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Right to Defence of an Accused – Scope and Ambit of the Right

Sunny Kumar*

Abstract

This paper examines the constitutional and statutory foundations of the right to legal representation in India, tracing its evolution from the Constituent Assembly debates to the contemporary criminal justice framework under the Bharatiya Nagarik Suraksha Sanhita (BNSS). While Articles 21, 22(1), and 39-A collectively guarantee access to counsel and free legal aid, judicial interpretation has created ambiguity regarding when this right begins—particularly in the pre-arrest and investigative stages. Through an analysis of landmark decisions such as *Nandini Satpathy*, *Hussainara Khatoon*, *Ranchod Mathur Wasawa* and the *Kasab* case, the paper highlights the tension between constitutional protections and restrictive judicial stances that limit the presence of lawyers during police interrogation. Using the recent Allahbadia controversy as a case study, it argues that excluding legal assistance at police stations exacerbates power imbalances, risks coercive practices, and undermines procedural fairness. The paper further discusses the role and shortcomings of legal aid institutions in ensuring meaningful access to justice, especially for economically disadvantaged accused persons. Ultimately, it contends that safeguarding the right to defence requires extending legal consultation beyond formal arrest, strengthening institutional delivery of legal aid, and adopting reforms that balance investigative efficacy with constitutional guarantees.

Keywords - Right to Legal Representation; BNSS 2023; Police Interrogation; Free Legal Aid; Criminal Justice System.

I. INTRODUCTION

The constitutional framework of India acknowledges the critical function that an advocate plays in the criminal justice system. According to 'Article 22' of the Indian Constitution[1], no person who has been arrested is *"denied the right to consult and to be defended by a legal practitioner of his choice."* Any individual who is arrested and questioned by the police "shall be" entitled to meet an advocate of his choice during interrogation, though not throughout interrogation. The same concept was inculcated under 'section 41-D' of the *'Code of Criminal Procedure'*[2] *("Cr.P.C").* Though Cr.P.C has now been repelled by '*Bharatiya Nagarik Suraksha Sanhita, 2023'*[3], ("BNSS") even under this new Sanhita the same concept has been instituted Under section 38 which reads as *"When any person is arrested and interrogated by the police, he shall be entitled to meet an advocate of his choice during interrogation, though not throughout*

* Public Prosecutor, Govt. of Bihar.

[1] INDIA CONST. art. 22

[2] Code of Criminal Procedure, 1973, § 41-D, No. 2, Acts of Parliament, 1974 (India).

[3] Bharatiya Nagarik Suraksha Sanhita, 2023, No. 45, Acts of Parliament, 2023 (India).

interrogation."[4] Furthermore, Section 340 of the 'BNSS' (earlier Section 303 Cr.P.C) affirms that anyone who is charged with a crime in a criminal court has the right to be "defended by an advocate of his choice". From the foregoing, it is clear that the Indian criminal justice system acknowledges the value of legal counsel in guaranteeing an accused person a fair investigation and trial. It is true that when an "arrested" individual is being questioned while in detention, a literal interpretation of these clauses- namely, 'Article 22' of the Constitution and 'Section 38' of the BNSS- come into play. However, 'Section 340' of the BNSS addresses a situation in which an individual is already in a criminal court. Therefore, it appears that the role of a lawyer for a person facing legal proceedings who has not yet been arrested by the police is not recognized by statute.

Recently, a controversy involving several YouTube personalities, including influencers and comedians, broke out in India. During an appearance on a YouTube show, Ranveer Allahbadia, a well-known YouTube personality and podcast host, allegedly made offensive and profane remarks which resulted in multiple FIRs. In this particular case, the Supreme Court has once again raised the question of legal representation. In this case, a lawyer accompanied the accused in the police station. Considering this, the court asked *"Why did the lawyer go? Under which law? Just because you can pay and lawyers will start rendering these services? This is insulting the (lawyers') dress also."*[5] Finally, while passing an order granting protection from arrest, the Court imposed a condition that Allahbadia *"will not be accompanied by any counsel inside the police station during the course of investigation"*[6].

This paper examines the crucial issue of when the right to legal advice and consultation begins. It explores whether this right is confined to the post-arrest stage or extends to the pre-arrest and investigative phases. Drawing from constitutional provisions, statutory mandates, and judicial interpretations, it analyses landmark cases such as Nandini Satpathy[7] and Kasab[8] to understand the scope of Articles 21 and 22. The paper questions whether the right to legal representation applies only to arrested individuals or also to those under suspicion or inquiry. It argues that limiting legal access to the post-arrest stage threatens procedural fairness and risks misuse of police powers. Through Hussainara Khatoon[9]and Ranchod[10], the paper stresses that economic disadvantage should not bar to justice. Article 21, read with Article 39-A, obligates the State to provide legal aid, incorporated in Section 304 Cr.P.C. (now Section 341 BNSS). Denial of such aid violates fundamental rights and vitiates trials. Using the Kasab case, it highlights that legal representation is inalienable, irrespective of crime.

This paper is divided into seven parts, including the Introduction. The second section traces this right in constituent Assembly debates. The third section addresses both the right to choose a legal practitioner and free legal aid. Followed by the fourth section which analyzes the applicability of this right in serious crimes like terrorism. The fifth examines whether lawyers can accompany accused persons during police interrogation. Second last section explores the right to legal

[4] Ibid § 38.

[5] Priya Pareek, Why Ranveer Allahbadia, Samay Raina Have Got Everybody Enraged, INDIA TODAY (Feb. 11, 2025), https://www.indiatoday.in

[6] Id.

[7] Nandini Satpathy v. Dani 1978 INSC 82

[8] Mohd. Ajmal Amir Kasab v. State of Maharashtra, 2012 INSC 357.

[9] Hussainara Khatoon v. State Of Bihar, 1979 INSC 35

[10] Ranchod Mathur Wasawa vs State Of Gujarat MANU/SC/0442/1973

defence beyond formal arrest or custody, and finally the last section will deal with the conclusion and suggestions.

II. CONSTITUENT ASSEMBLY DEBATE

It is said that every development can be traced in history, and indeed this right finds its footprint during the framing of the constitution itself. In this section we will briefly see how this right was introduced in the constitution, and what was argued before adopting this right. The Constituent Assembly witnessed intense debate on the right to representation or defence, especially in the context of preventive detention. The original draft Article 15A[11] (later Article 22) granted safeguards under ordinary criminal law, such as the 'right to be informed of the grounds of arrest', to be 'produced before a magistrate' within 24 hours, and not to be detained beyond that period without judicial sanction. However, these protections were explicitly denied to those under preventive detention. Clause 3(b)[12] excluded such detainees from these rights, effectively removing access to timely legal remedies, representation, or even knowledge of the grounds of detention. This led to sharp criticism from several members. Shri M. Ananthasayanam Ayyangar argued for an express constitutional right to consult and be defended by a legal practitioner, recalling how in the 1942 movement, accused persons were denied defence and cross-examination, violating natural justice[13]. Dr. P.K. Sen supported at least the right to be informed of detention grounds and to make representations.[14] Pandit Hirday Nath emphasised that provincial security laws already required this and called for periodic reviews by the Advisory Board and limits on detention duration[15]. Shri Mahavir Tyagi opposed preventive detention altogether, calling its inclusion in a chapter on fundamental rights a contradiction, warning it could be used by future governments against political dissenters.[16] In response, Dr. B.R. Ambedkar defended the provision as a restraint on legislative power and accepted some suggestions. He added the right to be *"defended by a legal practitioner of his choice"* and introduced a clause (now Article 22(5)) mandating that a detenu be informed of grounds and allowed to make a representation[11]. However, no right to legal counsel during Advisory Board hearings or trial-like safeguards was included. Ultimately, the Constitution offered full defence rights in ordinary arrests, but only limited safeguards in preventive detention, reflecting a compromise between individual liberty and national security.[17]

In the next section, we will see how this right of choosing a legal practitioner is dealt in the constitution and other statutes.

III. RIGHT OF CHOOSING A LEGAL PRACTITIONER

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[11] Constituent Assembly Debates, Vol. 9, 15 Sep. 1949, available at https://www.constitutionofindia.net/debates/15-sep-1949/
[12] Id.
[13] Dr. Babasaheb Ambedkar, Writings and Speeches, Vol. 15 (Ministry of External Affairs, Government of India, available at https://www.mea.gov.in/Images/CPV/Volume15.pdf.
[14] Constituent Assembly Debates, Vol. 9, 15 Sep. 1949, available at https://www.constitutionofindia.net/debates/15-sep-1949/
[15] C.K. Thakker (rev.), Ratanlal & Dhirajlal's The Code of Criminal Procedure 577 (17th ed. 2005).
[16] Id.
[17] Id.

In this section, we will examine how Article 22(1) and Section 340 of BNSS (Earlier 303) reinforce the principle of natural justice within the adversarial legal system. Subsequently, we will explore how this right is further strengthened in cases of financial incapacity, where the Constitution and judicial pronouncements mandate the State's duty to provide free legal aid to ensure fairness and dignity for all, regardless of economic status. This section has been divided into two parts, the first will focus on the right to choose a legal practitioner, while the second part will address the right to free legal aid in cases of financial incapacity.

A. *Right of Accused to Consult a Legal Practitioner of His Choice*

Article 22(1) of the Indian Constitution states that no one who is arrested may be refused the opportunity to consult with and be represented by the lawyer of his choice. One of the features of the adversarial system used in India is the ability to defend oneself by a lawyer of one's choosing[18]; without this, the goals of natural justice will be defeated[19]. A fair trial is contingent upon the accused's fundamental right to choose own counsel. According to section 340 of the BNSS, which has replaced Section 303 of the Code, ratifies this constitutional clause, *"any person accused of an offence before a criminal Court, or against whom proceedings are instituted, may of right be defended by pleader of his choice."*[20] This right begins at the time of arrest[21], and the court has an obligation to provide the defense attorney with a fair and reasonable hearing; any infraction of this rule voids the trial[22]. The foundation of the right to have one's own attorney defend them was established in the famous *Powell v. Alabama*[23] case, in which the US Supreme Court ruled that the right to be heard would be squandered if it did not recognize the right to legal representation. A person who lacks the services of a skilled lawyer runs the risk of being placed on trial without a sufficient charge and convicted based on inadequate or irrelevant evidence because even clever people frequently struggle to understand the complexities of legal procedure. Therefore, it is crucial for justice to be achieved so that everyone has the opportunity to speak with a qualified legal representative. In addition to discussing the right to have a pleader defends him; this part suggests that if he is being held in custody, he should have a fair chance to speak with his lawyer in order to discuss his defense[24]. The accused may be allowed to consult the attorney during the course of the investigation, but not throughout the investigation. It would be unfair to have a police officer present throughout the lawyer's questioning, even though there is no explicit prohibition against them doing so[25].

Section 132 (1) & (2) of the 'Bharatiya Sakshya Adhiniyam', 2023[26] ("BSA"), which replaced Section 126 of the 'Indian Evidence Act, 1872'[21], states that communications between the accused and his attorney are confidential and privileged, making them inadmissible in court. It is suggested that appropriate changes be made to the relevant legislation to fully implement this clause, thereby prohibiting the presence of a police officer at the location of the accused's and

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[18] Gautam Bhatia, On the Ethics of Representation in an Adversarial Legal System (Oct. 21, 2018), Constitutional Law and Philosophy (blog), IndConLawPhil, https://indconlawphil.wordpress.com/2018/10/21/on-the-ethics-of-representation-in-an-adverserial-legal-system/ (last visited Aug. 28, 2025).

[19] Id.

[20] Code of Criminal Procedure, 1973, § 303, No. 2, Acts of Parliament, 1974 (India).

[21] Moti Bai v. State, MANU/RH/0040/1954

[22] Muthu Karuppa Seervai v. Emperor, MANU/TN/0154/1959

[23] Powell v. Alabama, 287 U.S. 45 (1932).

[24] Kailash Nath v. Emperor, MANU/ALL/0043/1947

[25] D. K. Basu v. State of West Bengal. MANU/SC/0157/1997 .

[26] Bharatiya Sakshya Adhiniyam, 2023, § 132(1) & (2), No. 47, Acts of Parliament, 2023 (India).

his attorney's questionnaire. Though even in the new Adhiniyam the legislation missed to incorporate these changes.

B. In case of financial constraints.

We all belong to a society that is recognized to include a wide range of individuals with varying levels of financial security. In most cases, those with money are able to hire the lawyer of their choice, but what about the poor? Justice would never be served in the truest sense if the state did not provide an attorney to the accused who could not afford one. This law or system was initially established in America, but it was gradually adopted in our nation as well after certain events, such as Maneka Gandhi[27]. Before the Maneka[28], the court in Hussainara Khatoon[29] provided the same rules that no one should be denied this privilege simply because they are not financially stable. They are equally entitled to have a lawyer or legal professional present and defend them. The poor would be more susceptible to the unfairness that already exists in many parts of our nation if they were denied adequate legal aid or a lawyer due to their financial instability. This scenario is extremely difficult to envision. Therefore, it should be the state's responsibility to ensure that all accused parties, regardless of their financial situation, have access to competent attorneys. Proper legal counsel should not be a privilege reserved for the rich.

The right to free legal aid at the State's expense is implicitly guaranteed by Article 21 of the Constitution in cases when the accused is impoverished and unable to pay for legal representation. The insertion of this constitutional right in the Code under Section 304 (now under Section 341 of Sanhita) has given it practical implications. A poor accused person may petition for this right under that section in order to have his right fulfilled. But just because he didn't apply for it[30] doesn't mean it can be refused.

As soon as the accused is brought before the magistrate for the first time in compliance with Section 58 of the Sanhita, (earlier Section 57 of the Code) the entitlement to free legal aid begins. According to the guidelines established by the High Court, the Sessions Court will allocate the accused to this pleader, who would then be compensated by the State Government. In the eloquent case of *Ranchod Mathur Wasawa v. State of Gujarat[31],* speaking for the bench Justice Krishna Iyer stated that the Court should make sure that the pleaders it appoints are qualified to handle complex cases and that the practice of selecting attorneys should not be used as a favoritism tactic toward new members of the bar. He continued by saying that in order to assist the cause of justice, the attorney so selected should be allowed enough time and space to prepare for his defense[32]. The accused who wants free legal aid must, however, demonstrate his financial situation; he cannot take advantage of the provision if he has enough money to hire an attorney on his own. According to the ruling in *Ashok Kumar*[33], the accused's claim of destitute would be refuted by the fact that he has already hired legal counsel. The failure to offer free legal aid would vitiate the trial and result in the conviction and sentence being set aside[34] unless specifically refused with a valid and justified explanation. However, if the judge is convinced that the guilty

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[27] Maneka Gandhi vs Union Of India 1978 INSC 16
[28] Id.
[29] Hussainara Khatoon v. State Of Bihar, 1979 INSC 35
[30] Suk Das v. Union Territory of Arunachal Pradesh, 1986 INSC 31
[31] Ranchod Mathur Wasawa vs State Of Gujarat MANU/SC/0442/1973
[32] See also Hussainara Khatoon v. State of Bihar, MANU/SC/0058/1979
[33] Ashok Kumar v. State of Rajasthan MANU/RJ/0116/1995
[34] Kailash Nath v. Emperor, MANU/ALL/0043/1947

plea was sincere and voluntary, the trial won't be vitiated even if the accused chose to enter a guilty plea without using the free legal aid offered by the Legal Aid Scheme.[35] As intended by our Constitution's founding fathers, the 'Code of Criminal Procedure', which has now been repelled by 'BNSS' in the year 2023, grants the accused a set of just and equitable rights that enable him to preserve his fundamental human dignity. Numerous court rulings that have been rendered in recent years that are in accordance with the majority of established international standards have further strengthened these rights.

C. Role of the Legal Services Authorities

The Legal Services Authorities Act[36], establishes a statutory framework designed to give effect to Article 39-A of the Constitution by ensuring free and competent legal services for those who cannot afford them. Through three-tier architecture- National, State and District Legal Services Authorities- together with taluk and village level committees, the statutory scheme aims to translate constitutional promise into institutional practice. The Authorities perform a range of functions that are directly relevant to the accused's right to counsel and to pre-trial fairness: organising Lok Adalats and legal-aid clinics, empanelling panel lawyers, conducting legal campaigns, and operating targeted schemes for early access to justice at police stations, prisons and courts.

Statutorily defined categories of beneficiaries- persons in custody, children, women, Scheduled Castes and Scheduled Tribes, victims of trafficking, the mentally ill and those below prescribed income thresholds make the Legal Services Authorities an obvious vehicle for protecting the right to counsel under Articles 21 and 22. Beyond mere entitlement, the Authorities have developed operational measures - remand/duty lawyer schemes, rosters for station duty advocates, and prison-legal aid clinic protocols- that are expressly designed to secure legal assistance at the earliest stage of contact with the criminal justice system. These operational schemes seek to reduce the temporal gap between arrest and access to advice, thereby mitigating risks of coercion, uninformed waiver of rights, and unfair custodial interrogation.

Legally, the Authorities therefore perform three complementary roles. First, they provide preventive and remedial legal aid by ensuring that persons in custody are informed about, and given access to, a lawyer. Second, they are responsible for capacity-building and quality control through empanelment norms, training modules and mentoring structures for panel counsel. Third, they act as an access infrastructure by embedding legal aid within communities, law schools and correctional institutions. Notwithstanding this robust architecture, significant implementation gaps persist. Coverage of police stations remains uneven, awareness of duty-lawyer rosters is limited, and systemic problems such as delayed payments, ad hoc empanelment practices and weak monitoring undermine the Authorities' capacity to secure meaningful early access to counsel. Strengthening statutory and administrative linkages by mandating display of remand lawyer rosters at police stations, incorporating duty-lawyer notifications into arrest procedures, ring-fencing funding for district legal aid and instituting enforceable timelines for stipend disbursement- would help to operationalise the constitutional promise in a concrete and administrable manner.

[35] Tyron Nazarath v. State of Maharashtra, MANU/MH/0160/1989

[36] The Legal Services Authorities Act, No. 39 of 1987, India Code (1987).

i. Quality of legal-aid lawyers: problems, judicial expectations and reform measures

The Act's promise is not solely quantitative; it envisages *competent* legal services. The judiciary has reiterated that the right to legal aid must be effective, warning that indigence cannot justify inferior representation[37]. Yet empirical and administrative evidence points to recurring deficiencies in the quality of legal aid[38]. Low per-capita spending, delayed and inadequate remuneration, uneven empanelment standards, insufficient training and the absence of systematic mentoring are common problems that translate into weak client counselling, limited investigation, poor use of procedural remedies and a general inability to handle complex criminal matters.

To bridge the gap between judicial expectations and ground realities, policy responses must be both structural and practical. Standardising empanelment criteria across districts with transparent scoring and public rosters would reduce arbitrariness in selection and improve accountability. Introducing a cadre of dedicated criminal legal-aid defence counsel on retainer or full-time terms for custody and serious offences would professionalise representation and improve continuity. Mandatory continuing legal education- focusing on forensic evidence, custody law, plea strategy and rights-based defence paired with formal mentoring arrangements would raise competency levels. Equally important are reforms to the remuneration regime: fixing minimum fees for custody, bail and trial work, and ensuring automated, time-bound payments would curb attrition and incentivise better performance.

Monitoring and accountability mechanisms should accompany these measures. Measurable performance indicators case preparation time, frequency of court appearances, use of interim applications and client satisfaction feedback together with an accessible grievance and disciplinary procedure for clients, would create incentives for quality improvement. Finally, leveraging law-school legal aid clinics for investigative support and deploying case-management technology for panel advocates can strengthen both capacity and efficiency. Taken together, these interventions- grounded in the Authorities' existing statutory remit can transform legal aid from a formal entitlement into an effective safeguard of the accused's right to a fair trial.

Now, the question arises whether all criminals should be granted the fundamental right of free legal help, regardless of the seriousness of their crimes, is another important topic to concentrate on. Now, let us look whether all accused are eligible for this right considering the seriousness of crime committed.

D. Seriousness of crime and right to legal representation.

By saying this, I am not disputing the accused's fundamental right; rather, the question is whether someone who has been charged with a serious crime and against whom there is adequate evidence should be granted the protection of the Constitution or not. With the backing of Kasab case, I will be analyzing this issue. Considering that all lawyers were given the opportunity to take up Kasab's case and that no one was willing to take it on, Kasab was nonetheless entitled to his inalienable right to defend himself in court.

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[37] Ashok v. State of Uttar Pradesh, Crim. App. No. 771 of 2024, 2024 LiveLaw (SC) 941.

[38] Mr. Shashi Kant, A Study of Legal Aid in Current Scenario, 45 J. Adv. Zoology 413 (2024).

The Supreme Court ruled that a detenu who is statutorily excluded from legal representation can still obtain representation through a friend under common law. Kasab had other choices for defending himself even if the Bombay Metropolitan Magistrate Court Bar Association's lawyers declined to take his case, and that does not imply that he would not be granted a fair trial in that matter. According to the ruling laid down in *Nandini Satpathy*[39], our nation's current legislation, as stated in Article 22(1) of the Constitution read with Article 39-A, mandates that anybody who is arrested or facing prosecution get free legal help and consultation. In State of M.P. v. Shobharam[40], the Supreme Court ruled that the State of Maharashtra has a legal duty to do so.[41] The provision of free legal aid to the accused at the State's expense is likewise covered by Section 304 of the 1973 Code of Criminal Procedure. Furthermore, a process cannot be considered just and fair[42] if it does not provide legal services to an accused individual who cannot afford a lawyer. This does not, however, obligate the attorney to take up any of the cases that are presented to him[43]. A lawyer is required by the Bar Council of India Rules, which were established under the Advocates Act, 1961[44], to accept any brief that is presented to him. However, he has the right to decline a specific brief if there are exceptional circumstances[45]. Even a lawyer who is compelled to take the lawsuit on his behalf would face criticism and exclusion because of the widespread rage and hatred sparked by the terrorist attacks. A lawyer who takes on the case of a terrorist like Kasab faces social, political, and professional repercussions. Members of the Shiv Sena and other political party activists have attacked the homes of lawyers who have come forward and attempted to use the judicial system to bring him to justice. Additionally, such actions harm the lawyer's reputation in the eyes of the public, leading to widespread demonstrations and negative sentiments that impact both his personal and professional lives. Thus, a fierce debate engulfed the entire country following the tragic terrorist assaults in Mumbai. Should these instances be allowed to be defended in court? Given the seriousness of his offense, do they have a right to legal assistance? Should they be hanged or put to death without a trial, as is the case in nations like China, Iran, Iraq, and others? Whether denying legal assistance will damage India's reputation as the largest democracy in the world, which is based on the ideas of equality and fairness. Is the death penalty all they deserve? Answers to these concerns, however, necessitate careful consideration of a number of factors, such as India's commitments under international law, the constitutional guarantees afforded to all citizens in this respect, human rights violations, and the distinction between an unfair society and a democracy.

Legally speaking, it is undeniable that cases like Ajmal Kasab should receive legal assistance; yet, given the ire of the general public and the populace, no one should dare jeopardize the integrity and security of the nation. Over the years, Indian statutes and the Supreme Court's and the High Courts' interpretations of them have made it clear that everyone accused of committing a serious crime must receive legal assistance, whether or not they request it. The 1948 'Universal

[39] Nandini Satpathy vs Dani 1978 INSC 82
[40] State Of Madhya Pradesh v. Shobharam 1966 INSC 110 .
[41] Madhav Hayawadanrao Hoskot vs State Of Maharashtra 1978 INSC 138
[42] Hussainara Khatoon v. State Of Bihar 1979 INSC 35
[43] The Advocates Act, No. 25 of 1961, India Code (1961).
[44] Id.
[45] Advocates Act, No. 25 of 1961, § 11, India Code (1961).

Declaration of Human Rights'[46], which India joined, upholds the presumption of innocent unless proven guilty in a court of law. The Indian Constitution guarantees the 'right to life'[47], which includes the right to legal assistance[48]. Equal justice and free legal aid are additionally mandated by Articles 22 and 39-A of the Constitution. The BNSS Section 340, and 341 (earlier section 303 and 304 of Code) discuss an accused person's entitlement to legal representation and the State's obligation to offer legal assistance. While the right to hire a lawyer to represent the accused is a procedural right that should be respected and treated separately, questions of guilt and innocence pertain to the trial's content.

IV. Access to Legal Counsel at the Police Station

Now, coming to the question especially in the context of Allahbadia case, which we have discussed earlier. In this section we will analyze the remark observed by the Supreme court. For the ready reference let us revisit the statement made by the court. The court observed that *"…Why did the lawyer go? Under which law? Just because you can pay and lawyers will start rendering these services? This is insulting the (lawyers') dress also….. will not be accompanied by any counsel inside the police station during the course of investigation"*[49]. In this context the questions arises whether the remark observed by the court stands in the eye of law or not? Whether an accused person can be accompanied by their lawyer to the police station or not? For answering all these questions, we will see the various cases of the supreme court itself where the access to legal counsel have been interpreted, and we will see whether this right is given to the accused at the police station or not.

Judicial Precedents

The right to access legal counsel and advice- especially during police investigation and interrogation- has undergone considerable interpretation and reinterpretation by the Indian judiciary. In *Nandini Satpathy v. P.L. Dani*[50], a three-judge bench of the Supreme Court broadened the scope of Article 20(3) of the Constitution, which protects against self-incrimination. The Court made it clear that this protection is not confined to courtrooms but extends to the investigation stage as well. It recognized that violations could occur through not just physical coercion but also mental pressure, intimidating atmosphere, prolonged questioning, and psychological manipulation- often common in police stations. It was in this context that the Court recognized the presence of a lawyer during interrogation as a critical safeguard to prevent abuse of rights.

However, this expansive understanding was substantially narrowed in *Poolpandi v. CCE*[51], where another three-judge bench, relying on an earlier five-judge ruling in *Ramesh Chandra Mehta v. State of West Bengal*[52], ruled that those interrogated under certain special statutes such

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[46] Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).
[47] India Const. art. 21.
[48] India Const. art. 39 A, See also Hussainara Khatoon v. State Of Bihar 1979 INSC 35, Madhav Hayawadanrao Hoskot vs State Of Maharashtra, 1978 INSC 138
[49] Supra note 5.
[50] Nandini Satpathy v. Dani 1978 INSC 82
[51] Poolpandi Etc. Etc v. Superintendent, Central Excise, 1992 INSC 159
[52] Romesh Chandra Mehta v. State Of West Bengal, 1968 INSC 255

as the Customs Act[53], or FERA[54], could not claim the protections under Article 20(3) as they were not formally "accused" and the officers were not "police officers" in the constitutional sense. As a result, the *Poolpandi* judgment drew a distinction between persons formally accused in criminal cases and those questioned under special laws.

The narrowing of *Nandini Satpathy* continued in *Jugal Kishore Samra*[55], where a two-judge bench equated regular criminal cases with special law cases under the NDPS Act, Customs Act, and FERA, all of which carried penal consequences. By not distinguishing between the two, the Court effectively sidelined the *Nandini Satpathy* precedent, without expressly overruling it.

Further clarity or restriction came in *Mohd. Ajmal Amir Kasab v. State of Maharashtra*[56], where the Supreme Court stated that the right to consult and be defended by a legal practitioner should not be interpreted as allowing the lawyer's presence during interrogation. The Court emphasised that in Indian legal practice, the lawyer's role is largely confined to court proceedings and acknowledged that no judgment had, in fact, fully endorsed the presence of a lawyer during police interrogation in line with *Nandini Satpathy*.

Taken together, these decisions show a clear trend: the expansive reading of the right to legal counsel during pre-trial stages under Article 20(3) and Article 22(1) as laid down in *Nandini Satpathy* has been significantly curtailed by later rulings. Today, the presence of a lawyer during investigation is almost entirely barred, with rare exceptions in cases involving risk of custodial violence or forced confession. Even then, courts have only allowed lawyers to be present at a visible (but not audible) distance during questioning—a far cry from full legal assistance.

I argue that this limitation arises from a misinterpretation of *Poolpandi* by the Court in *Samra* case. While *Poolpandi* only distinguished *Nandini Satpathy* based on the statutory context, it did not repudiate its principles. If the bench in *Samra* genuinely believed there was a conflict, it should have referred the matter to a larger bench for authoritative clarification. This remains an unresolved issue that may one day come up for constitutional adjudication.

Even if one accepts the Supreme Court's position in recent judgments such as in the *Allahbadia* case where it criticized the presence of a lawyer during investigation at police stations, it raises serious concerns about the resulting imbalance in the criminal justice system. Denying an accused person the right to be accompanied by a lawyer, especially at such a critical stage, disproportionately empowers investigating authorities and leaves the individual vulnerable to misuse of power.

There is a flawed assumption that Article 20(3)'s protection applies only after formal arrest. However, if a person is evidently under suspicion as was the case with Allahbadia, who faced multiple FIRs the denial of even basic consultation rights at the police station runs counter to the spirit and substance of Article 20(3). Lawyers are vital intermediaries between the accused and the police, ensuring that their clients' rights are not trampled upon during investigations. They help ensure procedural fairness and act as a check against coercion.

The central question here is not whether a lawyer must be present during actual questioning, but whether an accused person can be accompanied by their lawyer to the police station at all? Preventing this altogether strengthens the already dominant position of the investigative agency

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[53] The Customs Act, No. 52 of 1962, India Code (1962).

[54] The Foreign Exchange Regulation Act, No. 46 of 1973, India Code (1973) (repealed 1999).

[55] Senior Intelligence Officer vs Jugal Kishore Samra MANU/SC/0731/2011.

[56] Supra note 8.

and weakens any protective mechanisms afforded to the accused under the Criminal Procedure Code. By refusing to acknowledge this dynamic, the Supreme Court's recent stance overlooks the inherently intimidating nature of police stations for ordinary citizens. For many, the police represent not just state authority but also potential abuse of power. The presence of legal counsel offers a psychological and legal safeguard against the risk of unlawful practices a reality that courts must not ignore.

As this analysis shows, while post-arrest legal rights are constitutionally recognised, the artificial and arbitrary exclusion of these rights during the pre-arrest stage remains problematic. There is no rational justification for this distinction, especially when the consequences of pre-arrest interrogation may significantly impact the fairness of future proceedings. The primary objective of criminal investigation and trial is to uncover the truth, and to ensure this is done fairly, two rights must be balanced: the accused's right to a fair trial and the investigating authority's duty to conduct an effective investigation. By completely excluding lawyers from police stations during pre-arrest or investigative stages, the legal framework leans dangerously in favour of unregulated police authority. This imbalance must be corrected. A more balanced and nuanced approach—one that respects both constitutional rights and the practical needs of investigation—is essential to ensure that justice is not only done but seen to be done. The legal system must evolve to recognise the legitimate role of lawyers beyond the courtroom and uphold a fairer equilibrium between competing interests within the criminal justice system.

V. Right to defend

It is now evident that an arrested individual has the constitutional right to legal representation. However, one may ask what is he being defended against? We believe that the right to legal representation would encompass the ability to seek release from arrest through legal representation. But is the right to legal representation granted exclusively to those who are arrested only? This problem will be addressed in this section.

The right to legal representation also applies to defense in a trial that could lead to the loss of one's personal freedom. However, another question arises that will a person be allowed to be represented by a lawyer if he is being tried under a law that does not provide for an order that would result in the loss of his personal liberty? Such a question arises because the Constitution's Articles 21 and 22 only address protecting individual liberty. The wording of these articles and the context in which they appear in the Constitution make that very clear. In the case of State of M.P. v. Shobharam[57], the respondents were not allowed to be defended by a lawyer because section 63 of the act[58] under which the accused was tried bared the same. In another instance of State of Punjab v. Ajaib Singh[59] distinctly laid down that Article 22(1) was not applicable to persons held in custody or bail under an order of a court and, therefore, the point did not arise for decision. In both cases the trial was vitiated as the respondent's fundamental right to defend was infringed.

Article 22(1) provides two types of protection to those who have been arrested. The first is that a person who has been arrested cannot be held in custody without being informed of the reasons

[57] State Of Madhya Pradesh v. Shobharam, 1966 INSC 110

[58] The Madhya Bharat Panchayat Act, No. 58 of 1949.

[59] The State Of Punjab v. Ajaib Singh, 1952 INSC 57

for the arrest; the second is that he has the right to counsel and the representation of a lawyer of his choosing. The wording used here is very clear once more. When someone is arrested, they are said to "nor shall be denied the right to consult, and to be defended by, a legal practitioner of his choice." The exercise of the right as long as the arrest remains in effect is obviously included in the word "defended". The individual defends himself against his arrest and the charge against which he was arrested before being released on bail. He then must appear in person to answer the charge against which he is released on bond.

VI. CONCLUSION

The right to defence is the cornerstone of a fair criminal justice system, rooted in the Indian Constitution and reinforced by statutory law. Article 22(1) guarantees that no person under arrest shall be denied the right to consult and be defended by a lawyer of their choice, a safeguard mirrored in the Cr.PC and now in the BNSS. Read with Article 21's guarantee of life and liberty and Article 39-A's directive of free legal aid, this framework obliges the State to ensure justice irrespective of economic status.

Judicial interpretations, however, reveal a tension between principle and practice. In *Nandini Satpathy*, the Supreme Court acknowledged that legal assistance during interrogation was essential to prevent coercion. Yet, later rulings such as *Poolpandi*, *Samra*, and even the *Kasab* judgment narrowed this scope, limiting the role of counsel to post-arrest proceedings and excluding their presence in police interrogations. The recent *Allahbadia* case reiterated this restrictive stance, barring counsel from police stations altogether. Such decisions tilt the balance in favour of investigative agencies, leaving suspects vulnerable at a stage where their rights are most fragile.

The paper also highlighted the role of free legal aid as an inalienable part of Articles 21 and 39-A. Cases like *Hussainara Khatoon* and *Ranchod Mathur Wasawa* confirmed that indigence cannot justify inferior representation. Yet, gaps persist in delivery — delays in appointing competent counsel, poor remuneration, lack of training, and limited awareness continue to undermine the constitutional promise.

Ultimately, the analysis shows that while post-arrest rights are relatively well protected, the absence of safeguards at the pre-arrest and interrogation stages remains a serious flaw. Denying counsel at such stages not only risks abuse but also diminishes public faith in the fairness of justice. The right to defence, therefore, must be expanded and implemented in a manner that is effective, equitable, and visible.

VII. RECOMMENDATIONS

For the betterment and achieving the goals of the constitution, the following are the changes from the author's perspective that can be adopted to strengthen the rights provided. ***Firstly,*** The BNSS should guarantee consultation with counsel throughout interrogation, or at the very least, permit the lawyer's presence at a visible distance. ***Secondly,*** Audio-visual recording of interrogations should be made mandatory, with access granted to defence counsel. ***Thirdly,*** the law should recognize a limited right to counsel at the pre-arrest stage when individuals are summoned for questioning. Officers who deny or obstruct legal access must face penalties to ensure accountability. ***Fourthly,*** The Legal Services Authorities must be strengthened through better funding, systematic empanelment, and mandatory training in forensic evidence, custodial rights, and trial strategy. Payments to legal aid lawyers should be automated and time-bound to prevent attrition. ***fifthly,*** National campaigns are needed to aware the right to free legal aid. Police officers must undergo regular training to understand and respect this duty. ***Sixthly,*** Legal aid clinics and NGOs should collaborate to provide multilingual awareness material in police stations, prisons, and courts, ensuring that people know where and how to seek representation.

By strengthening law, policy, and awareness simultaneously, India can move closer to a system where the right to defence is not a privilege but a practical reality, ensuring that justice remains both fair and accessible.