



ELECTRONIC RECORDING OF CRIMINAL INTERROGATIONS – SHOULD INDIA ADOPT IT?

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Abstract: *A transparent and efficient criminal justice system is the utopia that every nation craves to attain. India is no exception and it has constantly made efforts to improve its criminal justice dispensation. The recent enactment of the new criminal laws is an endeavor in the similar direction. However, the increasing number of wrongful convictions, allegations of police torture, and lack of accountability and transparency in the custodial interrogations, highlight that India still has a long way to go before it achieves its utopian dream of a fair and just criminal justice system. Various foreign nations employ the mandatory practice of ‘electronic recording of criminal/custodial interrogations’ so that the possibility of coercion in custody is reduced, investigating officials stay accountable, and an official evidentiary record of the entire interrogation can be maintained. India has not yet explored the possibility of enforcing the mandatory usage of electronic recording of its criminal interrogations; however, considering the advantages and the potential that the technology holds, this paper explores the need and rationale of introducing electronic recording of criminal interrogations in India from a legal perspective and concludes that the adoption of the practice will immensely benefit India and will act as a preventive mechanism against any foul play or human rights abuse at the investigation stage of its criminal justice system.*

Keywords: Electronic Recording of Custodial Interrogations, False Confessions, Custodial Torture.

INTRODUCTION

Barack Obama once said that “we need to keep making our streets safer and our criminal justice system fairer”.¹

¹ President Barack Obama, 2016 Democratic National Convention Speech, ABC News (July 27, 2016), <https://abcnews.go.com/Politics/full-text-president-barack-obamas-2016-democratic-national/story?id=40949231>.

The message ingrained in these words extends a universal appeal that we mend our legal systems in a way that transparency, accountability, efficiency and fairness are the prominent values that ensue.

The recent enactment of new criminal laws in India seems to be a step in the similar direction. Even a cursory glance of the new insertions would reveal the intent of our legislature to integrate the use of electronic means and devices in the Indian criminal justice system to make the justice dispensation more efficient at the stage of trial and other judicial proceedings.²

However, if we talk about transparency and fairness at the stage of investigation and interrogation, the new laws haven't done much and the picture remains blurry. What happens in the closed interrogation rooms or custodial examination of suspects still remains a mystery or a story to be deciphered from the incomplete case diaries and the final reports. Professor Kent Roach has highlighted in his recent research that India has witnessed a high number of acquittals in wrongful conviction cases by the constitutional courts in the year 2016 to 2022.³ He further highlights that one of the most common reasons for wrongful convictions in terrorism cases was 'false confessions by accused.'⁴

Also, recently on November 30, 2024, five police officials were accused of custodial torture on a computer engineer who was picked up by the police for interrogation in connection to a theft case.⁵

Research and incidents like these highlight the lack of a mechanism at the investigation stage in India that can ensure transparency in investigations as well as accountability on the part of investigating officers. A review of other jurisdictions reveals that 'electronic recording of custodial interrogations' might be an effective practice in the said direction and this paper aims to underscore if the adoption of such a practice can be a step towards ensuring the needed transparency, accountability and fairness that is lacking at the investigation stage of the criminal justice system in India.

CONCEPT AND RATIONALE OF 'ELECTRONIC RECORDING OF CUSTODIAL INTERROGATIONS'

'Electronic recording of custodial interrogations' involves the audio/ video/ digital recording of a custodial interview of a suspect/ accused by a law enforcement officer. The practice has its roots in the United Kingdom and is regularly employed by nations such as the United States, China, Vietnam, Australia, etc.

The recording in these nations is either a mandate by the legislature/ judiciary or is a voluntary effort on the part of the investigating agencies; however, what distinguishes these nations from India is that all these nations have a policy of admitting the confessions made in police custody as long as they are voluntary and thus, as a matter of ensuring accountability and transparency, preventing police abuse, ensuring voluntary character of the

² Bhartiya Nagarik Suraksha Sanhita, §§ 2(1)(a), 2(1)(i), 530 (2023).

³ Kent Roach, Wrongful Convictions, Wrongful Prosecutions and Wrongful Detention in India, 35 NLSIR 250, 250 (2024).

⁴ *Id.* at 256.

⁵ *Court Case Ordered Against Five Cops for Alleged Custodial Torture*, Times of India, Nov. 30, 2024,

<https://www.bing.com/search?q=Court+Case+Ordered+Against+Five+Cops+for+Alleged+Custodial+Torture%2C+Times+of+India%2C+Nov.+30%2C+2024%2C&form=ANNTH1&ref=4fb1c958fbbc49fcabdba1e5d5fec171&pc=DCTS>

confessions and thereby preventing consequent wrongful convictions on false confessions, these nations electronically record their custodial interrogations.⁶ In fact, the Supreme Court of Alaska has considered the practice of recording custodial interrogations by the police as a part of the due process requirement in the Alaska Constitution.⁷

Psychological research studies in these jurisdictions have confirmed that many-a-times, even an innocent suspect can falsely confess to a crime during the long and tedious police interrogations, that he/she never committed, due to factors such as young age, mental disability, conscious/ unconscious disclosure of the facts by the police to the accused, usage of inducement, threats, psychological trickery and deceit by the police officials, etc.⁸

Brandon Garrett in his research mentions an incident wherein a mentally ill man, Eddie Lloyd was wrongfully convicted of the brutal rape of a young girl on the premise of a false confession.⁹ The man had himself confessed to the crime and had provided accurate details of the crime, including the usage of a green bottle for sodomization of the victim, description of the crime scene while mentioning a tree at which he had left the garments of the victim and all such details had gotten corroborated by medical and other evidences.¹⁰ However, after 17 years, his conviction was found to be wrongful as the DNA found at the crime scene didn't match with his DNA, indicating that his detailed confession and accurate description of the crime might have been a result of the conscious/ unconscious disclosure of the crime related details by the officers during the interrogation meetings.¹¹ Even though the confession of Lloyd was audio-taped *but the interrogation and conversations that led to the confession were unrecorded, highlighting the danger of partially recorded interrogations*, the possibility of false confessions in interrogations despite the non-usage of any physical torture and the non-availability of any concrete evidence to adjudge the voluntariness of such confessions.¹²

Research by Lan Chi Le and others discusses some Vietnamese cases wherein the convicts were exposed to police brutality and torture leading to false confessions and discovery of the murder weapon based on the police-instructed script; however, the allegations of police torture and abuse in all such cases were ignored as there was no record of the custodial interrogations.¹³

Kassin and Gudjonsson in their study on the psychology of confessions highlight that electronic recording of interrogations “deters the police from using egregious tactics and conducting overly lengthy interrogations, prevents frivolous coercion claims by the defence, provides an accurate record of what actually happened

⁶ Kent Roach, Comparative Reflections on Miscarriages of Justice in Australia and Canada, 17 FLINDERS L.J. 381 (December 2015); Alan M. Gershel, A Review of the Law in Jurisdictions Requiring Electronic Recording of Custodial Interrogations, 16 RICH. J.L. & TECH. 1 (Spring 2010); Kuibin Zhu & David M. Siegel, Electronic Recording of Custodial Interrogations with Chinese Characteristics: Tool for Transparency or Torture, 45 HONG KONG L.J. 795 (2015); Lan Chi Le et al., Understanding Causes for Wrongful Convictions in Vietnam: A View from the Top and the Bottom of the Iceberg, 17 Asian J. Criminology S55, S55-S73 (2022), <https://doi.org/10.1007/s11417-022-09390-7>.

⁷ Stephan v. State 711 P.2d 1156 (Alaska 1985)

⁸ Saul M. Kassin & Gisli H. Gudjonsson, The Psychology of Confessions: A Review of the Literature and Issues, 5 Psychol. Sci. Pub. Int. 33 (2004), <https://www.jstor.org/stable/40062301>; Brandon L. Garrett, False Confessions, 37 Litig. 54 (2011), <http://www.jstor.com/stable/23075545>

⁹ Brandon L. Garrett, False Confessions, 37 Litig. 54, 54-58 (2011), <http://www.jstor.com/stable/23075545>

¹⁰ *Id.* at 54-57.

¹¹ *Ibid.*

¹² *Ibid.*

¹³ Le et al., *supra* note 6.

including the disclosure of any crime related details by the police, and helps the officials in reviewing the interrogations to find the forgotten details, and the like.”¹⁴

However, academicians such as Alan Gershel, Kuibin Zhu, and Matthew Johnson in their research over the usage of electronic recording in USA and China have time and again provided some cautions and emphasized that in order to get the maximum results out of this practice, the cameras should be neutrally placed to capture not only the suspect/ accused but also the interrogators and others present in the room so that the judge can easily determine the employment of any coercion or tactics on the part of the interrogators while also observing the demeanour of the accused/suspect.¹⁵ Also, they stress that maximum efforts should be made to record the interrogations in their entirety as partial recording of the interrogation is often futile.¹⁶

The Chinese scholars suggest that the practice of electronic recording won't be of much use when the police officials retain control over the recordings and the advocate of the accused is not present during all the interrogation sessions.¹⁷

However, various scholars have stated that the nations that have employed this practice have claimed that its benefits outweigh the costs and ensure efficiency, accountability as well as transparency in the criminal justice system.¹⁸ Also, as evident by the experiences of different jurisdictions discussed, with the right policies and laws in place, the practice can be an efficient prevention and redressal mechanism, especially in custodial abuse complaints and wrongful convictions stemming out of false confessions during police interrogations.

SHOULD INDIA ELECTRONICALLY RECORD THE CUSTODIAL INTERROGATIONS - THE RATIONALE

If we talk about criminal justice system in India, we would find that the criminal laws in India do provide for electronic recording of investigation statements under S. 161 of the Code of Criminal Procedure (hereinafter, “CrPC”), now replaced by Bhartiya Nagarik Suraksha Sanhita (hereinafter, “BNSS”), and judicial confessions under S. 164 of CrPC by way of audio-visual means; however, the same is not mandatory being qualified by the word ‘may’ and doesn't extend to the electronic recording of the interrogations that go on for days before the accused is actually produced before the Magistrate.

Further, as noted in the introduction section, the accusations of the usage of police torture and harassment are common in India and many-a-times, especially in organised crimes like terrorism, false confessions by accused and suspects are quotidian affairs.¹⁹ Thus, a mechanism to ensure transparency and accountability throughout the stage of interrogation is needed in India as well and adoption of the practice of ‘electronic recording of custodial

¹⁴ Kassin & Gudjonsson, *supra* note 8, at 60-61.

¹⁵ Kassin & Gudjonsson, *supra* note 8, at 61; Gershel, *supra* note 6, at 15; Zhu & Siegel, *supra* note 6, at 800.

¹⁶ Zhu & Siegel, *supra* note 6, at 799; Matthew B. Johnson, Juvenile Miranda Case Law in New Jersey, From Calro, 1966, to JDH, 2001: The Relevance of Recording All Custodial Questioning, 30 J. PSYCHIATRY & L. 3 (Spring 2002); Edward W. Berg, Videotaping Confessions: It's Time, 207 MIL. L. REV. 253 (2011).

¹⁷ Zhu & Siegel, *supra* note 6, at 795, 818.

¹⁸ Kassin & Gudjonsson, *supra* note 8, at 61.

¹⁹ Roach, *supra* note 3; Roach, *supra* note 4; *supra* note 5.

interrogations' can be a great initiative.

In a public interest litigation filed in the case of Prakash v. Commissioner, while relying on the international conventions, the experiences of other nations, and the 239th report of the Law Commission, the Gujarat High Court had strongly recommended the usage of the technology of electronic recording, especially during the interrogation of accused and witnesses.²⁰ The court was of the view that such a technology has the potential to assist the court by providing evidence in the fact-finding inquiry of custodial violence allegations as well as to deter the risky interrogation methods which are likely to elicit false confessions.²¹

It can be very well argued that unlike the other countries discussed above, India follows a policy of exclusion of confessions made to police officers or in police custody under the Indian Evidence Act, 1872 (hereinafter, "IEA"), now replaced by Bhartiya Sakshya Adhiniyam, 2023 (hereinafter, "BSA") and hence such confessions are inadmissible and there exists no need of experimenting with this technology.²² However, when we analyse the laws deeply, the picture is not as rosy as it appears.

In the IEA, even though police confessions are inadmissible, still the disclosure statement obtained, whether as a part of the confession under Ss. 25 and 26 or as a part of the non-confessional statement under S. 161 of CrPC read with S. 162 (2) of CrPC, is very well admissible, if there is a consequent discovery, under S. 27 of the IEA.

One good illustration is the case of Bijender @ Mandar vs State of Haryana, wherein the appellant was convicted merely on the basis of his disclosure statement leading to a subsequent discovery and even though the Supreme Court had overturned the conviction on the grounds of irregularities in the discovery procedure, the court had still stated that such discovery statements can be the sole basis of conviction provided the discovery evidences are unimpeachable and corroborated.²³

Similar was the situation in the case of Aghnoo Nagesia v. State of Bihar, wherein the case revolved around the discovery statement made to the police officer, which was rejected merely because of non-availability of any other corroborating evidences.²⁴ Had the discovery statement been supported by some other evidences or sources proving the motive of the accused, the conviction might not have been set aside and the accused might have been sentenced to death.

Such cases very well illustrate the potential of discovery statements under S. 27 of the IEA in creating substantive evidence against the accused, and *these discovery statements are nothing but mostly an output of the lengthy interrogations taking place in the closed interrogation rooms*. Thus, what goes behind these tedious investigations undoubtedly needs more transparency.

Further, even if there exists no discovery statement rather a judicial confession is recorded by the Magistrate under S. 164 of CrPC, this recording of confession is eventually a proceeding that takes place post the police

²⁰ Prakash v. Commissioner of Police, Gujarat High Court, Sep. 20, 2005, Indian Kanoon, <https://indiankanoon.org/doc/195612027/>.

²¹ *Ibid.*

²² Indian Evidence Act, §§ 25-27, 1872.

²³ Bijender @ Mandar v. State of Haryana, (2021) 7 SCC 706.

²⁴ Aghnoo Nagesia v. State of Bihar, (1966) SCR (1) 134.

interrogation. In the case of State through Superintendent of Police, CBI/SIT Vs. Nalini and Ors., it was stated by the Supreme Court that a judicial confession recorded by a Magistrate under S. 164 of CrPC is a substantive piece of evidence against the accused.²⁵ Now, many people would argue that at the stage of judicial confessions under S. 164 of CrPC, there are enough safeguards and the Magistrate won't record it unless it is satisfied about the voluntary character of the confession and that there was no foul play by the investigating officers.²⁶ However, in cases, where some psychological manipulation or deceit is involved in the interrogation by the investigating officers, it is very difficult for a Magistrate to be sure of the voluntariness of the confession in the absence of any concrete record of the interrogations. Even if the confessional statement is recorded by the police through electronic means, there will still be a mystery as to what all led to that confession and a mere perusal of case diaries or final reports might not reveal the true picture. Thus, adoption of the practice of 'electronic recording' will anyhow be an additional support for the judicial magistrates, who need to adjudge the voluntary character of the judicial confessions made under S. 164 of CrPC.

Thus, it can be stated that a mandatory requirement of recording all the interrogations in their entirety, as recommended by academicians in the context of other countries (noted above), can go to a great extent in assisting the judges in evaluating the voluntariness of the discovery statement as well as the judicial confession, produced as substantive evidences during the trial. As also noted in the previous section, transparency and accountability are two of the most cited benefits in other countries when the investigation proceedings in their entirety are recorded by the investigating officers. Even in the case of D.K. Basu v. State of West Bengal, it was stressed by the court that a mere finding of the torture and injustice that took place inside the four walls of the lock-up is not by itself a meaningful remedy and had advocated for monetary compensation by the state.²⁷ However, even a monetary compensation can neither remedy a wrongful conviction, the premise of which was a false judicial confession or a police planted discovery statement, nor the physical torture inflicted on an accused in the custody. Thus, a preventive strategy by way of incorporation of mandatory electronic recording of all interrogations related to a case in their entirety, coupled with their safe-keeping till a reasonable period of time, can provide a better safeguarding of justice in the criminal justice system of our country.

Electronic recording will impose accountability on the investigating officers and minimise the chances of usage of any physical torture upon the accused by them as they would be bound to record all the interrogation meetings with the accused/suspect and would be answerable for non-recording of any of the disputed interrogation proceedings.

Even if we look at the contrary situation, wherein the accused persons or witnesses impose fake allegations of custodial harassment on the investigating officers, a well-maintained electronic record of all interrogations will be of great help by minimizing the swearing contests amongst the parties and helping the judges in ascertaining the truth.

Further, the mandate of electronic recording of all interrogations of the accused must extend not only when the

²⁵ State through Superintendent of Police, CBI/SIT Vs. Nalini and Ors., (1999) INSC 235.

²⁶ The Code of Criminal Procedure, § 164 (1), (2), 1973.

²⁷ D.K. Basu v. State of West Bengal, (1997) 1 SCC 416, 291, 292.

accused is in police custody but also, when the accused is in the judicial custody of the State, especially since the BNSS has under S. 187 (2) allowed the availability of police custody at any time during the 40 or 60 days period allowed for the investigation.²⁸ There is a risk that the investigating officer might threaten the accused in judicial custody with serious consequences when he gets remanded to police custody if he doesn't make a false police scripted confession or discovery. A glance at S. 20 of the Delhi Prisons Rules, 1988 would reveal that with the permission of the competent court, a police officer can interrogate the accused at any time in judicial custody in the presence of the jail officer or superintendent who is to be at a distance so as not to hear the conversations between the police officer and the accused.²⁹

Thus, mandatory usage of electronic recording of such interrogations in judicial custody will also be a step in promoting transparency of the investigation proceedings as well the accountability on the part of police officers to not use any deceitful tactics or torture on the accused.

If we talk about organised crimes, they are dealt under different state laws that admit the custodial confessions made to investigating officers in evidence. Many people would argue that even though the state laws such as Maharashtra Control of Organised Crime Act, 1999 and Karnataka Control of Organised Crime Act, 2000 make the confessions in police custody admissible but they contain detailed and adequate safeguards against false confessions. However, the increasing wrongful convictions under such special laws especially in terrorism cases, as pointed out by Prof. Roach above, are a testament to the fact that the existing safeguards are inefficient in preventing false confessions.³⁰ Also, when we dive deeper into these laws, we would find that even though these laws mandate the recording of the confessional statements, however, they don't make it mandatory to record all the custodial interrogations that resulted in the confessional statement in their custody.³¹ Thus, what had happened in the case of Lloyd in US can very well happen in the confessions made under such organised crime laws in India.

CONCLUSION

It can be concluded in the light of the above research that the practice of 'electronic recording of custodial interrogations' can be an effective adoption for India that will make the criminal justice system more transparent, accountable, fair and just at the investigation stage of the offences. Many-a-times, we don't feel the need of incorporating some preventive mechanisms in our justice delivery system unless there is some grave and visible human rights abuse or suffering. However, the research by Prof. Roach revealing numerous wrongful convictions, is a warning in itself that something is definitely wrong in the criminal justice system in India. Since the

²⁸ Bhartiya Nagarik Suraksha Sanhita, § 187(2), (2023): The Magistrate to whom an accused person is forwarded under this section may, irrespective of whether he has or has no jurisdiction to try the case, after taking into consideration whether such person has not been released on bail or his bail has been cancelled, authorise, from time to time, the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole, or in parts, at any time during the initial forty days or sixty days out of detention period of sixty days or ninety days, as the case may be, as provided in sub-section (3), and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction.

²⁹ Delhi Prisons (Visitors of Prisons) Rules, §20 (5), 1988: Any interview permitted under an order from the competent court shall take place in the presence of the deputy Superintendent or other proper officer of the jail, who shall keep at such a distance that he may not hear the conversation that takes place.

³⁰ See Roach, *supra* note 4.

³¹ Maharashtra Control of Organised Crime Act, § 18, 1999; Karnataka Control of Organised Crime Act, § 19, 2000.

investigation stage mostly forms the foundation of a criminal trial, a lack of transparency and accountability on the part of investigating officials is no small concern. In the absence of a national registry of wrongful convictions in India, it becomes imperative to inculcate preventive mechanisms such as ‘electronic recording’ at the stage of investigation, in order to minimize the possibility of false confessions and police torture, to enhance the accountability and transparency on the part of investigating officials and most importantly, to provide the judges with a concrete record of proceedings behind the closed interrogation doors.

However, before moving ahead with the proposal, it is necessary that a pilot study is conducted in few police stations first to ascertain the costing, training requirement, ease of usage, technological requirements, and the challenges associated with the implementation in remote areas. Also, detailed rules need to be laid down by the Legislature so that all forms of custodial interrogations under CrPC or the special laws, whether in the police custody or the judicial custody, are mandatorily recorded in their entirety and the interrogators can be held liable in the case of partial recordings.

This research is an attempt to ignite the attention of the legal minds in our country towards the unexplored potential of the technology of electronic recording in making the criminal justice system fairer and more transparent and in reducing the instances of wrongful convictions and deprivation of the liberty of innocent individuals in our country. It is recommended that further research must be undertaken by the members of legal fraternity in the direction of privacy and data protection issues related to the technology, qualitative interviews with police officials and acquitted convicts, and quantitative analysis of judgements basing convictions on judicial confession and discovery statements.