MEDIA REVIEW

Where constitutional protections need protection: Much needed light on first production of accused in Magistrates' Courts

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The report under review is a study brought out by Project 39A, an initiative of the National Law University, Delhi, launched in 2014. The project takes inspiration from the equal justice and equal opportunity values of Article 39A of the Constitution of India [1]. Several of the Project's earlier studies have led research into the neglected areas of crucial constitutional issues concerning the criminal justice system. The present report, too, does pioneering work, focussing on a seldom examined arena, the magistrates' courts, to "ask whether the implication for liberty and safety in custody—as envisioned in Article 21 and 22(2) of the Indian Constitution [1]—is fully realised" (p 7). This is where an accused person is to be produced by the police within 24 hours of arrest, ie "first production", when the magistrate is required "to scrutinise the grounds and legality of arrest, assess the availability of quality legal representation, consider the safety of the accused in custody, and make a determination on bail or further detention" (p 4). The assurance of fulfilment of these Constitutional protections can go a long way towards safeguarding the physical and mental health of the detainee, which is most under threat at this stage.

The study provides valuable insights, using an ethnographic research method, primarily that of observation of the activity and prime actors in the magistrates' courts. An Appendix to the report contains the documents that guided the researchers as to what to observe and what precautions to take to ensure their own safety. The Guiding Questions emphasise that "the focus of the study will be on the intangible elements of the courtroom experience and access to justice — including... the dynamics in court between different state and semi-state actors". Medical doctors are seen to be among the semi-state actors — "who are formally independent but have close association with the state in their everyday functioning" (Appendix, p iii).

Chapters II and III analyse the use of the Arrest Memo and Medico Legal Certificate (MLC) respectively, documents first mandated by the 1996 Supreme Court's judgment in *DK Basu v State of West Bengal* [2: para 35] to aid the remand court in ensuring compliance by the police and other detaining authorities with statutory provisions and constitutional guarantees, during first production. The MLC flows from the judgment's attempt to provide an independent check on custodial violence by prescribing that "The arrestee should be subjected to medical examination by trained doctor every 48 hours during his detention in custody". Under a 2009 statutory requirement, the MLC should mention "therein any injuries or marks of violence upon the person arrested, and the approximate time when such injuries or marks may have been inflicted" under Section 54(2), Code of Criminal Procedure [3] (July 2024 onwards: Section 53(2), Bharatiya Nagarik Suraksha Sanhita (BNSS)).

Chapter IV looks at the overall role of the Magistrate and the court dynamics between various other players — court staff, prosecution and defence lawyers, police, accused and their families — and their relative importance within the system. Chapter V is an interesting account of the researchers' experiences of fieldwork. It warrants a detailed reading. These stories paint an intimate picture and provide the researchers' perceptions of the functioning of the courts. Their narrations of the humdrum and the exciting, of ordeals and adventures, not only provide insights to the average reader, but should also prove useful to future researchers. The report ends with a set of Key Conclusions.

Scope and methodology: some questions

The scope of the study raises certain questions. Firstly, it is not clear why a study on constitutional protections during first production and remand should choose to focus only on Articles 21 and 22(2), and exclude Article 20(3) and 22(1) [1]. The reason for this omission is not explained in the report, and is further reflected in the lack of observations on the right of the accused not to be compelled to bear witness against themselves, to be informed of the grounds of arrest, and to have the legal defence of their choice.

Another question arises regarding the exclusion of special courts under the National Investigation Agency (NIA) Act [4], and some other special laws, from the coverage of the study. These are also courts of first production and remand for the accused under such Acts. The first two experiences of first production with which the report opens, to "suggest the many ways in which production hearings are unable to address custodial violence and protect the right of the accused to life, liberty, dignity, and safety" (pp 3-4), refer to

the 2001 Parliament Attack Case and the 2007 Mecca Masjid Case, both cases of the type not covered in the study. As there is little procedural or substantive difference in the law governing first production and remand in special courts and magistrates' courts, we feel an ethnographic study covering both could have shed much light on the efforts and effectiveness of presiding officers at both levels of the judicial hierarchy in safeguarding constitutional protections. Observations on the interactions of special court judges with personnel of special agencies like the NIA, the Enforcement Directorate (ED) and others, and the impact of those interactions on ensuring the observance of constitutional safeguards would have been useful.

A sharper focus on the role of the doctor, often the first and even the only person, outside the arresting authority, to have independent access to the arrestee before first production in court, would have been helpful. The medical officer has been assigned by law the responsibility of a sentinel protecting the right to life and to freedom from physical and mental torture. The guiding questions for the researchers' courtroom observations could have directed them towards seeing if there had been satisfactory fulfilment of the doctor's statutory obligations under Section 54 CrPC [3] (now Section 53, BNSS), to record injuries and to furnish a copy of the MLC to the arrestee or nominee. The report mentions that court spaces were unfamiliar for most of the researchers (p 13). Some level of familiarity with other spaces, too, where the theme of the study is being played out — police station, lock-up, government hospital casualty ward — is important for understanding the happenings in the court and the documents seen there. An ethnographer can acquire such familiarity during research, when the process is long enough. But with the given shorter time frame, an alternative could have been to include members in the research team who have prior familiarity with the target spaces — like the *basti* or prison NGO worker, the "social worker" in a slum who regularly visits police stations, or the former prisoner who has been a jail-house lawyer. The inclusion of trained researchers is important. However, considering the short time and the difficulty of finding both training and familiarity in the same person, a better option could have been a mix of both, especially as the research was conducted in pairs. All this however is not to take away from the quality of the work produced by the research team within three months, despite these challenges.

Some weaknesses

Naib court's role

A major error in the report is in the analysis of the "naib court", a key player in the first production and remand proceedings. A blurb on page 30 identifies him as a police officer. However, the text of the report, which mentions "naib court" over sixty times, places him within the judicial structure, referring to him variously as a court official (p 47), court administrative staff (p 160), court staff (pp 15, 112, 123), and even equating him with the Reader, who is a court official (p 108).

The reason for the misclassification, could be that it was the naib courts themselves, either explicitly, or implicitly, in the way the magistrates related to them, who gave the impression of being part of the court staff, ie, the judiciary, rather than the prosecution.

This misconception results in misinterpretations. The naib court, whose role is variously described as critical, significant, crucial, overwhelming and prominent (pp 109-112), has been observed doing gate-keeping, shaping courtroom perceptions, influencing courtroom proceedings (p 111), orchestrating extension of remand (p 109), and even steamrolling an accused to accept the formality of a legal aid lawyer, despite his having engaged a private lawyer (p111). But all these observations seem to have been made with the understanding that the naib court is a member of the court staff, appointed by the judiciary, rather than a policeman, appointed by the Police Commissioner and allotted to the prosecutor's office. The section on Courtroom Dynamics (p 112) concludes that the naib court is essential to the functioning of the court, but appears to be playing a greater role in remand and production matters than procedurally mandated by law. Actually, no law gives any role, lesser or greater, to the police to mediate and decide remand and production matters. Similarly, Chapter IV ends (p 123) by seeing the naib court's significant role arising from a need for efficiency, with overworked magistrates relying "on court staff a little more" and overlooking their responsibility to ascertain police compliance with due process. In fact, the magistrate relying on the naib court is handing over ascertainment of police compliance to the police themselves; and the unusually important role of the naib court policeman in first production and remand is the abdication of constitutional due process. The naib court is not something/someone essential to the court; from the researcher's observations, it is rather a device that subverts the judicial process. The more the magistrates rely on the naib court, the more they compromise the independence of the judiciary. This had even led, in 2017[5], to the Chief Justice, Delhi High Court, getting the impression of an unhealthy "nexus" and directing the Delhi Police Commissioner that "a naib court may not be posted in the same court/same court complex and with the same judicial officer for more than one tenure."

Compromised legal aid system

Similarly, the report's key conclusion on the role of the legal aid counsel (LAC) remand lawyer points only to their absence from court. It ignores the structural anomalies apparent from researchers' observations of the LAC acquiescing to the naib court denying an accused their constitutional right to legal representation of their choice (p 111); or of a magistrate instructing the naib court to remove

the LAC's presence from the record (p 174: endnote 14). It not only shows the LAC to be just a fig-leaf for non-implementation of the fundamental right under Article 22(1), but also reveals a legal aid system so subordinate to the prosecution that the attendance of the defence lawyer was required to be recorded by the prosecution's police representative. The report is unable to see this because it sees the naib court as court staff.

Grounds for arrest

Another guarantee that the Supreme Court has upheld is that if the accused is not informed in writing of the grounds for arrest in accordance with the mandate of Article 22(1), the arrest is rendered illegal, entitling the accused to be released [6]. As mentioned earlier, the study has neglected this constitutional provision. Neither the guiding questions for researchers, nor their observations, find any mention of compliance with this provision.

The doctor during first production

As pointed out earlier, a major player not covered in the report, but who is germane to constitutional protections from torture and custodial violence, is the doctor. Despite physical absence from the court precincts, the doctor looms large over the proceedings, particularly through the medium of the MLC. The researchers saw a case where injuries were plainly visible, but AIIMS had issued an MLC certifying there were no fresh injuries (p 109). Yet again, in the MLC of Safdarjung Hospital in the case of SAR Geelani, the doctor, after confessing to being under pressure, recorded no marks or injuries (p 3). In another case, the accused complained that the doctor looked at him from a distance and gave an 'all okay' MLC (p 118); and in yet another case, the defence lawyer complained of torture of his client for four days, but there was no mention of this in the MLC (p 94). On the other hand, the researchers do not seem to have come across any example of a doctor being proactive in bringing an incident of torture to light.

This silence and even connivance of the doctors involved is mirrored in other reports on the subject. The recently released *Status of Policing in India Report 2025* on 'Police Torture and (Un)Accountability' [7] tells of many doctors declining to be interviewed for the study, despite an assurance of anonymity [7: p 138]. A doctor who was interviewed shared her view that, "A lot of doctors feel those who are classified as criminals deserve to be beaten, or tortured, or killed. I think that is the larger culture even among healthcare providers" [7: p 140]. It could be this support for torture among medical professionals that was finding its way into the MLCs that reached the Magistrates' Courts. A conclusive finding however would have to await further investigation.

Future directions

This pioneering work has, with in-depth observation and analysis, exposed several dark aspects of the working of the Magistrate Courts. Though its section on Key Conclusions avoids giving specific recommendations, it ends with some pointers for "future directions", which merit consideration. The areas that the authors of the report feel require attention are: further research on district courts, implementation of statutory safeguards, relief for violations of safeguards, and development of jurisprudence regarding what amounts to a violation of safeguards on arrest and remand, and the consequences of the same. We suggest another space meriting examination — the government clinics and hospital casualty wards where the accused is first taken from the police lock-up, even before being produced before the magistrate.

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