

DISCUSSION

Continuing the conversations on protection of constitutional rights during first production and remand in Magistrate Courts

JINEE LOKANEETA, ZEBA SIKORA

Abstract

Here, we respond to some of the thoughtful and critical concerns raised by the reviewers as our attempt to continue the conversations on the protection of constitutional rights during first production and remand in Magistrate Courts in Delhi. In particular, we respond to the comments about the role of the naib court, formally a part of the police and yet, as our observations show, functioning as a part of the administrative court machinery. We also focus on the reviewers' emphasis on semi state actors such as the doctors whose role during the pretrial process has rarely been analysed despite its being crucial. We hope that our report and conversations such as these will generate more attention towards this constitutionally and statutorily required safeguard with implications for the life, liberty, safety and dignity of those in custody.

Keywords: Artefacts, arrest memos, constitutional courts, first production, magistrates, medico legal certificate, remand

We thank the reviewers, Vernon Gonsalves and Arun Ferreira, for their thoughtful and thorough engagement [1] with our 2024 report titled *Magistrates & Constitutional Protections: An ethnographic study of first production and remand in Delhi courts* [2]. We appreciate their acknowledgement that this report 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...is fully realised...'" [1]. The three-month long study was conducted across different magistrate courts spanning all the district courts of Delhi. Here, we respond to some of the reviewers' comments in an effort to both clarify some of the concerns they have brought up, as well as think collectively about the path forward in ensuring that the focus on this phase of a criminal proceeding continues. Ultimately, our effort is to acknowledge the challenges of conducting the study first time around; where, as the introduction of our report acknowledges, even identifying the first production and remand cases was a challenging task — given their absence from the cause list of the magistrate courts. Similarly, the tension between the formal role of the courts and the different actors versus the actual practice observed ethnographically forms the backbone of the study [3].

The review raises some questions about the characterisation of naib courts in the report, and suggests that the report misrepresents them as part of the "judicial structure". There is no dispute about their formal identity as police officers and

their formal role acting as a link between the police stations and courts. Our courtroom observations, however, allowed us to focus on courtroom dynamics and the interaction between key actors beyond their formal roles. And what was striking here, and what the report draws attention to, was the prominent administrative role of naib courts inside the courtroom. Unlike the other very visible police figures in remand proceedings — investigating officers from the police station and escort officers — the naib courts had a distinctly administrative function and were deeply embedded in the administrative machinery inside the courtroom. This is also suggested in the report on the Delhi High Court directive (2017) noted by the reviewers, that points to an impression of a nexus between naib courts and judicial officers [4]. Our research observations did not always clarify the defined boundaries of the role of the naib courts and who they were accountable to, and further study is needed in this regard.

However, what became clear through our research was that the naib court was a key actor mediating the experience of the accused at first production and remand. Through the report, we have tried to draw attention to this routine feature of magistrate courts and highlighted some of its implications on constitutional rights during remand. The reviewers' close engagement with the text and comments urge us to extend our argument and consider the implications of the naib court's involvement as police subversion of a judicial process — an important direction for further examination of this issue this issue. The report does highlight, however, that the routine involvement of the naib court and the undermining of accused persons' rights go unnoticed, because first production and remand proceedings are not prioritised in the everyday functioning of magistrate courts. The main focus of our study is to point out that currently the first production and remand process, despite being a constitutional requirement, are treated as routine bureaucratic processes.

The systematic undermining of remand processes in the everyday functioning of magistrate courts is perhaps why other more striking and visible forms of police intervention in these proceedings also continue unquestioned, with serious implications for the safety and wellbeing of the accused produced from (police or judicial) custody. The report draws attention to the distinct roles that the different police personnel play in this process. The production hearing is intended to be a crucial opportunity for the accused person to inform a judicial authority about their experience

in police or judicial custody, without fear of reprisal. The report raises the question: how can the accused be expected to speak freely about custodial violence, or even truthfully respond to the magistrate's inquiry about torture in custody, in the face of such overwhelming police presence? The lack of physical separation between the police and the accused at this stage of the legal process has never been the subject of jurisprudence, and continues to be a major challenge.

The other area that we would like to focus on is the suggestion of the reviewers on the semi-state actors — namely the doctors. We call them semi-state actors, rather than non-state or state actors, since they are in this ambiguous position of being caught between their ethical obligation to their profession as doctors and the pressure to conform to the police requirements. Dr Amar Jesani has often raised the issue of the role of doctors in the context of custodial violence, something he and one of the authors of the report have previously written about [5]. Surveys with doctors in 1995 [5], and the latest *State of Policing Report 2025* (that the reviewers quote), have suggested a widespread acceptance of custodial violence, either as a necessary aspect of policing or due to police pressure [6].

Yet, even when the focus has been on the role of doctors, and their part in enabling custodial violence, the emphasis, in previous work (including our own), has often been on the role of doctors in autopsies in custodial death cases that even the National Human Rights Commission has highlighted. Rarely has the emphasis been on the crucial document at the heart of this process at the first production level — namely the Medico Legal Certificate (MLC). As the report points out, even the limited snapshot of observing the engagement of the magistrate with the MLC suggests that the MLC could be the source of much revelation if only there was a more than perfunctory glance at the document itself. Probing more closely into the cause of the visible injuries, rather than accepting the oft mentioned reasons — public beating, accidents, old injuries, for example, would also go a long way in ensuring some accountability from the police and doctors. Rather than just accepting the brief explanations provided by the police or escort officers, the doctors could be summoned into the courts in some cases. That may establish a direct relationship of the doctors with this process of first production and remand, and enable them to escape the pressure created when the main relationship with the court is only through the police. Undoubtedly, as a recent essay by one of the authors of the report suggests, the role of the doctors in ensuring safety in custody is crucial and needs much more intervention by the courts [7]. The medical checklist created by Commonwealth Human Rights Initiative (CHRI) and Centre for Enquiry into Health and Allied Themes (CEHAT) especially for the MLC, that actually acknowledges the close relationship between nature of injuries and custodial violence, can be a major intervention in this regard, alongside the reviewers' suggestion to create conditions for an independent evaluation by the doctors [8]. As Amar Jesani has put in another context, "normally when

doctor-patient interaction takes place, the patient is in fetters and a police person is guarding the detainee," a structural issue that could be addressed by the magistrates [9].

Questions of access did determine some of the lack of focus on the so-called exceptional cases, the capturing of the ecosystem — including the police station, doctors/hospitals — and one would imagine even interviews with the detained and prisoners themselves. Yet, the focus of this particular study was just observing in a public setting the performance of magistrates in the protection of constitutional rights through the engagement of the two artefacts, the arrest memo and the MLC. To that extent, the focus of the report was on the role of magistrates themselves as constitutional courts of the first order. Yet as the reviewers rightly point out, the question can only be more fully answered if other actors associated with the process or, to put it differently, those creating the artefacts could actually be interviewed in all the thousands of cases our team witnessed. In that sense, this particular ethnography focused on a snapshot of the process that occurs in the few minutes that the accused gets in the magistrate court.

Finally, we do hope that this conversation will lead to even more focus on the first production and remand phase of the criminal justice system. After all, the recent acquittal of the 12 convicted in the Mumbai terror blasts case [10] is a stark reminder of the role that the magistrates, doctors, lawyers alongside the police and other law enforcement agencies may play in perpetuating not only the violation of the right to life and liberty but also the right to safety and dignity that is at the heart of our report. We are deeply grateful to the reviewers for enabling us to take this conversation forward.

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