect...**

In Pon Adithan v. Deputy Director, Narcotics Control Bureau, Madras [(1999) 6 SCC 1], whereupon reliance has been placed by the High Court, **this Court had used retracted confession as a corroborative piece of evidence and not as the evidence on the basis whereof alone, a judgment of conviction could be recorded...**

A search and seizure or an arrest made for the purpose of proceeding against a person under the Act (NDPS Act) cannot be different only because in one case the authority was appointed under the Customs Act and in the other under another. What is relevant is the purpose for which such arrest or search and seizure is made and investigation is carried out. The law applicable in this behalf must be certain and uniform. Even otherwise Section 138B of the 1962 Act must be read as a provision containing certain important features, namely:

(a) There should be in the first instance statement made and signed by a person before a competent custom official.

(b) It must have been made during the course of enquiry and proceedings under the Customs Act.

Only when these things are established, a statement made by an accused would become relevant in a prosecution under the Act. Only then, it can be used for the purpose of proving the truth of the facts contained therein. It deals with another category of case which provides for a further clarification. Clause (a) of Sub-section (1) of Section 138B deals with one type of persons and Clause (b) deals with another. The Legislature might have in mind its experience that sometimes witnesses do not support the prosecution case as for example panch witnesses and only in such an event an additional opportunity is afforded to the prosecution to criticize the said witness and to invite a finding from the court not to rely on the assurance of the court on the basis of the statement recorded by the Customs Department and for that purpose it is envisaged that a person may be such whose statement was recorded but while he was examined before the court, it arrived at an opinion that is statement should be admitted in evidence in the interest of justice which was evidently to make that situation and to confirm the witness who is the author of such statement but does not support the prosecution although he made a statement in terms of Section 108 of the Customs Act. We are not concerned with such category of witnesses. **Confessional statement of an accused, therefore, cannot be made use of in any manner under Section 138B of the Customs Act.** Even otherwise such an evidence is considered to be of weak nature.” (emphasis supplied)

## JUDGMENTS OF LARGER BENCHES

As seen *supra*, the Benches in *Romesh Chandra Mehta* (5 Judge Constitution Bench), *Poolpandi* (3 Judges), *Ilias* (5 Judge Constitution Bench), *Balbir Singh* (4 Judge Bench) have all tilted in favour of the concept of allowing Revenue officers to record self-inculpatory statements and that the same may be relied upon to convict such arrestees if the matter proceeds to criminal trial, whereas *D. K. Basu* and *Noor Aga* although later, were decided by 2 Judge Benches. *Nandini Satpathy*, although decided by a 3 Judge Bench, was held in *Poolpandi* to not apply to investigative procedure under the Customs Act, 1962.

It also shows that the interpretations of Revenue statutes, that on one hand, allow the recording of self-inculpatory statements on the ground that Revenue officers are not Police officers, has

brought into question the legality and constitutionality of the provisions, requiring the interpretation of such statutes in their legal and constitutional perspective.

The admissibility of self-inculpatory statements, albeit factually verifiable with respect to the voluntariness of statements made by independent corroboration of their contents, does leave much to be desired by way of legislative correction as far as the Constitutional safeguard against self-incrimination is concerned. It would be quite another thing if self-inculpatory statements recorded before Revenue officers were made strictly relevant to the domain of duty realisation only and not to criminal prosecution.

The specificity that may be seen in *Noor Aga* is that a conviction based on charges under the Narcotic Drugs and Psychotropic Substances Act, 1985 (Act no. 61 of 1985) (NDPS Act), which is a Code in itself, was set aside on the ground that when Customs officers prosecute under the NDPS Act, they must be subject to the same evidentiary exclusion under section 25 of the Evidence Act as Police officers. Thus, *Noor Aga* can be seen to deal with excluding the instrumentality of the Customs Act, 1962 for seeking a conviction under the NDPS Act. However, this does not undo the inherent procedural tilt for convictions under the Customs Act, 1962 itself.

Leaving even a small margin of possibility to convict based on self-inculpatory statements, somehow runs contrary to the Constitutional safeguard under Article 20(3) of the Indian Constitution.

## **HYPOTHESIS**

The hypothesis of the present research is that *'the absence of a uniform procedure across various agencies which are tasked with enforcing the law and whose statutory powers include the power to investigate, detain, arrest, file complaints/chargesheets and prosecute for violation of the provisions of the respective laws that they enforce, is arbitrary, unfair and violative of the mandate of Arts. 14 and 21 of the Constitution of India leading to variable and unfair differentiation.'*



## RESEARCH QUESTIONS AND METHODOLOGY

The methodology utilised for the present research is **doctrinal research**. The researcher, in order to examine the matters discussed *supra* would seek answers to the following questions in the state of the law as it is presently:

1. *What is the purpose of procedural safeguards? Do investigative functions call for procedural safeguards?*
2. *What are the procedural safeguards presently in place? Do they apply to all agencies?*
3. *What are the investigative procedural formalities under the CrPC? What is the purpose of such formalities? Do they apply to all agencies?*
4. *Are intelligence and law-enforcement fused among Police agencies? Are intelligence and law-enforcement functions fused among Revenue agencies?*
5. *Does 'intelligence' and 'security' cover 'investigation' and 'prosecution'?*
6. *Is it one of the functions of the Right to Information Act to ensure processual sanctity of law enforcement?*
7. *Do revenue statutes have certain presumptions that tilt towards inculcation?*

## TESTING OF HYPOTHESIS

### A. *What is the purpose of procedural safeguards?*

Procedural safeguards are put in place to ensure that the law enforcement agency entrusted with the task of investigation does not abuse its powers over detained/arrested persons and does not commit what are called 'custodial crimes'. The National Crime Records Bureau 'Crime in India' statistics<sup>lxxxvi</sup> reveals the year-wise total number of deaths/disappearances in Police Custody. The limitation of these statistics is that they do not record the complaints of custodial violence or death in the custody of agencies other than the Police. Also, only those figures make it to these statistics which are returned by various States and Union Territories. In cases where no such returns are received, such statistics are not recorded<sup>lxxxvii</sup>. Hence, these statistics

are at best, an estimate of custodial violence in India and by no means a completely accurate source of statistics on deaths in the custody of law enforcement agencies.

The purpose of custodial safeguards, is thus very obvious, i.e. to ensure that detained persons are not harmed.

**B. *What are the procedural safeguards presently in place? Do they apply to all agencies?***

The minimum standard of custodial safeguards is laid down by the Supreme Court in the case of *D. K. Basu v. State of West Bengal*,<sup>lxxxviii</sup>. The directions laid down are as under:

*‘(1) The police personnel carrying out the arrest and handling the interrogation of the arrestee should bear accurate, visible and clear identification and name tags with their designations. The particulars of all such police personnel who handle interrogation of the arrestee must be recorded in a register.*

*(2) That the police officer carrying out the arrest of the arrestee shall prepare a memo of arrest at the time of arrest and such memo shall be attested by at least one witness, who may be either a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. It shall also be countersigned by the arrestee and shall contain the time and date of arrest.*

*(3) A person who has been arrested or detained and is being held in custody in a police station or interrogation centre or other lock-up, shall be entitled to have one friend or relative or other person known to him or having interest in his welfare being informed, as soon as practicable, that he has been arrested and is being detained at the particular place, unless the attesting witness of the memo of arrest is himself such a friend or a relative of the arrestee.*

*(4) The time, place of arrest and venue of custody of an arrestee must be notified by the police where the next friend or relative of the arrestee lives outside the district or and through the Legal Aid Organisation in the District and the police station of the area concerned telegraphically within a period of 8 to 12 hours after the arrest.*

(5) *The person arrested must be made aware of this right to have someone informed of his arrest or detention as soon as he is put under arrest or is detained.*

(6) *An entry must be made in the diary at the place of detention regarding the arrest of the person which shall also disclose the name of the next friend of the person who has been informed of the arrest and the names and particulars of the police officials in whose custody the arrestee is.*

(7) *The arrestee should, where he so requests, be also examined at the time of his arrest and major and minor injuries, if any, present on his/her body, must be recorded at that time. The "Inspection Memo" must be signed both by the arrestee and the police officer effecting the arrest and its copy provided to the arrestee.*

(8) *The arrestee should be subjected to medical examination by a trained doctor every 48 hours during his detention in custody by a doctor on the panel of approved doctors appointed by Director, Health Services of the concerned State or Union Territory, Director, Health Services should prepare such a panel for all Tehsils and Districts as well.*

(9) *Copies of all the documents including the memo of arrest, referred to above, should be sent to the Magistrate for his record.*

(10) *The arrestee may be permitted to meet his lawyer during interrogation, though not throughout the interrogation.*

(11) *A police control room should be provided at all district and State headquarters, where information regarding the arrest and the place of custody of the arrestee shall be communicated by the officer causing the arrest, within 12 hours of effecting the arrest and at the police control room it should be displayed on a conspicuous police board.*<sup>1xxxix</sup>

The Supreme Court has observed in this judgment that ‘Apart from the police, there are several other governmental authorities also like Directorate of Revenue Intelligence, Directorate of Enforcement, Coastal Guard, Central Reserve Police Force (CRPF), Border Security Force (BSF), the Central Industrial Security Force (CISF), the State Armed Police, Intelligence Agencies like the Intelligence Bureau, R.A.W., Central Bureau of Investigation (CBI), CID, Traffic Police, Mounted Police and ITBP, which have the power to detain a person and to interrogate him in connection with the investigation of economic offences, offences under the Essential Commodities Act, Excise and Customs Act, Foreign Exchange Regulation Act etc. There are instances of torture and death in custody of these authorities as well..... The

requirements, referred to above flow from Articles 21 and 22 (1) of the Constitution and need to be strictly followed. These would apply with equal force to the other governmental agencies also to which a reference has been made earlier.<sup>’xc</sup>

### ***Changes made to the CrPC after the D. K. Basu judgment***

Sections 41B, 41C and 41D added vide the Criminal Procedure Code (Amendment) Act, 2008 give effect to some of the directions laid down in D. K. Basu, i.e. section 41B provides for procedure of arrest according to the D. K. Basu judgment, section 41C provides for a control room in districts, section 41D gives an arrested person a right to meet an Advocate of his/her choice during custody.<sup>’xci</sup>

### ***The case of admissible confessions***

In the United States, *Miranda v. Arizona*<sup>’xcii</sup> and *Escobedo v. Illinois*<sup>’xciii</sup> still hold the field. A confession made before a Police Officer is admissible in evidence, provided that the detainee was informed that he/she is entitled to silence and to his/her right to consult a lawyer during police interrogation.

In India, Sections 25 and 26 of the Indian Evidence Act, 1872 hold that confessions made in Police custody are not admissible in evidence. However, as seen in *State of Punjab v. Barkat Ram* (supra) and in several other cases, a Customs officer is held not to be a Police officer for the purpose of section 25 of the Evidence Act. Hence, a confessional statement made before a Customs officer is admissible in evidence, even when the Customs department proceeds against an assessee criminally<sup>’xciv</sup>. Neither the Customs Act nor any other Act like the Prevention of Money Laundering Act, 2002 or any of the other ‘special’ Acts seen *supra* make any provision for a detainee’s right to silence, because the statement made by such detainee in custody are going to be admissible in evidence.

The Law Commission of India in the 152<sup>nd</sup> Report have recommended that '*We are further of the view that the exclusionary provisions contained in sections 25 and 26 of the Evidence Act which are, at present, confined to police officers, should be extended to all public servants having power to arrest and detain persons in custody.*<sup>’xcv</sup>

Thus, custodial safeguards as the ones seen in D. K. Basu and Sections 41B to 41D of the CrPC and vide circulars Circular No. 13/2013-Cus dated 17<sup>th</sup> September 2013 issued vide F. No. 394/68/2013(AS) regarding ‘Guidelines for Arrest & Bail in relation to offences punishable under Customs Act’ and by Circular No. 974/08/2013-CX dated 17<sup>th</sup> September 2013 issued vide F. No. 4/2/2011-CX-1 regarding ‘Arrest and Bail under Central Excise Act, 1944’ seen *supra*, apply to all agencies. However, the accountability of such agencies to the public at large through systems like Station Diary and under the RTI Act, are variable.

Therefore, public transparency of custodial safeguards varies across agencies.

***C. What are the investigative procedural formalities under the CrPC? What is the purpose of such formalities? Do they apply to all agencies?***

Investigation as provided under the CrPC is contained in Chapter XII, from Sections 154 to 176.

Formally, investigation under the CrPC begins with a report of cognizable offence to the Police<sup>xcvi</sup>. A Judicial Magistrate can also direct the Police to register a First Information Report and report to him/her<sup>xcvii</sup>.

Section 157 provides for the reporting of offences registered by Police officer to the Magistrate empowered to take cognizance of such offences. This is to ensure general judicial oversight with respect to the actions of the Police.

Section 160 empowers a Police officer to summon a witness and section 161 empowers such Police officer to examine witnesses and record their statements. However, accused persons themselves are exempted from being summoned as witnesses against themselves<sup>xcviii</sup>.

Section 162 provides that no statement which is recorded in writing shall be signed by a witness and the use of such a statement in the recording of evidence before a Court of law is limited to the extent of contradicting a witness in the manner provided by section 145 of the Evidence Act<sup>xcix</sup>.

Section 163 specifically provides that no inducement, threat or promise shall be offered or made as mentioned in section 24 of the Evidence Act<sup>c</sup>.

Section 164 provides that confessional statements may only be recorded by Magistrates and that too after informing the person making such a statement that he/she is not bound to make

such a statement and that if he/she does make a confessional statement, it would be used as evidence.

Section 167 empowers the jurisdictional Magistrate to release a pre-trial arrested person under investigation on Bail if the investigation cannot be completed within 90 days in case of an offence punishable with life, death or not less than ten years and within 60 days in case of any other offence.

Section 169 empowers the officer in charge of a Police station to release an accused subject to his/her enacting a bond to appear before the appropriate Magistrate, in case evidence is found to be insufficient.

Section 172 mandates the maintaining of a case diary by the officer investigating a case where day to day entries are supposed to be maintained. Although the case diary is not to be disclosed to the accused or to his advocates except when such officer refers to the case diary to refresh his/her memory or when the Court uses such case diary to contradict the investigating officer.

Section 173 provides for the submitting of the final report of investigation to the Magistrate upon completion of investigation. It also provides for further investigation by Police in case fresh evidence comes to light, by taking formal permission from the Court<sup>ci</sup>.

Besides maintaining a case diary u/s 172 of the CrPC, the Police have to maintain a general diary or 'station diary' u/s 44 of the Police Act, 1861.

The sum total of the formalities of the investigation process from the perspective of custodial safeguards under the CrPC and procedural safeguards under the Police Act, 1861 reflects that:

- The Police have the power to find out facts independently of any direction or order in case of offences classified as 'cognizable' under the CrPC.
- The Police can record statements of witnesses, but not self-incriminating statements of accused persons. Statements made in the process of investigation shall not be signed by the witnesses making them. They are not substantive evidence<sup>cii</sup>.
- The Police cannot offer any inducement, threat or promise in the process of making their investigation.
- A case diary which contains a minute record of the investigation may not ordinarily be shown to the accused or to his Advocates, but only such part of the case diary as is used

by the Court to contradict the concerned Police officer or referred to by such officer for refreshing of memory will be subject to section 161 or section 145 of the Evidence Act.

- A general diary shall be maintained at every Police Station ‘to record therein all complaints and charges preferred, the names of all persons arrested, the names of the complainants, the offences charged against them, the weapons or property that shall have been taken from their possession or otherwise, and the names of the witnesses who shall have been examined.’<sup>ciii</sup>
- The purpose of the above formalities, is clearly to ensure that investigation carried out by the Police is fair and is not one based on custodial torture, threat and making of false promises to secure information.
- The above safeguards and procedural formalities, expressly apply to Police agencies. They do not apply strictly to other law enforcement agencies which enforce the law under several other Acts like the Customs Act, 1962<sup>civ</sup> or under the NDPS Act<sup>cv</sup>. Vide *Deepak Mahajan’s* case (supra), the powers of the Magistrate u/s 167 are held to be applicable in the seeking of remand by agencies other than the Police. Thus, while the protective safeguards under Chapter XII of the CrPC are not necessarily applicable to agencies other than the Police, the procedural means of arresting and seeking remand can be utilised by such other agencies.
- The same restrictions ought to apply to all agencies which exercise powers of arrest, detention, investigation, reporting/chargesheeting and prosecution, as the reason for putting in place such safeguards is that the Police machinery has such overwhelming powers in order to carry out such investigation.

**D. *Are intelligence and law-enforcement functions fused among Police agencies?***

***Are intelligence and law-enforcement functions fused among Revenue agencies?***

According to the Police Act, 1861, it is the duty of a Police officer ‘*to obey and execute all orders and warrants lawfully issued to him by any competent authority; to collect and communicate intelligence affecting the public peace; to prevent the commission of offences and public nuisances; to detect and bring offenders to justice and to apprehend all persons whom he is legally authorized to apprehend, and for whose apprehension sufficient ground exists; and it shall be lawful for every police officer, for any of the purposes mentioned in this*

section, without a warrant, to enter and inspect any drinking-shop, gaming-house or other place of resort of loose and disorderly characters.’ (emphasis supplied) Usually, the functions of executive policing and intelligence-gathering are separated in practice and a Special Branch exists as a part of a Police formation<sup>cvii</sup> for collecting and collating intelligence. At the Union level, the Intelligence Bureau specialises in collecting and disseminating intelligence to other agencies to act upon<sup>cviii</sup>. So also, the Research and Analysis Wing (R&AW) of the Cabinet Secretariat, is not charged with performing executive Police functions<sup>cxiii</sup>. However, the same cannot be said of the Directorate of Revenue Intelligence, which has among its many functions, the collecting of intelligence about smuggling, contraband, under-invoicing etc as well as investigation<sup>cxix</sup>.

Thus, while intelligence and law-enforcement functions are not fused among the Police agencies, they are fused among the Revenue agencies.

#### ***E. Does 'intelligence' and 'security' cover 'investigation' and 'prosecution'?***

‘Intelligence’ and ‘security’ are nowhere defined under the Police Act, 1861 or under the CrPC. However, the term ‘investigation’ is defined and the process of prosecution is provided under the CrPC<sup>cx</sup>. Section 23 of the Police Act, 1861 as seen *supra* provides for collecting and communication of intelligence affecting the public peace<sup>cxii</sup>.

The term ‘intelligence’ does not find mention in the Customs Act, 1961. Section 11 of the Customs Act provides for the power to prohibit importation or exportation of certain goods for *inter alia*, ‘the maintenance of the security of India’<sup>cxii</sup> and for ‘the fulfilment of obligations under the Charter of the United Nations for the maintenance of international peace and security’<sup>cxiii</sup>

The general sense of the terms ‘intelligence’ and ‘security’ must be taken here.

‘Intelligence’ comes from Latin *intelligentia*, from *intelligere* ‘understand’<sup>cxiv</sup>. In Government terminology, it implies ‘1. information about an enemy or a potential enemy; 2. the evaluated conclusions drawn from such information; 3. an organization or agency engaged in gathering such information’<sup>cxv</sup>

‘Security’ is ‘The state of being free from danger or threat.’<sup>cxvi</sup>



‘Investigation’ under the CrPC ‘includes all the proceedings under this Code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorised by a Magistrate in this behalf.’<sup>cxvii</sup>

‘Prosecution’ is ‘The institution and conducting of legal proceedings against someone in respect of a criminal charge.’<sup>cxviii</sup>

Within the plain meaning of the terms whose definitions are seen *supra*, the terms ‘intelligence’ and ‘security’ do not cover ‘investigation’ and ‘prosecution’ and hence the processes must also be deemed to be distinct, although one or more agencies while performing one of these functions may also perform some of the other functions as a part of the main function or as a separate item of duty cast upon such agencies.

**F. Is it one of the functions of the Right to Information Act to ensure processual sanctity of law enforcement?**

As seen *supra*, the preamble of the Right to Information Act states that it is ‘An Act to provide for setting out the practical regime of right to information for citizens to secure access to information under the control of public authorities, **in order to promote transparency and accountability in the working of every public authority....**’

Transparency and accountability are most certainly the cornerstones of ensuring processual sanctity of law enforcement, as there can be no processual sanctity without transparency and accountability.

Subject to certain exceptions, the Right to Information Act, 2005 provides for a disclosure of information.

It can be stated that it is one of the functions of the Right to Information Act to ensure processual sanctity of law enforcement.

**G. Do revenue statutes have certain presumptions that tilt towards inculcation?**

**Procedural aspects under revenue statutes –**

Section 108 of the Customs Act provides for the recording of statements by a Customs officer, which can be done in custody.

Section 131 of the Income Tax Act, 1961 empowers an authorised officer to issue summons and examine persons on oath.

Section 11 of the Prevention of Money Laundering Act, 2002 empowers the authorised officers to issue summons and examine persons on oath.

#### **Presumptions under the Customs Act, 1962 –**

Section 138A of the Customs Act provides that a culpable mental state shall be presumed in any prosecution for an offence under the Act. Section 138B of the Act also provides that statements made under the Act shall be admitted in evidence.

Section 138C provides for the admissibility of micro-films, facsimile copies of documents and computer printouts etc. Section 139 provides for a presumption as to documents.

#### **Presumptions under the Central Excise Act, 1944 –**

Section 36A provides for the presumption about the truth and contents of documents. Section 36B provides for the admissibility of micro films, facsimile copies of documents and computer printouts as documents and as evidence.

#### **Presumptions under the Prevention of Money Laundering Act, 2002 –**

Section 22 provides for presumptions as to records and property found during a survey. Section 23 provides for presumption in case of connected transactions in case one of such transactions is shown to be one involving money-laundering. Section 24 puts the burden of proof of showing that an alleged transaction is not one involving money-laundering upon the person charged with it.

Looking at the provisions of the several revenue statutes, it is clear that the presumptions built into these statutes tilt towards inculcation.

Neither of the above Acts separates the presumptions for proceedings before adjudicating authorities and Courts of law. The presumptions (albeit not irrebuttable) do not specify that they are limited to adjudication proceedings. In fact, section 138A of the Customs Act specifically mentions that the Court shall presume a culpable mental state<sup>cxix</sup>. In such cases, where the burden of proving otherwise lies upon the accused that procedural safeguards are most likely to be thwarted. Therefore, planting of evidence is also possible in such cases. With the same powers to arrest and detain possessed by a revenue law enforcing agency, when a presumption although rebuttable, is cast upon an accused, it would be almost impossible for an accused to establish through the evidence led by the prosecution (including cross-examination) or through further evidence that he/she is innocent if the Court is led to a conclusion that certain facts with respect to did exist, coupled with a self-inculpatory statement which such an accused can be forced into recording under the Customs Act<sup>cxx</sup>. The responsibility to retract a self-inculpatory statement lies upon an accused. There is no provision for providing legal aid to arrested persons in Customs custody under the Customs Act. In fact, the Supreme Court has held in the case of *Poolpandi and Ors. v. Superintendent, Central Excise etc.*<sup>cxxi</sup> that ‘*The purpose of the enquiry under the Customs Act and the other similar statutes will be completely frustrated if the whims of the persons in possession of useful information for the departments are allowed to prevail. For achieving the object of such an enquiry if the appropriate authorities be of the view that such persons should be dissociated from the atmosphere and the company of persons who provide encouragement to them in adopting a non-cooperative attitude to the machineries of law, there cannot be any legitimate objection in depriving them of such company. The relevant provisions of the Constitution in this regard have to be construed in the spirit they were made and the benefits thereunder should not be "expanded" to favour exploiters engaged in tax evasion at the cost of public exchequer. Applying the `just, fair and reasonable test' we hold that there is no merit in the stand of appellant before us.*’

The power to record statements which are admissible in evidence even in criminal trials and which can also be recorded by excluding the advice and assistance of legal counsel is a matter too critical to be left untouched. The Law Commission of India in their 152<sup>nd</sup> Report have recommended that the provisions of Sections 25 and 26 of the Indian Evidence Act be extended to all such officers who possess the power to arrest and detain persons in custody<sup>cxxii</sup>.

## The mandate of Articles 14 and 21 of the Constitution of India

Art. 14 provides for the equality before law and equal protection of the laws and Art. 21 provides for the right to life. Right to fair procedure<sup>cxxiii</sup> is therefore implicit in the Constitution of India. A fair procedure would also imply a procedure which is equal for equal situations. Investigative custody, whether under Police or Customs or other agencies, implies a curtailment of the liberty of an arrested person. Uniform procedure for safeguarding the custodial rights of a detainee is therefore desirable.

## INFERENCE

From the answers to the research questions above, the hypothesis that *'the absence of a uniform procedure across various agencies which are tasked with enforcing the law and whose statutory powers include the power to investigate, detain, arrest, file complaints/chargesheets and prosecute for violation of the provisions of the respective laws that they enforce, is arbitrary, unfair and violative of the mandate of Arts. 14 and 21 of the Constitution of India leading to variable and unfair differentiation.'* is proven.

## CONCLUSION AND SUGGESTIONS

Streamlining of investigative procedural safeguards across agencies is possible only by enacting a uniform investigative safeguards procedure while balancing the interest of the State. This can be achieved by enacting amendments to the various laws which provide for arrests and detention and making them subject to certain common norms that are presently followed under the Code of Criminal Procedure, 1973. A common **Code of Investigative Procedural Safeguards** for all law enforcement and investigating agencies should be enacted which will streamline the procedural safeguards presently practised and would help in achieving custodial processual justice.

From the discussion *supra* it can be seen that information transparency in the investigative sphere of the work of revenue agencies shall not dilute the efficacy of revenue collection and

contraband prevention. Hence, safeguards related to investigation by all agencies should be made subject to disclosure under the Right to Information Act.

A separation of intelligence gathering on one side and investigation and prosecution on the other among Revenue agencies as among Police agencies, would not lead to a loss in the efficacy of revenue collection and contraband prevention. The role of the Directorate of Revenue Intelligence as an intelligence agency should be maintained. However, the same agency should not be allowed to investigate and prosecute and that task should be handed over to other wings, which must be amenable to disclosure under the Right to Information Act, 2005.

The Law and Order-Revenue binary is not relevant to the doctrine of custodial safeguards, as such safeguards are meant to protect anybody in investigative custody. Which statute the investigative agency is formed or operates under is not relevant to decide if procedural safeguards should apply or not.

Custodial interrogation brings with it the problem of custodial torture. Although it was held in the case of *Poolpandi* that a person subject to Revenue-related interrogation cannot insist on the 'comforts' that he/she is used to, that is much different from being made to record self-inculcating statements in custody.

The foremost criticism of the view taken in *Poolpandi* would be that lawyers, are by function, not '*persons who provide encouragement in adopting a non-cooperative attitude to the machineries of law*'. It is the Constitutional mandate of the legal profession to protect the interest of a person and especially an individual in duress.

Self-inculpatory statements recorded in custody even when such statement is retracted, being relied upon for convicting an accused under the Customs Act, 1962 if it is '*found to be voluntarily made*', albeit with the caution of corroboration as seen in *Balbir Singh* which was decided by a 4 Judge Bench, leaves things to the discretion of the trial Court. The ruling out of all self-inculpatory statements being made relevant to sustain a conviction laid down by a 2 Judge Bench in *Noor Aga* does not overrule *Balbir Singh*. The likelihood of a conviction being sustained on self-inculpatory statements made in custody appears to be a departure from the Constitutional guarantee against testimonial compulsion. Discretion cannot be a substitute for a fundamental Constitutional guarantee.

It is practically impossible to hold back the coercive edge of a law-enforcement agency in getting recorded self-inculpatory material. The existence of duress as seen in Justice Subba Rao's dissent in *Barkat Ram* lies in the nature of custody itself, and not in the function of the agency empowered to exercise the power to detain. The cases of death in the custody of Revenue agencies, although the statistics of such deaths are not recorded like they are for those in Police custody, show that custodial torture in Revenue custody is a real phenomenon which cannot be wished away by citing the functional differences between Police and Revenue agencies.

Judicial examination of the question of self-inculcation in the custody of Revenue agencies over the years has shown that the inculcation-facilitating procedure of Revenue statutes is not only liable to misuse, but it also presents many questions of reliability with respect to the custodial statements which are retracted post-custody.

The device of re-summoning a person who has retracted his custodial statement must be reviewed and no agency should have the powers to re-summon a person for the purpose of disowning a retraction, as that shows the failure of the Revenue law enforcing agency to investigate without custodial torture and duress.

Revenue is undoubtedly a precious resource, but the likelihood of misuse of the extraordinary powers not only to realise revenue from suspected defaulters, but also to sustain convictions based on custodial statements which can be used for corroboration even if retracted later, falls afoul of the Constitutional guarantee under Article 20(3) of the Constitution of India.

The incidence of custodial torture while exercising the extraordinary powers provided by Revenue statutes breaches the Constitutional guarantee of fairness in procedure. The fact that there is no barometer for recording of instances of custodial death and torture in the custody of Revenue agencies is a matter that needs urgent legislative attention. The maintenance of custodial torture and death related data of each and every agency clothed with the power to arrest and detain people is an urgent necessity. The National Crime Records Bureau may be given the charge of recording agency-wise data of complaints about and action taken with respect to custodial torture and death in respect of agencies besides the Police in addition to their present mandate of studying this phenomenon in Police custody across India.

The example of Her Majesty's Revenue and Customs Service (HMRC) in the United Kingdom, being bound by the same procedure as the Police, while exercising powers of investigation, shows that it is possible to realise revenue and investigate revenue default, cartelising and organised crimes against the revenue while upholding the processual safeguard of access to a lawyer. The very concept of access to a lawyer is to ensure that nothing self-inculpatory is forced out of an arrestee. While Revenue statutes and jurisprudence that has evolved thereunder provide for the evidentiary admissibility of corroboration, self-inculcation should not be admissible in evidence in this respect and this aspect requires legislative change.

In case it is deemed necessary for the sake of factual investigation that self-inculpatory material must be allowed to be recorded, it must be made inadmissible in criminal trials by express legislative sanction. The standard of proof for establishing a criminal offence should be common for every criminal trial, and self-inculpatory statements should be expressly put outside the purview even of corroboration. Independent proof coupled with the evidentiary presumptions under the Revenue statutes is sufficient to ensure that wilful defaulters are not spared criminal penalty.

The suggestion made by the Law Commission of India in their 152nd Report, that of extending the evidentiary exclusion of Sections 25 and 26 of the Indian Evidence Act, 1872 to all public servants empowered to arrest and detain, as a safeguard against custodial torture, must be given serious legislative consideration.

The separate statutes providing for different powers of the non-Police investigating agencies often brings forth challenges of compliance with the CrPC in order to avail of the coercive processes provided solely under the Code. Thus, the strict separation between a Police officer and Customs officer or any other officer under the special statutes, does not always help such non-Police officers. If all investigating agencies are provided with the same common Code, their investigation would become smoother.

Some procedural safeguards which are specific to the Police Act, 1861 like the General Diary, ought to be legislated into the arrest-related provisions of the CrPC, so that every agency that makes arrests is bound by it. The investigation-related provisions in the CrPC, like Case Diary

also ought to be brought into the common ground of investigative procedure, in order to maintain better oversight, control and probity in investigation.

The concept of *Mirandizing* of an arrestee as practised in the United States<sup>xxxiv</sup> ought to be implemented in terms of the *D. K. Basu* directions (supra) and introduced as an amendment to the CrPC, in that the directions and the rights of an arrestee ought to be read out to him/her and besides the signature of such arrestee on the arrest memorandum, the fact that such arrestee has understood his/her rights also ought to be separately recorded. Such reading of directions and rights of an arrested person ought to be videographed and stored in servers under the control of officers other than those belonging to law enforcement, preferably Judicial officers.

The *D. K. Basu* guidelines ought to be displayed on the walls of agencies other than the Police.

The very essence of procedural justice is to give effect to the motto that '*justice must not only be done but also seem to be done*'. In order to uphold this very fundamental requirement of justice, the streamlining of investigative procedural safeguards across agencies is an urgent requirement. It is hoped that appropriate legislative changes are brought in so as to give effect to this fundamental desideratum.



## ENDNOTES

- <sup>i</sup> Available at <https://www.britannica.com/topic/Draconian-laws>, Accessed on 25<sup>th</sup> October 2018
- <sup>ii</sup> Regulated by Circular No. 13/2013-Cus dated 17<sup>th</sup> September 2013 issued vide F. No. 394/68/2013(AS) regarding 'Guidelines for Arrest & Bail in relation to offences punishable under Customs Act' and by Circular No. 974/08/2013-CX dated 17<sup>th</sup> September 2013 issued vide F. No. 4/2/2011-CX-1 regarding 'Arrest and Bail under Central Excise Act, 1944'
- <sup>iii</sup> Although the Code of Criminal Procedure has been revised and a new Code has come into place from 25<sup>th</sup> January 1974
- <sup>iv</sup> Defined u/s 2(c) of the CrPC — “cognizable offence” means an offence for which, and “cognizable case” means a case in which, a police officer may, in accordance with the First Schedule or under any other law for the time being in force, arrest without warrant.
- <sup>v</sup> AIR 1962 SC 276
- <sup>vi</sup> Griffiths, Percival, 'To Guard My People: The History of the Indian Police', Earnest Benn, London, 1971, pp. 88
- <sup>vii</sup> *Ibid*
- <sup>viii</sup> *Ibid*, pp 90
- <sup>ix</sup> Available at <http://bombayhighcourt.nic.in/libweb/oldlegislation/crpic1861/Code%20of%20Criminal%20Procedure,%201861.html>, Accessed on 28<sup>th</sup> October 2018
- <sup>x</sup> *Sagar Balu Ubhe v. State of Maharashtra*, Criminal Writ Petition No. 499 of 2012, Decided on 7<sup>th</sup> January 2014
- <sup>xi</sup> Available at <http://bombayhighcourt.nic.in/libweb/oldlegislation/crpic1861/Code%20of%20Criminal%20Procedure,%201861.html>, Accessed on 28<sup>th</sup> October 2018
- <sup>xii</sup> Dhull, Kavita, 'A study of confession under criminal law with special reference to its evidentiary value', PhD Thesis submitted to Department of Law, Maharshi Dayanand University, 2011, Chapter 2, Retrieved on 27<sup>th</sup> October 2018 from [http://shodhganga.inflibnet.ac.in/bitstream/10603/7860/9/09\\_chapter%202.pdf](http://shodhganga.inflibnet.ac.in/bitstream/10603/7860/9/09_chapter%202.pdf)
- <sup>xiii</sup> *Ibid*, pp. 48
- <sup>xiv</sup> *Ibid*, pp. 46
- <sup>xv</sup> (1994) 3 SCC 440
- <sup>xvi</sup> *Ibid*
- <sup>xvii</sup> *Ibid*
- <sup>xviii</sup> *Ibid*
- <sup>xix</sup> Writ Petition (Criminal) No. 2453/2018 (Delhi High Court)
- <sup>xx</sup> Order dated 4<sup>th</sup> September 2018 in Criminal Appeals Nos. 1114-1115/2018, Coram: Hon'ble Justice A. M. Khanwilkar and Hon'ble Justice D. Y. Chandrachud
- <sup>xxi</sup> Writ Petition (Criminal) No. 3818 of 2018, Order dated 17<sup>th</sup> October 2019
- <sup>xxii</sup> *Ibid*
- <sup>xxiii</sup> Available at <https://indianexpress.com/article/cities/delhi/murder-case-filed-in-jewellers-death-at-dri-office-after-delhi-hc-intervention-5432116/> Accessed on 27<sup>th</sup> August 2020
- <sup>xxiv</sup> Writ Petition (Criminal) No. 67 of 2017, Decided on 23<sup>rd</sup> November 2017
- <sup>xxv</sup> s. 45(1) of the Prevention of Money Laundering Act, 2002
- <sup>xxvi</sup> AIR 1970 SC 940
- <sup>xxvii</sup> AIR 1978 SC 1025
- <sup>xxviii</sup> AIR 1992 SC 1795
- <sup>xxix</sup> Criminal Appeal No. 1759 of 2017, Order dated 10<sup>th</sup> October 2017; Coram: Hon'ble Justice Kurain Joseph and Hon'ble Justice R. Banumathi
- <sup>xxx</sup> AIR 1997 SC 610
- <sup>xxxi</sup> (2011) 12 SCC 362
- <sup>xxxii</sup> The Narcotic Drugs and Psychotropic Substances Act, 1985 (Act no. 61 of 1985)
- <sup>xxxiii</sup> Order dated 7<sup>th</sup> December 2010, <https://main.sci.gov.in/jonew/bosir/orderpdfold/1200286.pdf>, Accessed on 27<sup>th</sup> August 2020
- <sup>xxxiv</sup> (2011) 14 SCC 1
- <sup>xxxv</sup> *Rajuram Purohit v. Union of India and Ors.*, Criminal Writ Petition No. 349 of 2018, Order dated 25<sup>th</sup> January 2018 :

- followed in* Amrutlal Kaluram Purohit v. Union of India and Ors., Criminal Writ Petition No. 572 of 2018, Order dated 10<sup>th</sup> April 2018 and in Shubham Jain and Ors. v. Union of India and Ors., Criminal Writ Petition No. 3104 of 2018, Order dated 20<sup>th</sup> July 2018
- <sup>xxxvi</sup> State of Punjab v. Barkat Ram, AIR 1962 SC 276 (2-1 Majority) : Ilias v. Collector of Customs, Madras, (1969) 2 SCR 613 (5 Judge Constitution Bench)
- <sup>xxxvii</sup> Romesh Chandra Mehta v. State of West Bengal, AIR 1970 SC 940
- <sup>xxxviii</sup> Ibid
- <sup>xxxix</sup> Poolpandi and Ors. v. Superintendent, Central Excise and Ors., AIR 1992 SC 1795
- <sup>xl</sup> Directorate of Enforcement v. Deepak Mahajan, (1994) 3 SCC 440
- <sup>xli</sup> Section 104(3), Customs Act, 1962 (52 of 1962); Section 13 r/w Section 21(2), Central Excise Act, 1944 (1 of 1944)
- <sup>xlii</sup> Om Prakash and Anr. v. Union of India and Anr., (2011) 14 SCC 1
- <sup>xliii</sup> Section 108, Customs Act, 1962 (52 of 1962); Section 50, Prevention of Money Laundering Act, 2002 (15 of 2003)
- <sup>xliv</sup> State of Punjab v. Barkat Ram, AIR 1962 SC 276
- <sup>xlv</sup> Balbir Singh v. State of Punjab, AIR 1957 SC 216 (4 Judge Bench)
- <sup>xlvi</sup> Section 138A, Customs Act, 1962 (52 of 1962); Section 24, Prevention of Money Laundering Act, 2002 (15 of 2003)
- <sup>xlvii</sup> Balbir Singh v. State of Punjab, AIR 1957 SC 216 (4 Judge Bench)
- <sup>xlviii</sup> Section 193, Indian Penal Code, 1860 (45 of 1860)
- <sup>xlix</sup> Section 228, Indian Penal Code, 1860 (45 of 1860)
- <sup>l</sup> Section 104, Customs Act, 1962 (52 of 1962); Section 13, Central Excise Act, 1944 (1 of 1944)
- <sup>li</sup> Circular No. 38/2013-Customs issued vide F. No. 394/68/2013(AS) dated 17th September 2013 regarding 'Guidelines for Arrest & Bail in relation to offences punishable under Customs Act' - "Since arrest takes away the liberty of an individual, the power must be exercised with utmost care and caution in cases where a Commissioner of Customs or Additional Director General has reason to believe on basis of information or suspicion that such person has committed an offence under the Act punishable under the sections 132 or 133 or 135 or 135A or 136 of the Customs Act, 1962." and Circular No. 974/08/2013-CX., dated 17-9-2013 Issued vide F.No. 4/2/2011-CX-1 also dated 17th September 2013 applicable to the Central Excise department also speaks of arrest in respect of offences which are cognizable. A person in order to be arrested under the Central Excise Act is also required to be suspected of committing an offence punishable under the Act.
- <sup>lii</sup> Section 2(n) of the Code of Criminal Procedure, 1973 (2 of 1974)
- <sup>liii</sup> 45 of 1860
- <sup>liv</sup> Merriam Webster Legal Dictionary. <https://www.merriam-webster.com/dictionary/suspect#legalDictionary>. Last visited on 2<sup>nd</sup> May 2019
- <sup>lv</sup> Merriam Webster Legal Dictionary. <https://www.merriam-webster.com/dictionary/accused>. (Last visited on 2<sup>nd</sup> May 2019)
- <sup>lvi</sup> AIR 1962 SC 276
- <sup>lvii</sup> Indian Evidence Act, 1872 (1 of 1872)
- <sup>lviii</sup> Law Commission of India. 152<sup>nd</sup> Report on Custodial Crimes. Chapter 11 "Law of Evidence". Available at <http://lawcommissionofindia.nic.in/101-169/Report152.pdf>. (Last visited on 2<sup>nd</sup> May 2019).
- <sup>lix</sup> 1990 CrLJ 2201
- <sup>lx</sup> Section 8(1) of the Right to Information Act, 2005
- <sup>lxi</sup> Section 24 of the Right to Information Act, 2005
- <sup>lxii</sup> Ibid
- <sup>lxiii</sup> Ibid
- <sup>lxiv</sup> Schedule II, Right to Information Act, 2005
- <sup>lxv</sup> 23, 24 and 25 added by GSR(E) dated 9<sup>th</sup> June 2011 issued by Ministry of Personnel, Public Grievances and Pensions (Department of Personnel and Training)
- <sup>lxvi</sup> Transfer Case (Civil) No. 136 of 2015, Ajay Kumar Agrawal v. Union of India and Ors.
- <sup>lxvii</sup> Available at <http://www.dri.nic.in/main/charter>, Accessed on 30<sup>th</sup> October 2018
- <sup>lxviii</sup> Available at <http://enforcementdirectorate.gov.in/functions.html?p1=1189301540844708898>, Accessed on 30<sup>th</sup> October 2018
- <sup>lxix</sup> Available at [https://en.wikipedia.org/wiki/Intelligence\\_Bureau\\_\(India\)](https://en.wikipedia.org/wiki/Intelligence_Bureau_(India)), Accessed on 30<sup>th</sup> October 2018
- <sup>lxx</sup> In re Death of Sawinder Singh Grover, 1995 Supp (4) SCC, 450
- <sup>lxxi</sup> Newspaper Report. 11<sup>th</sup> November 2017. <https://indianexpress.com/article/india/customs-duty-evasion-case-key-accused-dies-in-ahmedabad-due-to-gastrointestinal-complications-4932289/> (Last visited on 2<sup>nd</sup> May 2019).
- <sup>lxxii</sup> Newspaper Report. 3<sup>rd</sup> November 2018. <https://indianexpress.com/article/cities/delhi/murder-case-filed-in-jewellers-death-at-dri-office-after-delhi-hc-intervention-5432116/> (Last visited on 2<sup>nd</sup> May 2019).

<sup>lxxiii</sup> Entry 5, Schedule 2, Right to Information Act, 2005 (22 of 2005)

<sup>lxxiv</sup> Entry 3, Schedule 2, Right to Information Act, 2005 (22 of 2005)

<sup>lxxv</sup> 22 of 2005

<sup>lxxvi</sup> Crime in India Statistics 2016. Published by National Crime Records Bureau. Available at <http://ncrb.gov.in/StatPublications/CII/CII2016/pdfs/Crime%20Statistics%20-%202016.pdf>. (Last visited on 2<sup>nd</sup> May 2019).

<sup>lxxvii</sup> Annual Report of the National Human Rights Commission for the year 2015-2016. Available at [http://nhrc.nic.in/sites/default/files/NHRC\\_AR\\_EN\\_2015-2016\\_0.pdf](http://nhrc.nic.in/sites/default/files/NHRC_AR_EN_2015-2016_0.pdf). (Last visited on 2<sup>nd</sup> May 2019).

<sup>lxxviii</sup> 1984 c. 60

<sup>lxxix</sup> HMRC's criminal investigation powers and safeguards. Paragraph 3 'Police and Criminal Evidence': UK Government Website: <https://www.gov.uk/government/publications/criminal-investigation/criminal-investigation#police-and-criminal-evidence-pace>. (Last visited on 2<sup>nd</sup> May 2019).

<sup>lxxx</sup> Ibid

<sup>lxxxi</sup> UK Government Legislation. Criminal Evidence Act 1984 (Application to Revenue and Customs) Order 2015. Available at <https://www.legislation.gov.uk/uksi/2015/1783/contents/made>. (Last visited on 2<sup>nd</sup> May 2019).

<sup>lxxxii</sup> "58. Access to legal advice.

- (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.
- (2) Subject to subsection (3) below, a request under subsection (1) above and the time at which it was made shall be recorded in the custody record.
- (3) Such a request need not be recorded in the custody record of a person who makes it at a time while he is at a court after being charged with an offence.
- (4) If a person makes such a request, he must be permitted to consult a solicitor as soon as is practicable except to the extent that delay is permitted by this section.
- (5) In any case he must be permitted to consult a solicitor within 36 hours from the relevant time, as defined in section 41(2) above.
- (6) Delay in compliance with a request is only permitted—
  - (a) in the case of a person who is in police detention for [F1an indictable offence] ; and
  - (b) if an officer of at least the rank of superintendent authorises it.
- (7) An officer may give an authorisation under subsection (6) above orally or in writing but, if he gives it orally, he shall confirm it in writing as soon as is practicable.
- (8) [F2Subject to sub-section (8A) below] An officer may only authorise delay where he has reasonable grounds for believing that the exercise of the right conferred by subsection (1) above at the time when the person detained desires to exercise it—
  - (a) will lead to interference with or harm to evidence connected with [F3an indictable offence] or interference with or physical injury to other persons; or
  - (b) will lead to the alerting of other persons suspected of having committed such an offence but not yet arrested for it; or
  - (c) will hinder the recovery of any property obtained as a result of such an offence.[F4(8A)An officer may also authorise delay where he has reasonable grounds for believing that—
  - (a) the person detained for [F5the indictable offence] has benefited from his criminal conduct, and
  - (b) the recovery of the value of the property constituting the benefit will be hindered by the exercise of the right conferred by subsection (1) above.
- (8B) For the purposes of subsection (8A) above the question whether a person has benefited from his criminal conduct is to be decided in accordance with Part 2 of the Proceeds of Crime Act 2002.]
- (9) If delay is authorised—
  - (a) the detained person shall be told the reasons for it; and
  - (b) the reason shall be noted on his custody record.
- (10) The duties imposed by subsection (9) above shall be performed as soon as is practicable.
- (11) There may be no further delay in permitting the exercise of the right conferred by subsection (1) above once the reason for authorising delay ceases to subsist.
- [F6(12)Nothing in this section applies to a person arrested or detained under the terrorism provisions.]

<sup>lxxxiii</sup> UK Government Legislation. Criminal Evidence Act 1984 (Application to Revenue and Customs) Order 2015. Website : <https://www.legislation.gov.uk/uksi/2015/1783/contents/made>. (Last visited on 2<sup>nd</sup> May 2019).

<sup>lxxxiv</sup> (2008) 16 SCC 417

<sup>lxxxv</sup> The Narcotic Drugs and Psychotropic Substances Act, 1985 (Act no. 61 of 1985)

<sup>lxxxvi</sup> Available at <http://ncrb.gov.in> Accessed on 4<sup>th</sup> November 2018

<sup>lxxxvii</sup> Available at <http://ncrb.gov.in/>, Crime Statistics, Limitations

lxxxviii AIR 1997 SC 610

lxxxix Ibid

xc Ibid

xc<sup>i</sup> Section 6, Code of Criminal Procedure (Amendment) Act, 2008

xc<sup>ii</sup> 384 U.S. 436

xc<sup>iii</sup> 378 U.S. 478

xc<sup>iv</sup> Sections 138A and 138B of the Customs Act, 1962

xc<sup>v</sup> Law Commission of India, 152nd Report on Custodial Crimes, Chapter 11, page 43

xc<sup>vi</sup> Section 154, CrPC

xc<sup>vii</sup> Section 156(3), CrPC

xc<sup>viii</sup> Shyamlal Mohanlal Choksi v. State of Gujarat, AIR 1965 SC 1251

xc<sup>ix</sup> *Tahsildar Singh v. State of UP*, AIR 1959 SC 1012

<sup>c</sup> Section 24, Indian Evidence Act, 1872 – ‘**Confession caused by inducement, threat or promise, when irrelevant in criminal proceeding.**— A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the Court, to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.’

<sup>ci</sup> *Ram Lal Narang v. State through Delhi Administration*, (1979) 2 SCC 322

<sup>cii</sup> *Baladin And Ors. v. State Of Uttar Pradesh*, AIR 1956 SC 181

<sup>ciii</sup> Section 44, Police Act, 1861

<sup>civ</sup> *Naresh J. Sukhawani v. Union of India*, AIR 1996 SC 522

<sup>cv</sup> *R. N. Kaker v. Shabir Fidahusein*, 1990 CrLJ 144 (Bom)

<sup>cvi</sup> Available at <https://mumbai.police.maharashtra.gov.in/specialbranch.asp>, Accessed on 14<sup>th</sup> November 2018

<sup>cvi<sup>i</sup></sup> Available at [https://en.wikipedia.org/wiki/Intelligence\\_Bureau\\_\(India\)](https://en.wikipedia.org/wiki/Intelligence_Bureau_(India)), Accessed on 14<sup>th</sup> November 2018

<sup>cvi<sup>iii</sup></sup> Available at [https://en.wikipedia.org/wiki/Research\\_and\\_Analysis\\_Wing](https://en.wikipedia.org/wiki/Research_and_Analysis_Wing), Accessed on 14<sup>th</sup> November 2018

<sup>cix</sup> Available at <http://www.dri.nic.in/main/charter>, Accessed on 14<sup>th</sup> November 2018

<sup>cx</sup> Section 2(h) and Chapters XII, XVI, XVII, XVIII of CrPC

<sup>cx<sup>i</sup></sup> Section 23, Police Act, 1861

<sup>cx<sup>ii</sup></sup> Section 11(2)(a) of the Customs Act, 1962

<sup>cx<sup>iii</sup></sup> Section 11(2)(q) of the Customs Act, 1962

<sup>cx<sup>iv</sup></sup> Available at <https://en.oxforddictionaries.com/definition/intelligence>, Accessed on 14<sup>th</sup> November 2018

<sup>cx<sup>v</sup></sup> Available at <https://www.dictionary.com/browse/intelligence>, Accessed on 14<sup>th</sup> November 2018

<sup>cx<sup>vi</sup></sup> Available at <https://en.oxforddictionaries.com/definition/security>, Accessed on 14<sup>th</sup> November 2018

<sup>cx<sup>vii</sup></sup> Section 2(h), CrPC

<sup>cx<sup>viii</sup></sup> Available at <https://en.oxforddictionaries.com/definition/prosecution>, Accessed on 14<sup>th</sup> November 2018

<sup>cx<sup>ix</sup></sup> Section 138A, Customs Act, 1962 138A. Presumption of culpable mental state.—(1) In any prosecution for an offence under this Act which requires a culpable mental state on the part of the accused, the court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution. Explanation.—In this section, —culpable mental state includes intention, motive, knowledge of a fact and belief in, or reason to believe, a fact. (2) For the purposes of this section, a fact is said to be proved only when the court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability.

<sup>cx<sup>x</sup></sup> Section 108, Customs Act, 1962

<sup>cx<sup>xi</sup></sup> AIR 1992 SC 1795

<sup>cx<sup>xii</sup></sup> Available at <http://lawcommissionofindia.nic.in/101-169/Report152.pdf>, Chapter 11, Accessed on 15<sup>th</sup> November 2018

<sup>cx<sup>xiii</sup></sup> *A. K. Kraipak & Ors. Etc v. Union of India & Ors.*, AIR 1970 SC 150

<sup>cx<sup>xiv</sup></sup> Available at <http://www.mirandawarning.org/whatareyourmirandarights.html>, Accessed on 27<sup>th</sup> August 2020