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The Visible Advocate: Section 38 of the Bharatiya Nagarik Suraksha Sanhita and the Right That Cannot Be Heard

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ABSTRACT

This paper examines the entitlement to legal assistance during police interrogation created by Section 38 of the Bharatiya Nagarik Suraksha Sanhita, 2023, in the light of the first authoritative construction placed upon it by the Supreme Court in State of Andhra Pradesh v. Suda Suresh Veera Venkata Naga Raju. The provision permits an arrested person to meet an advocate of his choice during interrogation, “though not throughout interrogation”, and the Court has now held that this confers a right to meet counsel rather than a right to counsel’s continuous presence, permitting the advocate to remain only within sight of his client. The paper argues that Section 38 is not a reform at all but a verbatim reproduction of Section 41D of the Code of Criminal Procedure, 1973, inserted in 2009, and that it codified a concession first framed as a judicial direction in D.K. Basu v. State of West Bengal and later reduced, in an ad hoc direction in a revenue intelligence interrogation, to sight without hearing, thereby displacing the considerably wider position taken in Nandini Satpathy v. P.L. Dani without that decision ever having been overruled. Measured against the standard that a procedural guarantee must be practical and effective rather than theoretical or illusory, an advocate who may see but not hear is positioned to detect physical coercion and nothing else, while the protection under Article 20(3) is directed at what the accused is induced to say. The difficulty is compounded by Section 187(2) of the Sanhita, which permits police custody to be sought in parts across the first forty or sixty days, multiplying the occasions at which an inaudible advocate must serve as the sole safeguard. Drawing on European, English and American jurisprudence, the paper proposes that the qualifying clause be amended, that audio-visual recording be made a statutory obligation rather than a judicial condition, and that a consequence in evidence be attached to breach.

Keywords: Right to counsel, custodial interrogation, Section 38 BNSS, Article 20(3), self-incrimination, police custody, effective participation

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I. INTRODUCTION

The Bharatiya Nagarik Suraksha Sanhita, 2023 replaced the Code of Criminal Procedure, 1973 as the general procedural criminal law of the country, and the replacement was presented as an exercise in decolonising the criminal justice system rather than as a consolidation of existing provisions.¹ Procedural criminal law occupies a distinctive position because it determines the conditions under which the coercive power of the State may be exercised against an individual before any finding of guilt, and it therefore mediates the relationship between the citizen and the police more directly than any other body of law.² Where a new Code carries an old provision forward unaltered, the continuity is easily overlooked, and the assumption that a rewritten statute has reformed what it restates is difficult to displace.

Section 38 of the Sanhita is such a provision. It states that 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 interrogation”.³ The language is not new. It reproduces, word for word, Section 41D of the Code of Criminal Procedure, 1973, which was inserted by the Code of Criminal Procedure (Amendment) Act, 2008 and received assent on 7 January 2009.⁴ Parliament therefore had before it, in the course of a comprehensive re-enactment of procedural criminal law, a provision whose qualifying clause had been criticised for the better part of two decades, and it carried that clause into the new Code unchanged.

The provision received its first authoritative construction from the Supreme Court on 27 July 2026 in *State of Andhra Pradesh v. Suda Suresh Veera Venkata Naga Raju*.⁵ A Bench of Vikram Nath and Sandeep Mehta, JJ. held that the entitlement conferred by Section 38 “is the right to meet an advocate of choice during interrogation” and that it does not “contemplate the continuous, ongoing physical presence of an advocate for the entirety of each interrogation session”.⁶ Having so held, the Court permitted the advocate to remain within the interrogation premises at a place “where he can see the respondent-accused”, and directed that the interrogation sessions be videographed.⁷ The construction is significant not only for what it

¹ Press Release, PRESS INFORMATION BUREAU, MINISTRY OF LAW AND JUSTICE, *Ministry of Law and Justice Organises Conference Titled ‘India’s Progressive Path in the Administration of Criminal Justice System’* (Apr. 21, 2024), <https://www.pib.gov.in/PressReleasePage.aspx?PRID=2018392>.

² K.N. CHANDRASEKHARAN PILLAI, R.V. KELKAR’S CRIMINAL PROCEDURE (7th ed. 2021).

³ Bharatiya Nagarik Suraksha Sanhita, 2023, § 38, No. 46, Acts of Parliament, 2023 (India).

⁴ Code of Criminal Procedure, 1973, § 41D, No. 2, Acts of Parliament, 1974 (India), inserted by the Code of Criminal Procedure (Amendment) Act, 2008, No. 5, Acts of Parliament, 2009 (India).

⁵ *State of Andhra Pradesh v. Suda Suresh Veera Venkata Naga Raju*, 2026 INSC 744, 2026 SCC OnLine SC 1389, 2026 LiveLaw (SC) 722 (India).

⁶ *Id.* ¶¶ 23–24.

⁷ *Id.* ¶ 27.

settles but for the setting in which it was settled, because the arrested person seeking his advocate's presence was a police inspector accused of causing a death in custody, in a case where, as the Court recorded, the deceased had never been produced before a magistrate, his body remained untraced, and the original hard disks of the closed-circuit camera system had not been recovered.⁸

This paper aims to analyse the entitlement created by Section 38 and to assess whether it satisfies the standard, long accepted in international human rights adjudication, that a procedural guarantee must be practical and effective rather than theoretical or illusory.⁹ That standard supplies the lens through which the provision is examined throughout. The paper argues that Section 38, as construed in *Suda Suresh*, produces a safeguard that operates against physical coercion and is structurally incapable of operating against the psychological compulsion at which Article 20(3) of the Constitution is directed, and that this deficiency is aggravated rather than relieved by Section 187(2) of the Sanhita, which has altered the architecture of police custody in a manner that multiplies the occasions on which the safeguard must function.

The analysis proceeds in eight further parts, which trace the jurisprudential history that Section 38 codified, set out the investigative rationale the qualifying clause is understood to serve, examine the constitutional concerns arising under Articles 20(3) and 22(1), identify the difficulties disclosed by a close reading of the bare text, consider the interaction between Section 38 and Section 187(2), draw on comparative material from the European Court of Human Rights, the European Union, England and Wales and the United States without treating any of it as an unqualified benchmark, and propose a reconstruction of the entitlement.

II. THE RIGHT TO COUNSEL IN CUSTODY: WHAT SECTION 38 CHANGED

A. *Nandini Satpathy* and the consultative right

The starting point in Indian law is *Nandini Satpathy v. P.L. Dani*, decided on 7 April 1978 by a Bench of Krishna Iyer, Jaswant Singh and Tulzapurkar, JJ.¹⁰ The appellant, a former Chief Minister of Orissa, had been summoned for questioning under Section 161 of the Code of Criminal Procedure, 1973 and had declined to answer a questionnaire put to her. In addressing the scope of the protection against self-incrimination, the Court considered the position of a person subjected to what it described as near-custodial interrogation, and held that the services

⁸ *Id.* ¶¶ 4–5, 21.

⁹ *Airey v. Ireland*, App. No. 6289/73, [1979] ECHR 3, ¶ 24 (Eur. Ct. H.R. Oct. 9, 1979); see also *Salduz v. Turkey*, App. No. 36391/02, [2008] ECHR 1542, (2009) 49 EHRR 19, ¶ 51 (Eur. Ct. H.R. Nov. 27, 2008) (GC).

¹⁰ *Nandini Satpathy v. P.L. Dani*, (1978) 2 SCC 424 (India).

of a lawyer must be available for consultation in such circumstances.¹¹ Krishna Iyer, J. went further and observed that where the accused person expresses a wish to have his lawyer by his side while he is examined, “this facility shall not be denied”, and that a denial would expose the police to serious reproof on the question of whether any self-incriminatory statement so obtained had been voluntarily made.¹²

Two features of that holding deserve emphasis. The first is that the entitlement recognised was not merely one to consult counsel before or after questioning but to counsel’s presence during the examination itself. The second is that the Court grounded it in Article 20(3) read with Article 22(1) and treated counsel’s presence as instrumental to the voluntariness of any statement rather than as a courtesy.¹³ It is that instrumental reasoning which the later cases have progressively narrowed.

B. The retreat in *Poolpandi*

The retreat began with *Poolpandi v. Superintendent, Central Excise*, decided by a Bench of three Judges in 1992.¹⁴ The petitioners, summoned for questioning under the Customs Act, 1962 and the Foreign Exchange Regulation Act, 1973, sought the presence of their counsel during interrogation. The Court declined the request, reasoning that a person summoned under those statutes is not an accused person and that the presence of counsel during questioning would impede the investigation without any corresponding constitutional warrant.¹⁵ *Nandini Satpathy* was distinguished on the footing that it arose in a regular criminal case initiated by the police, whereas customs officers are not police officers, and the Court held itself bound by two earlier Constitution Bench decisions holding that a person questioned in a customs inquiry is not a person accused of an offence within the meaning of Article 20(3).

The distinction was available on the facts, but its consequence was that the wider reasoning in *Nandini Satpathy* ceased to be applied even in the context to which it plainly belonged. It should be noted that the Court in *Poolpandi* did not hold counsel’s presence to be constitutionally impermissible but held only that no right to such presence had been established in the circumstances before it, and the difference between those propositions has not always been maintained since.

¹¹ *Id.* ¶ 62.

¹² *Id.* ¶ 63.

¹³ INDIA CONST. art. 20, cl. 3; INDIA CONST. art. 22, cl. 1; see *Nandini Satpathy*, *supra* note 10, ¶ 63.

¹⁴ *Poolpandi v. Superintendent, Central Excise*, (1992) 3 SCC 259 (India).

¹⁵ *Id.* ¶¶ 4–11.

C. The sight-line compromise in *Jugal Kishore Samra*

The sight-line formula on which the Supreme Court has now settled in construing Section 38 was fashioned in *Senior Intelligence Officer v. Jugal Kishore Samra*, decided on 5 July 2011 by a Bench of R.M. Lodha and Aftab Alam, JJ.¹⁶ The respondent, who was on anticipatory bail, had been summoned by the Directorate of Revenue Intelligence in connection with a case under the Narcotic Drugs and Psychotropic Substances Act, 1985, and had obtained from the Metropolitan Sessions Judge, in an order affirmed by the High Court, a direction that he be interrogated only in the presence of his advocate. Taking its cue from the requirement laid down in *D.K. Basu v. State of West Bengal* that an arrestee “may be permitted to meet his lawyer during interrogation, though not throughout the interrogation”,¹⁷ the Supreme Court substituted its own direction, namely that the interrogation “may be held within the sight of his advocate or any other person duly authorized by him”, that the advocate “may watch the proceedings from a distance or from beyond a glass partition but he will not be within the hearing distance”, and that it would not be open to the respondent “to have consultations with him in course of the interrogation”.¹⁸

The Court relied on *Poolpandi* and treated *Nandini Satpathy* as not having been followed in later decisions.¹⁹ Three points about that order require attention. First, it was made in the exercise of discretion on the special facts of the case, including the respondent’s medical condition, and was not framed as a statement of general entitlement. Second, its three components are cumulative restrictions rather than grants: the advocate may see, he may not hear, and the client may not consult him while questioning is in progress. Third, the order was made in an investigation under a special statute which the Court held to stand on the same footing as the customs and foreign exchange inquiries that *Poolpandi* had already placed outside the reach of *Nandini Satpathy*. A direction crafted for that narrow setting has since migrated into the general law.

D. Section 41D, Section 38, and the codification of a concession

Section 41D was inserted into the Code of Criminal Procedure, 1973 by the Code of Criminal Procedure (Amendment) Act, 2008, which received assent on 7 January 2009, and reads in

¹⁶ *Senior Intelligence Officer v. Jugal Kishore Samra*, (2011) 12 SCC 362 (India) (Criminal Appeal No. 1266 of 2011, decided July 5, 2011).

¹⁷ *D.K. Basu v. State of West Bengal*, (1997) 1 SCC 416, ¶ 35, requirement (10) (India); see *Jugal Kishore Samra*, *supra* note 16, ¶¶ 27–28.

¹⁸ *Jugal Kishore Samra*, *supra* note 16, ¶ 28.

¹⁹ *Id.* ¶¶ 20–26.

terms identical to Section 38 of the Sanhita.²⁰ Its qualifying clause was not new even then: it restates, almost verbatim, the requirement laid down in *D.K. Basu* in December 1996, so that Section 41D gave statutory form to a judicial direction that had governed arrests for more than a decade, and *Jugal Kishore Samra*, decided after the amendment, took its cue from that direction rather than devising it.²¹ The amending Act introduced a package of measures addressing the position of arrested persons, of which Section 41D formed part, alongside Section 41A, which provides for a notice of appearance in place of arrest in specified cases, and Section 41B, which prescribes the procedure of arrest and the duties of the arresting officer.²² Within that package, Section 41D was the provision addressing legal assistance, and the qualifying words “though not throughout interrogation” were part of it from the outset.

The High Courts that have construed Section 41D have read the qualification restrictively. In a revision arising from proceedings initiated by the Directorate of Enforcement, the Calcutta High Court, in an interim order, declined to permit the advocate of an accused to remain present in the course of the entire interrogation, and permitted the accused to meet his advocate once a day for half an hour during the period of his detention, while directing that the interrogation be videographed.²³ The learned Judge expressly located Section 41D within the protection of Article 21 and described the exercise as one of striking a balance between the right of a citizen to be represented during investigation and the power of the investigating agency to carry on a proper investigation.²⁴

It follows that Section 38 of the Sanhita changed nothing, because the provision, its qualification and the restrictive judicial gloss upon it were all in place before the Sanhita was enacted. What the Sanhita did was to carry an existing compromise into a Code presented as a rights-enhancing replacement of colonial procedure, and what *Suda Suresh* has since done is to confer upon that compromise the authority of the Supreme Court, which it had not previously possessed in the context of ordinary police interrogation. The entitlement is now considerably narrower than the position stated in *Nandini Satpathy*, which has never been overruled and which no subsequent Bench of comparable strength has considered on its merits in this context.

²⁰ Code of Criminal Procedure (Amendment) Act, 2008, No. 5, Acts of Parliament, 2009 (India) (assented to on Jan. 7, 2009).

²¹ *D.K. Basu*, *supra* note 17, ¶ 35; *Jugal Kishore Samra*, *supra* note 16, ¶¶ 27–28.

²² Code of Criminal Procedure, 1973, §§ 41A, 41B, No. 2, Acts of Parliament, 1974 (India).

²³ Directorate of Enforcement, CRR No. 3943 of 2022 (Cal. HC Oct. 23, 2022) (Bibek Chaudhuri, J.) (India), *reported in* 2022 LiveLaw (Cal) 326.

²⁴ *Id.*

III. UNDERSTANDING THE RATIONALE

The qualification in Section 38 is not arbitrary, and an assessment that does not engage with its rationale will not be persuasive. Interrogation is a technique whose utility depends in part on the interrogator's ability to confront a suspect with material, to test inconsistencies as they emerge and to pursue lines of inquiry that open unexpectedly.²⁵ A lawyer entitled to intervene at each question alters that dynamic, and investigating agencies have consistently argued that the alteration is fatal, particularly in economic offences and organised crime, where the value of interrogation lies in the recovery of material and the identification of accomplices rather than in a confession, which is in any event inadmissible when made to a police officer.²⁶

That last consideration is of some importance and is frequently overlooked in the Indian debate. Section 23 of the Bharatiya Sakshya Adhiniyam, 2023, reproducing Sections 25 and 26 of the Indian Evidence Act, 1872, renders a confession made to a police officer, and a confession made while in police custody, inadmissible against the person making it, subject to the limited exception preserved by the proviso to Section 23(2) for so much of the information as distinctly relates to a fact thereby discovered.²⁷ The Indian system therefore does not depend upon custodial statements in the manner that systems admitting such statements do, and it is sometimes argued that the safeguard supplied by counsel's presence is correspondingly less necessary here than in jurisdictions where an interrogation transcript may be placed before the jury.

There is force in the premise but not in the conclusion drawn from it, because the inadmissibility of a custodial confession does not make custodial interrogation harmless. Information extracted during interrogation remains usable to generate admissible evidence, to locate witnesses and to obtain recoveries under the proviso to Section 23(2), and the pressure to which a person in custody is subjected does not become constitutionally immaterial merely because its product cannot be proved directly. The Supreme Court recognised as much in *Selvi v. State of Karnataka*, holding that the protection under Article 20(3) extends to the compulsory extraction of information having an inculpatory character and is not confined to statements tendered in evidence.²⁸ The rationale for the qualification therefore establishes that some limit on counsel's participation may be justified; it does not establish that a limit removing the advocate from the range of hearing altogether is the limit a balancing exercise would produce.

²⁵ Pillai, *supra* note 2.

²⁶ See Poolpandi, *supra* note 14.

²⁷ Bharatiya Sakshya Adhiniyam, 2023, § 23, No. 47, Acts of Parliament, 2023 (India); Indian Evidence Act, 1872, §§ 25–27, No. 1, Acts of Parliament, 1872 (India).

²⁸ *Selvi v. State of Karnataka*, (2010) 7 SCC 263 (India).

IV. CORE CONSTITUTIONAL CONCERNS

A. The right to meet and the question of effective participation

The constitutional difficulty raised by Section 38 begins with the character of the entitlement it creates. The Court in *Suda Suresh* held that the provision confers a right to meet an advocate and not a right to the advocate's continuous presence, and it gave effect to that construction by permitting the advocate to remain where he could see his client.²⁹ The entitlement, so understood, has three components: the client may consult his advocate before questioning begins, the advocate may observe the questioning without hearing it, and the client may not consult the advocate while the questioning is in progress, that last restriction having been laid down in *Jugal Kishore Samra* and not disturbed since.³⁰

It may be said in answer that this is a genuine advance, since the Code of Criminal Procedure, 1973 as originally enacted conferred no entitlement to counsel during interrogation at all, and that an advocate within sight is a meaningful check on the treatment of a person in custody. That answer has substance, and the Supreme Court's jurisprudence on custodial violence from *D.K. Basu* onwards demonstrates how much turns on the presence of an independent observer who can confirm that the detenu has not been assaulted, has been permitted to rest, and has been produced in the condition in which he was taken.³¹

The answer nevertheless fails to meet the objection, because the function of counsel at interrogation is not exhausted by observation. That proposition must be advanced against the current of authority rather than with it. In *Mohammed Ajmal Mohammad Amir Kasab v. State of Maharashtra*, the Supreme Court held that the right to consult and be defended by a legal practitioner arises when the arrested person is first produced before a magistrate, and added that the right is not to be construed as sanctioning or permitting the presence of a lawyer during police interrogation, the role of the lawyer in the Indian system being mainly focused on court proceedings.³² The argument developed below is therefore made against that observation and not with its support.

Legal assistance during questioning consists in advising the client whether a particular question need be answered, identifying when a question assumes a fact not established, recognising when a line of questioning has moved from the offence under investigation to an unrelated matter, and intervening when the manner of questioning becomes oppressive. Every one of those

²⁹ *Suda Suresh*, *supra* note 5, ¶¶ 24, 27.

³⁰ *Jugal Kishore Samra*, *supra* note 16, ¶ 28.

³¹ *D.K. Basu*, *supra* note 17, ¶ 35.

³² *Mohammed Ajmal Mohammad Amir Kasab v. State of Maharashtra*, (2012) 9 SCC 1, ¶¶ 484–485 (India).

functions requires the advocate to know what is being asked. An advocate beyond the range of hearing is not performing a reduced version of the function; he is performing a different function altogether, and it is not the function that Article 22(1) was understood in *Nandini Satpathy* to secure.

B. Article 20(3) and the point at which the protection attaches

Article 20(3) provides that no person accused of any offence shall be compelled to be a witness against himself.³³ The protection has been held to attach at the stage of investigation and not merely at trial, and to extend to a person against whom a formal accusation has been made, whether or not a charge-sheet has been filed.³⁴ In *Selvi*, the Court held that the compulsory administration of narcoanalysis, polygraph examination and brain electrical activation profiling violated Article 20(3), and it reasoned that the guarantee protects the mental privacy of the individual and the faculty of choosing whether to speak.³⁵

The consequence for Section 38 is direct, because the compulsion against which Article 20(3) operates is compulsion exerted upon the will of the person questioned, and it is exerted through what is said to him: the framing of questions, the assertion of what the investigators claim already to know, the suggestion of consequences, and the sustained repetition of a proposition until it is adopted. None of this is visible. An advocate watching through a glass partition sees a person being spoken to and cannot know whether that person has been told that his family will be implicated, that a co-accused has named him, or that his silence will be treated as an admission. The safeguard is calibrated to detect the pressure that Article 21 addresses through the prohibition on custodial violence and is structurally blind to the pressure that Article 20(3) exists to prevent.

It may be argued in response that Article 20(3) is adequately protected by the exclusionary rules in Sections 22 and 23 of the Bharatiya Sakshya Adhiniyam, and that the presence of counsel is therefore unnecessary to secure the constitutional guarantee. That argument was implicitly accepted in *Poolpandi* and it has an obvious appeal. It fails, however, for the reason identified in Part 3 above and developed by the Court in *Selvi*, namely that Article 20(3) is not a rule about the admissibility of statements but a restriction on the methods by which the State may obtain information from a person accused, and a restriction on method is not satisfied by a rule that excludes the product while leaving the method untouched.³⁶

³³ INDIA CONST. art. 20, cl. 3.

³⁴ *Selvi*, *supra* note 28; *Nandini Satpathy*, *supra* note 10.

³⁵ *Selvi*, *supra* note 28.

³⁶ *Id.*

C. Article 22(1) and the consultation it guarantees

Article 22(1) provides that no person who is arrested shall be denied the right to consult, and to be defended by, a legal practitioner of his choice.³⁷ The text distinguishes consultation from defence, and it is the former that is engaged at the stage of interrogation. The Supreme Court held in *Khatri (II) v. State of Bihar* that the right to legal assistance arises at the first production of the accused before the magistrate and not later,³⁸ and *Kasab* reaffirmed that position while declining to extend the right to the presence of a lawyer during police interrogation.³⁹ Neither decision, however, examines what consultation must involve if it is to inform the choices of a person while he is being questioned, which is the question Section 38 raises.

The question is what Article 22(1) requires of the consultation it guarantees. If consultation means an opportunity to speak to an advocate at some point during detention, the arrangement upheld in *Suda Suresh* satisfies it and the entitlement adds little to what Article 22(1) already provides. If it means legal advice capable of informing the choices the client must make while he is being questioned, the arrangement does not, because the advocate is denied the information on which such advice depends and the client is forbidden to seek it while the questioning continues. The restriction imposed in *Jugal Kishore Samra* is on this analysis the most consequential of the three components of the entitlement, and it has attracted the least attention.

It should be acknowledged that the Supreme Court has never held the right to be present at interrogation to be a distinct facet of Article 22(1), that the observation in *Kasab* points the other way, and that the argument advanced here is therefore not compelled by authority. It is, however, the argument that *Nandini Satpathy* accepted, and the burden of explaining why that decision no longer states the law has not been discharged by any subsequent judgment of the Court.

V. DIFFICULTIES WITH THE BARE TEXT

A. “Though not throughout” and the absence of a standard

The qualifying clause in Section 38 states a negative without supplying a measure. It tells the investigating officer what the arrested person is not entitled to, and it leaves entirely undetermined what he is entitled to.⁴⁰ Nothing in the provision indicates how often the arrested person may meet his advocate, for how long, at what stage of the interrogation, whether the meeting must precede questioning or may be sought during a break, or whether a request for a meeting must be acceded to when made. In the absence of a statutory measure, the content of

³⁷ INDIA CONST. art. 22, cl. 1.

³⁸ *Khatri (II) v. State of Bihar*, (1981) 1 SCC 627 (India).

³⁹ *Kasab*, *supra* note 32, ¶¶ 484–485.

⁴⁰ *Bharatiya Nagarik Suraksha Sanhita*, *supra* note 3, § 38.

the entitlement has been fixed case by case: the Calcutta High Court, in an interim order, allowed one meeting a day for half an hour,⁴¹ and the Supreme Court in *Suda Suresh* settled on presence within sight, a formulation that resolves the question of location while leaving the question of frequency untouched.⁴²

The consequence is that the scope of a statutory entitlement is fixed by the remand order in each case, which depends in turn on whether the arrested person has counsel able to obtain one, so that the provision confers most on those who least require it. A person able to move the High Court will secure conditions; a person unrepresented at the point of arrest will receive whatever the investigating officer considers “not throughout” to permit, and will have no means of establishing that the entitlement was denied.

B. The silence on recording

Section 38 says nothing about the recording of interrogation. Section 105 of the Sanhita requires audio-video recording of search and seizure, and Section 183 permits a confession or statement recorded by a magistrate to be recorded also by audio-video electronic means, which demonstrates that the drafters were attentive to the evidentiary value of recording in other contexts.⁴³ No corresponding statutory obligation attaches to custodial interrogation, which is the setting in which the risk of unrecorded coercion is highest.

The Supreme Court in *Suda Suresh* directed that the interrogation sessions be videographed, and the Calcutta High Court in the revision discussed above had issued a similar direction.⁴⁴ These are conditions attached by courts to particular orders rather than obligations arising from the statute; they bind nobody beyond the case in which they are made, and they are available only to an arrested person whose counsel asks for them and whose court is minded to grant them. The nearest general measure, the direction in *Paramvir Singh Saini v. Baljit Singh* that every police station, and every office of a central agency that interrogates and arrests, be equipped with closed-circuit cameras recording both video and audio and preserving the footage for eighteen months,⁴⁵ is addressed to premises rather than to the interrogation itself, and it too rests on judicial direction rather than on statute. A safeguard of that character cannot bear the weight that the narrowing of Section 38 places upon it, because the narrower the advocate’s role, the more the integrity of the interrogation depends on the record, and the record is what the statute does not require.

⁴¹ CRR No. 3943 of 2022, *supra* note 23.

⁴² *Suda Suresh*, *supra* note 5, ¶ 27.

⁴³ Bharatiya Nagarik Suraksha Sanhita, 2023, §§ 105, 183, No. 46, Acts of Parliament, 2023 (India).

⁴⁴ *Suda Suresh*, *supra* note 5, ¶ 27; CRR No. 3943 of 2022, *supra* note 23.

⁴⁵ *Paramvir Singh Saini v. Baljit Singh*, (2021) 1 SCC 184, ¶¶ 16–17, 19 (India).

C. The absence of an exclusionary consequence

The third difficulty is that Section 38 attaches no consequence to its own breach. If an arrested person is refused any meeting with his advocate during a period of police custody, the Sanhita does not provide that any resulting statement is inadmissible, that any recovery made in consequence is to be excluded, or that the remand is thereby vitiated. The position may be contrasted with Section 23(1) of the Bharatiya Sakshya Adhiniyam, which renders a confession to a police officer inadmissible irrespective of the circumstances in which it was made, and which therefore attaches an evidentiary consequence to the character of the person receiving the statement without requiring proof of any impropriety.⁴⁶

The absence of a consequence is significant because a procedural entitlement without a sanction is enforced only through the discretionary jurisdiction of the constitutional courts, which is exercised after the event and rarely in a manner that affects the trial. The Court's own approach in *Arnesh Kumar v. State of Bihar*, where it attached departmental action and liability for contempt to non-compliance with its directions on arrest, reflects the same recognition, namely that a direction unaccompanied by a consequence is liable to be disregarded.⁴⁷ It is for this reason that the argument advanced in Part 8 below is not confined to amending the qualifying clause, because an audible right that carries no consequence for its denial will reproduce the difficulty in a different form.

VI. THE CUSTODY MULTIPLIER: SECTION 187(2) BNSS

The difficulties identified above are aggravated by a structural change elsewhere in the Sanhita which has not been considered alongside Section 38. Under Section 167(2) of the Code of Criminal Procedure, 1973 as construed in *Central Bureau of Investigation v. Anupam J. Kulkarni*, police custody could be granted only during the first fifteen days from arrest, and a magistrate had no power to authorise it thereafter, whether or not the total of fifteen days had been exhausted.⁴⁸ The rule was rigid and it confined custodial interrogation to a defined window at the commencement of the investigation, after which the accused passed into judicial custody and remained there.

Section 187(2) and (3) of the Sanhita alter that architecture. Police custody remains limited to an aggregate of fifteen days, but it may now be sought in parts at any time during the first forty days, where the offence is punishable with imprisonment of less than ten years, or during the

⁴⁶ Bharatiya Sakshya Adhiniyam, 2023, § 23(1), No. 47, Acts of Parliament, 2023 (India).

⁴⁷ *Arnesh Kumar v. State of Bihar*, (2014) 8 SCC 273, ¶ 11 (India).

⁴⁸ *Central Bureau of Investigation v. Anupam J. Kulkarni*, (1992) 3 SCC 141, AIR 1992 SC 1768 (India).

first sixty days, in other cases.⁴⁹ In *Suda Suresh*, the Supreme Court gave effect to that change by holding that a court cannot impose an absolute and non-extendable outer limit on police custody, reasoning that such a limit “forecloses recourse to Section 187(2)” when fresh material emerges in the course of the investigation.⁵⁰ It is right to note that the correctness of *Anupam J. Kulkarni* had already been doubted by the Court before the Sanhita came into force, and that the legislative change addresses a real investigative difficulty where evidence surfaces after the initial period has lapsed.⁵¹

The consequence for Section 38 is nevertheless considerable, and it operates along two lines. The first is arithmetic. Custodial interrogation is no longer a single episode at the start of an investigation but a series of episodes that may be distributed across a period up to four times as long, and the entitlement under Section 38 must therefore function on a far greater number of occasions, at each of which the advocate is outside the range of hearing. The second concerns the position of the accused between episodes. Under the *Anupam J. Kulkarni* rule, an accused who completed the initial period knew that he would not be returned to police custody. Under Section 187(2), an accused in judicial custody on the twentieth day knows that an application may be made on the thirtieth, and an unexhausted balance of police custody remains available to the investigating agency throughout. The capacity to seek the return of a person to custodial interrogation is itself a form of pressure, and it is exerted in the interval, where no advocate is present at all and no safeguard of any kind applies.

It may be objected that this overstates the position, because each application under Section 187(2) requires judicial authorisation. The objection is well founded as a description of the scheme and does not meet the point, because *Suda Suresh* has held that the magistrate may not foreclose the possibility in advance, and the scrutiny that remains is directed to whether further custody is justified rather than to what occurs once it is granted. What occurs once it is granted is governed by Section 38, which has now been construed to exclude the only person present who might be in a position to say what occurred.

⁴⁹ Bharatiya Nagarik Suraksha Sanhita, 2023, § 187(2)–(3), No. 46, Acts of Parliament, 2023 (India).

⁵⁰ *Suda Suresh*, *supra* note 5, ¶ 22.

⁵¹ Awstika Das, *15 Days Police Custody Meant To Be Applied To Entire Period Of Investigation As A Whole: Supreme Court Doubts 1992 Precedent*, LIVE LAW (Aug. 8, 2023), <https://www.livelaw.in/top-stories/supreme-court-bar-police-custody-15-days-arrest-1992-precedent-anupam-kulkarni-larger-bench-reconsideration-234647>.

VII. COMPARATIVE INSIGHTS

A. The European standard from *Salduz* to *Beuze*

The European Court of Human Rights addressed the right of access to a lawyer during police questioning in *Salduz v. Turkey*, decided by the Grand Chamber on 27 November 2008.⁵² The applicant, a minor, had been questioned without access to a lawyer and had made statements that were later relied upon at his trial. The Grand Chamber held that Article 6 of the Convention applies to the pre-trial stage, that the rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction, and that access to a lawyer should be provided from the first interrogation of a suspect by the police unless compelling reasons are demonstrated.⁵³ The reasoning rested on the vulnerability of the suspect at that stage and on the fact that the material gathered during investigation determines the framework within which the offence will be considered at trial.⁵⁴

It would be convenient to treat *Salduz* as a settled benchmark against which Section 38 may be measured, and it would be inaccurate to do so. The Grand Chamber qualified the doctrine substantially in *Ibrahim v. United Kingdom* in 2016, holding that the absence of compelling reasons for restricting access to a lawyer does not of itself render proceedings unfair and that the question is whether the proceedings as a whole were fair, and it carried that approach further in *Beuze v. Belgium* in 2018, where a statutory restriction applying to all suspects was assessed on the same basis rather than treated as a violation in itself.⁵⁵ It has been argued in response that the minimum rights in Article 6(3) have thereby been reduced to factors in a global assessment rather than retained as guarantees.⁵⁶

The comparative lesson is therefore more qualified than it first appears, and it is a lesson about method. European jurisprudence has moved away from treating the denial of counsel as automatically fatal, but it has never moved away from the premise on which *Salduz* rested, namely that the assistance contemplated is assistance at the interrogation and not observation of it. What has been relaxed is the consequence of denial; what has not been questioned is the content of the right.

⁵² *Salduz*, *supra* note 9.

⁵³ *Id.* ¶¶ 50, 52, 55.

⁵⁴ *Id.* ¶ 54.

⁵⁵ *Ibrahim v. United Kingdom*, App. Nos. 50541/08, 50571/08, 50573/08 & 40351/09 (Eur. Ct. H.R. Sept. 13, 2016) (GC); *Beuze v. Belgium*, App. No. 71409/10 (Eur. Ct. H.R. Nov. 9, 2018) (GC).

⁵⁶ Ergul Celiksoy, *Overruling 'the Salduz Doctrine' in Beuze v Belgium: The ECtHR's Further Retreat from the Salduz Principles on the Right to Access to Lawyer*, 10 NEW J. EUR. CRIM. L. 342 (2019), <https://doi.org/10.1177/2032284419879228>.

B. Directive 2013/48/EU and effective participation

That content is stated with precision in Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013.⁵⁷ Article 3(3)(a) requires Member States to ensure that suspects have the right to meet in private and communicate with their lawyer, including prior to questioning. Article 3(3)(b) requires Member States to ensure that suspects “have the right for their lawyer to be present and participate effectively when questioned”, provides that the manner of participation is to be governed by national procedures, and stipulates that such procedures must not “prejudice the effective exercise and essence of the right concerned”. It further requires that where a lawyer participates in questioning, that fact be noted in the record.⁵⁸

The structure of Article 3(3) is instructive for the Indian debate because it separates two entitlements that Section 38 conflates. The right to meet and communicate in private is dealt with in sub-paragraph (a); the right to have the lawyer present and participating during questioning is dealt with separately in sub-paragraph (b). Section 38 provides for the first and, on the construction adopted in *Suda Suresh*, denies the second, while using the language of the first to describe the whole of the entitlement. The Directive also demonstrates that a legislature may regulate the manner of participation without abolishing it, and it supplies the governing limit in terms that correspond to the lens adopted in this paper, namely that regulation must not prejudice the essence of the right.

C. England and Wales: Code C and the intervening solicitor

The position in England and Wales under Code C of the Codes of Practice issued under the Police and Criminal Evidence Act 1984 is more permissive still, and it is valuable because it addresses directly the objection that an intervening solicitor obstructs the interview. Paragraph 6.9 of Code C provides that a solicitor may be required to leave an interview only if his conduct is such that the interviewer is unable properly to put questions to the suspect.⁵⁹ The accompanying Note for Guidance 6D states that the solicitor’s only role in the police station is to protect and advance the legal rights of his client, that this may on occasion require advice which has the effect of the client avoiding giving evidence that strengthens the prosecution case,

⁵⁷ Directive 2013/48/EU, of the European Parliament and of the Council of 22 October 2013 on the Right of Access to a Lawyer in Criminal Proceedings and in European Arrest Warrant Proceedings, and on the Right to Have a Third Party Informed upon Deprivation of Liberty and to Communicate with Third Persons and with Consular Authorities While Deprived of Liberty, art. 3(3), 2013 O.J. (L 294) 1.

⁵⁸ *Id.* art. 3(3)(a)–(b).

⁵⁹ HOME OFFICE, *Police and Criminal Evidence Act 1984 (PACE) Code C: Revised Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers* ¶ 6.9 (2023) (UK), <https://www.gov.uk/government/publications/pace-code-c-2023>.

and that the solicitor may intervene to seek clarification, to challenge an improper question or the manner in which it is put, and to advise the client not to reply to particular questions; what is objectionable is answering questions on the client's behalf or providing written replies for the client to quote.⁶⁰

The English scheme therefore accepts that the solicitor will intervene and defines the point at which intervention becomes obstruction, rather than removing the solicitor from the range of hearing so that the question cannot arise. It is a scheme that presupposes the admissibility of interview evidence, which is a material difference from the Indian position, but the difference cuts in a direction opposite to the one usually assumed, because where custodial statements are admissible the system has an incentive to secure the reliability of the interview, whereas where they are inadmissible the interview is less closely regulated precisely because less turns on it, and the person questioned is correspondingly less protected in fact.

D. The United States: *Miranda* and the limits of warning

The American position originates in *Escobedo v. Illinois* and was settled in *Miranda v. Arizona*, where the Supreme Court held that a person subjected to custodial interrogation must be informed of the right to remain silent and of the right to the presence of an attorney, and that if the person states that he wants an attorney, the interrogation must cease until an attorney is present.⁶¹ That reasoning rested on the psychological techniques described in contemporary police manuals, and on the conclusion that the atmosphere of custodial interrogation is inherently compelling and that the presence of counsel is the adequate protective device.⁶²

The American experience is nevertheless a caution rather than a model, because the protection depends on the suspect invoking it and a substantial majority of suspects waive the right, so that the practical effect of *Miranda* has been contested for decades.⁶³ A right to counsel that is formally available but which the suspect must activate, and which may be surrendered in the very conditions that make it necessary, will not perform the function assigned to it, and the proposals below therefore do not rest on a request-based model alone.

E. What carries across

Three propositions emerge, none of which depends on transplanting a foreign rule. The first is that every system surveyed distinguishes the opportunity to consult a lawyer from the lawyer's

⁶⁰ *Id.* Note for Guidance 6D.

⁶¹ *Miranda v. Arizona*, 384 U.S. 436, 444–45, 474 (1966); *Escobedo v. Illinois*, 378 U.S. 478 (1964).

⁶² *Miranda*, *supra* note 61, at 448–55, 466–67.

⁶³ Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266 (1996), <https://doi.org/10.2307/1144028>.

participation during questioning and treats them as separate entitlements requiring separate justification. The second is that regulation of the manner of participation is accepted everywhere as legitimate, the limit on such regulation being expressed in terms of the essence of the right rather than of investigative convenience. The third is that where a system relies on the suspect to activate the protection, it is substantially less effective than its formal statement suggests. Section 38, as construed, departs from the first, exceeds the second, and would not be rescued by the third.

VIII. CONCEPTUALISING AN AUDIBLE RIGHT

The argument to this point establishes that the entitlement in Section 38 is insufficient. What follows is a proposal for its reconstruction, framed so as to preserve the investigative interest that the qualifying clause was designed to protect.

A. Amending the qualifying clause

The words “though not throughout interrogation” should be replaced by a provision that permits the advocate to be present and to hear the questioning, while regulating his participation. The model in Article 3(3)(b) of Directive 2013/48/EU is available and requires no adaptation of principle: the advocate is present and participates effectively, the manner of participation is prescribed by law, and the prescription may not prejudice the essence of the right. The specific restriction that the English scheme adopts, namely that the advocate may be excluded only where his conduct prevents the interviewer from properly putting questions, supplies a workable standard and answers the objection that participation is incompatible with effective investigation, because it has operated in a jurisdiction with a high volume of custodial interviews for four decades.

It may be objected that such an amendment would import into ordinary Indian policing a standard evolved in better resourced systems, and would delay investigations in the very cases where speed is essential. The objection has weight in relation to the availability of counsel but not in relation to the content of the entitlement, and it is met by confining the obligation to periods of police custody authorised under Section 187 and by providing for legal aid counsel where the arrested person is unrepresented, as Section 341 of the Sanhita already contemplates at trial.⁶⁴

⁶⁴ Bharatiya Nagarik Suraksha Sanhita, 2023, § 341, No. 46, Acts of Parliament, 2023 (India).

B. Recording as a statutory obligation

The second proposal is that audio-visual recording of custodial interrogation should be made a statutory obligation rather than a condition available at judicial discretion. The Sanhita already requires audio-video recording in relation to search and seizure under Section 105 and permits it in relation to statements recorded by a magistrate under Section 183, and the extension of the principle to custodial interrogation involves no new technology and no new expense of any consequence.⁶⁵ The recording serves two purposes that the sight-line arrangement cannot serve: it preserves what was said for later scrutiny, and its existence alters the conduct of the interrogation while it is in progress.

Recording is not a substitute for counsel and should not be presented as one, since a recording is examined after the event and cannot advise the person being questioned at the moment advice is required. It is, however, the necessary complement to any regime of participation, because it is the record that permits a later court to determine whether the advocate was excluded properly.

C. A consequence for breach

The third proposal is that a consequence must attach to denial. The Sanhita should provide that where the entitlement under Section 38 has been denied, or where interrogation has proceeded without the recording required, no fact deposed to as having been discovered in consequence of information received during that interrogation shall be proved against the accused under the proviso to Section 23(2) of the Bharatiya Sakshya Adhiniyam. A consequence so framed is narrow, it operates on the only evidentiary route by which the product of custodial interrogation ordinarily reaches the court, and it does not disturb the admissibility of evidence obtained independently.

It may be argued that an exclusionary consequence is alien to Indian evidence law, which has generally admitted relevant evidence irrespective of the manner of its collection.⁶⁶ The argument is accurate as a general proposition and it is not decisive, because Sections 22 and 23 of the Adhiniyam are themselves exclusionary rules directed at the circumstances in which a statement was obtained rather than at its relevance, and the proposal extends an existing principle rather than introducing a new one.

D. The question left open

Finally, it should be recorded that the constitutional question has not been decided. The validity of Section 38 was challenged before the High Court of Punjab and Haryana in *Harlove Singh*

⁶⁵ Bharatiya Nagarik Suraksha Sanhita, *supra* note 43, §§ 105, 183.

⁶⁶ *Pooran Mal v. Director of Inspection (Investigation)*, (1974) 1 SCC 345 (India).

Rajput v. Union of India, on the grounds that the denial of an advocate's presence throughout interrogation violates Article 20(3) and the right to silence recognised in *Nandini Satpathy*, and notice was issued on that petition.⁶⁷ The Supreme Court in *Suda Suresh* construed the provision; it did not adjudicate its validity, and the question whether the construction survives Articles 20(3) and 22(1) remains open. A court addressing it will have to confront the position that a provision described as conferring a right to legal assistance during interrogation has been read to confer a right to be watched by a lawyer who is not permitted to hear.

IX. CONCLUSION: STRIKING THE BALANCE

Section 38 of the Bharatiya Nagarik Suraksha Sanhita, 2023 has been treated as an innovation of the new Code, and it is not one. The provision reproduces Section 41D of the Code of Criminal Procedure, 1973 without alteration, and the qualifying clause on which everything turns has been in the statute book since 2009. What the Sanhita did was to carry that clause into a Code presented as a reform, and what the Supreme Court did in *Suda Suresh* was to settle its meaning for the first time at the level of the Court, by holding that the entitlement is to meet counsel and not to counsel's presence, and by placing the advocate where he can see his client and no closer.

The arrangement is defensible as a protection against one kind of harm and indefensible as a protection against another. An advocate within sight can testify to the physical condition of the person questioned, and the value of that is not to be minimised in a system in which custodial violence has repeatedly occupied the Supreme Court, from *D.K. Basu* to *Paramvir Singh Saini*. He cannot testify to what the person was told, what he was promised, what he was threatened with, or how many times a proposition was put before it was accepted, and it is through those means that the compulsion prohibited by Article 20(3) is ordinarily exerted. Measured against the standard that a guarantee must be practical and effective rather than theoretical or illusory, an entitlement that operates against the visible and is blind to the audible does not answer the constitutional description it has been given.

The difficulty is not stationary, because Section 187(2) has converted custodial interrogation from a single episode into a series distributed across forty or sixty days, and the Supreme Court has held that a magistrate may not close that door in advance. Each additional occasion is one on which the entitlement must do its work, and the entitlement has been narrowed in the same

⁶⁷ *Harlove Singh Rajput v. Union of India* (P&H HC, notice issued Jan. 23, 2025) (India); see *Punjab & Haryana HC Issues Notice On PIL Against Section 38 BNSS Preventing Arrested Person From Meeting Lawyer Throughout Interrogation*, LIVE LAW (Jan. 23, 2025), <https://www.livelaw.in/high-court/punjab-and-haryana-high-court/punjab-haryana-high-court-bnss-provision-challenged-arrested-person-not-entitled-to-meet-lawyer-through-out-investigation-section-38-281815>.

judgment that widened the window; that combination is what makes the present position untenable rather than merely imperfect.

The three proposals advanced above are modest individually and sufficient together. None prevents the police from interrogating a person in custody, and none requires that an advocate be permitted to obstruct the process. What they require is that the person in custody be advised by someone who knows what is being asked of him. Until that is provided, the entitlement in Section 38 will remain what it has been since 2009, which is a right to be seen rather than a right to be heard, and the question left open in *Harlove Singh Rajput* will continue to be the one that matters.
