

Introduction

“Darkness of Cages shall Allow you to Breathe

For Thou shall not be Killed of Inhumanity !!”

Every person has to be treated as a human being first, irrespective of the fact that such person is a criminal. Even so the accused is considered innocent till proven guilty by a court of law. It is a characteristic of our democratic society that even the rights of the accused are deemed to be sacrosanct, even though he is charged with an offence.

Our statute is quite careful towards anyone’s “personal liberty” and hence doesn’t permit the detention of any person without proper legal sanction. It is provided by the article 21 of our constitution that there will be no person who shall be deprived of his life or personal liberty except according to procedure. The scope for corruption and connected malpractices arises at several stages in the day-to-day working of the Police. It can start at the time of registering a case, for taking a call to arrest or not arrest or for extortion or collecting ‘hafta’ for interfering in civil disputes, for producing false evidence and so on.

The power of arrest is the most important source of corruption and extortion by the police officers. From the moment, a case is registered by the Police on a cognizable complaint, they get the power to arrest any person who may be ‘concerned in that offence’, either on the basis of the complaint itself or on credible information otherwise received.

The procedure laid down by Article 21 must be followed in a ‘right, just and fair’ and not in any arbitrary, fanciful or oppressive manner. It is expected that the arrest should not only be legal but justified also. Even the Constitution of India, recognizes the rights of arrested person under the Fundamental Rights. Hence, the accused has been provided with certain rights under the law.

What is arrest?

Definition and meaning

Generally, a person who breaks the law is arrested. So, what is arrest? In general term, ‘arrest’ would mean that when a person is arrested they lose some of their freedom and liberty. They are put under restraint.

The Criminal Procedure Code of 1973, however, that deals with the aspects of arrests, has not defined the ‘Arrest’. When a person is arrested, then the arrested person is taken into custody of an authority empowered by the law for detaining the person. The person is then asked to answer the charges against him and he is detained so that no further crime is committed.

At times, there is restraint by the legal authority but sometimes the person on his own submits to the custody of the person making the arrest.

As per Legal Dictionary by Farlex, “Arrest” means “a seizure or forcible restraint; an exercise of the power to deprive a person of his or her liberty; the taking or keeping of a person in custody by legal authority, especially, in response to a criminal charge.”

In Indian law, Criminal Procedural Code 1973 (hereinafter referred to as CrPC), chapter V (Section 41 to 60) talks about Arrest of a person but it does not define arrest anywhere.

Types of Arrest: Two types of arrest

An arrest made in view of a warrant issued by a magistrate

An arrest made without such a warrant but in accordance with some legal provision permitting such an arrest

Who can arrest?

The arrest can be made by police, magistrate and even a private person

Section 41(1) CrPC Says: Any police officer- may without an order from a magistrate and without a warrant arrest any person who has committed a cognizable offence, who is in possession of stolen property, or is a state offender, who obstructs a police officer in discharge of his duty, who attempts to escape from lawful custody, who is declared as a deserted from any of the Armed Forces of the Union, who is a released convict and breaches his contract of release etc.

Section 42 authorizes a police officer to arrest a person for an offence which is non-cognizable if the person to be arrested refuses to give his name and residence.

Section 43 gives the right to a private person like you and me to carry out an arrest of a person who in his presence commits a cognizable or a non-bailable offence or who is a proclaimed offender. Section 44 arrest by magistrate as per section 44(1) of CrPC, the Magistrate has been given the power to arrest an individual who has committed an offence in his presence and also commit him to custody.

However, CrPC exempts the members of Armed forces from being arrested for anything done by them in discharge of their official duties except after obtaining the consent of the government (section 45 CrPC).

Section 46 of CrPC explains how arrest is made with or without warrant. Section 46(4) special protection as females, that forbids arrest of women after sunset and before sunrise, except in exceptional circumstances in which case the arrest can be done by a woman police officer after making a written report obtaining a prior permission from the concerned judicial magistrate of first class within whose local jurisdiction the offence is committed or the arrest is to be made.

Large number of persons arrested under sections 107 to 110, CrPC-

There is yet another category viz., sections 107 to 110 of the Code of Criminal Procedure. These sections empower the Magistrate to call upon a person, in situations/circumstances stated therein, to execute a bond to keep peace or to be on good behaviour. These provisions do not empower a police officer to arrest such persons. Yet, the fact remains (a fact borne out by the facts and figures referred to hereinafter) that large number of persons are arrested under these provisions as well. And we are speaking of vast discretion not in a civil service officer but in a member of armed force though technically speaking, it is also a civil service.

Constitutional protection

Clause (1) of Article 22 of the Constitution which is one of the fundamental rights in Part III, declares that "no person who is arrested shall be detained in custody without having informed, as soon as maybe, on the grounds for such arrest nor shall he be denied the right to consult and to be defended by a legal practitioner of his choice."

Clause (2) of Article 22 says that every person arrested and detained in custody shall be produced before the nearest magistrate within a period of 24 hours of such arrest excluding of course the time necessary for the journey from the place of arrest to the court of magistrate. The clause further 5 declares that no such person shall be detained in custody beyond the said period without the authority of a magistrate.

Clause (3) of Article 22 however provides that clauses (1) and (2) shall not apply to an enemy-alien or to a person who has been arrested under any law providing for preventive detention.

Constitutionality of Section 107 and 151 of CrPC

For the purpose of arresting without a warrant, a police officer may pursue such an individual into any place in India as stated under Section 48. Section 49 of the Code says that the arrested person shall not be subject to any unnecessary restraint or physical inconvenience unless it is required to do so to prevent his escape.

Section 151 gives power to the police officials to arrest a person, without a warrant, on the suspicion that he may commit a cognizable offence. However, this comes with certain conditions: the anticipated offence should be cognizable and the officer should feel that the offence would be prevented only by an arrest of the suspect. Section 107 gives similar powers to the magistrate. However, Numerous petitions have been filed questioning the constitutional validity of these sections as it gives plenty of room for the misuse of powers under these sections.

Misuse of power of arrest

Notwithstanding the safeguards contained in the Code of Criminal Procedure and the Constitution referred to above, the fact remains that the power of arrest is wrongly and illegally exercised in a large number of cases all over the country. Very often this power is utilized to extort monies and other valuable property or at the instance of an enemy of the person arrested.

Even in case of civil disputes, this power is being resorted to on the basis of a false allegation against a party to a civil dispute at the instance of his opponent. The vast discretion given by the CrPC to arrest a person even in the case of a bailable offence (not only where the bailable offence is cognizable but also where it is non-cognizable) and the further power to make preventive arrests (e.g. under section 151 of the CrPC and the several city police enactments), clothe the police with extraordinary power which can easily be abused.

Neither there is any in-house mechanism in the police department to check such misuse or abuse nor does the complaint of such misuse or abuse to higher police officers bear fruit except in some exceptional cases.

Balancing of societal interests and protection of rights of the accused

We are not unaware that crime rate is going up in our country for various reasons which need not be recounted here. Terrorism, drugs and organized crime have become so acute that special measures have become necessary to fight them not only at the national level but also at the international level. We also take note of the fact that quite a number of policemen risk their lives in discharge of their duties and that they are specially targeted by the criminal and terrorist gangs.

We recognize that in certain situations e.g., like the one obtaining in Kashmir today, a literal compliance with several legal and constitutional safeguards may not be practicable but we must also take note of and provide for the generality of the situation all over the country and not be deflected by certain specific, temporary situations.

We must also take note of the fact that very often it is the poor who suffer most at the hands of Police. Their poverty itself makes them suspects. This was said, though from a different angle, by George Bernard Shaw. He said "poverty is crime". But nowadays, even middle classes and other well-to-do

people, who do not have access to political power-wielders, also are becoming targets of Police excesses. We recognize that ensuring a balance between societal interest in peace and protection of the rights of the accused is a difficult one but it has to be done. We also recognize the fundamental significance of the Human Rights, which are implicit in Part III of our Constitution and of the necessity to preserve, protect and promote the Rule of Law which constitutes the bedrock of our constitutional system

Landmark Case Laws

Birendra Kumar Rai vs Union of India 1992

It was held that to make an arrest the police officer need not be handcuff the person, and it can be completed by spoken words also if the person submits to custody himself.

It was held in the case of *Bharosa Ramdayal vs Emperor, 1941*, that if a person makes a statement to the police admitting himself of committing an offence, he would be considered to submitting to the custody of the police officer. Also, if the accused goes to the police station as directed by the police officer, he has again considered to have submitted to the custody. In such cases, physical contact is not required.

In *Kultej Singh vs Circle Inspector of Police, 1992*, it was held by the court that keeping a person in custody in the police station or confining the movement of the person in the precincts of the police station amounts to arrest of the person.

Medha Patkar v. State (2007): This is a case in MP regarding the Sardar Sarovar Project. Some landowners and other people who were affected by this project in MP gathered on the road, shouting slogans, demanding land for land and other rehabilitation measures. The gathering was peaceful without disturbing public order and peace but despite this the Police took it upon themselves to beat the protestors and arrest all of them under Section 151 of CrPC and also summoned by the Magistrate under Section 107 of CrPC. There were women and children too among the protestors. When the protestors did not submit a personal bond then sending them to jail, still amounted to the violation of Article 21 of the Constitution of India.

Joginder Kumar v. State of U.P. (AIR 1994 SC 1349): the power of arrest and its exercise has been dealt with at length. It would be appropriate to refer to certain perceptive observations in the judgment: “The horizon of human rights is expanding. At the same time, the crime rate is also increasing. Of late, this court has been receiving complaints about violation of human rights because of indiscriminate arrests. How are we to strike a balance between the two? A realistic approach should be made in this direction. The law of arrest is one of balancing individual rights, liberties and privileges, on the one hand, and individual duties, obligations and responsibilities on the other; of weighing and balancing the rights, liberties and privileges of the single individual and those of individuals collectively; of simply deciding what is wanted and where to put the weight and the emphasis; of deciding which comes first – the criminal or society, the law violator or the law abider; of meeting the challenge which Mr. Justice Cardozo so forthrightly met when he wrestled with a similar task of balancing individual rights against society’s rights and wisely held that the exclusion rule was bad law, that society came first, and that the criminal should not go free because the constable blundered. The quality of a nation’s civilisation can be largely measured by the methods it uses in the enforcement of criminal law.”

The Supreme Court of India in *Nandini Satpathy vs. Dani (P.L.) And Anr* case gave an interpretation regarding the right of an accused person to be silent while police interrogation in relation to Article 20(3) of the Indian Constitution and Section 161(1) of the CrPC.

Kasturi Lal vs the State of UP, 1965

It was held that when a person is arrested on suspicion that he was carrying stolen property and the property found on the search is seized, such seizure shall be reported to a magistrate.

Mahadev vs the State of Uttar Pradesh

Taking of signature of the person searched on the memo of the recovery list is not required by this section. And even if the recovery memo is not signed by the accused, then the search is not illegal.

J Vaghela vs Kanti Bhai Jetha Bhai: This section protects the arrested person from physical torture and maltreatment in police custody.

Sheela Barse vs the State of Maharashtra (Important case): Supreme Court has warned the lower courts not to adopt a casual approach to custodial torture.

DK Basu vs the State of West Bengal, 1996, the Supreme Court issued a list of eleven guidelines in all cases of arrest and detention.

Date of judgement- 18-12-1996

Justice- Kuldeep Singh, A.S Anand

The eleven Supreme Court guidelines related to arrest and detention are:

1. The police officer who is going to arrest a person should bear accurate, visible, and clear identification and name tag with the designation. The particulars of all police officers/constables who handle interrogation of the arrestee must be recorded in the register.
2. The police officer who is going to arrest shall prepare a memo of the arrest and the time of the arrest, and such memo will be attested by at least one witness who may be either the member of the family of the arrestee or a respectable person of the locality from where the arrest is made. The memo will be signed by the arrestee and shall contain the time and date of arrest.
3. A person who has been arrested or detained is entitled to give information to his friend or relative or other person known to him (within 12 hours).
4. The time, place of arrest, venue of custody must be notified by the police to the friend or relative or known person.
5. The person arrested must be made aware of his right.
6. An entry must be made in the case diary at the place of detention regarding the person's arrest and mention the next friend of the arrestee who has been informed of the arrest.
7. The arrestee should, where he requests, be also examined at the time of his arrest and major and minor injuries, if present on his body, be recorded at that time.
8. The arrestee should be subjected to a medical examination by a trained doctor. (section 54)
9. Copies of all the documents, including the arrest memo, should be sent to the magistrate for his record.
10. The arrestee may be permitted to meet his lawyer during the interrogation, not throughout the interrogation.
11. A police control room should be provided at all districts and state headquarter, where information regarding the arrest and place of custody of the arrestee shall be communicated by the officer arresting within 12 hours of the arrest, and it should be displayed on a notice board.

R.R. Chari v. State of U.P., the Apex Court explained arrest as an act of a person where he/she can be taken in custody on ground of criminal charge. In constitutional sense, it's basically the seizure of a

person. Whereas in *State of Punjab v. Ajaib Singh*, it was observed by the court that arrest is putting restraint upon an abducted person. The result of which taking that person in legal custody on the ground of allegation or suspicion of commission of any criminal offence.

The Madras High Court in the case of *Roshan Beevi v. Joint Secretary* laid down the elements of arrest.

The elements required to constitute arrest are as follow:

- Intention to arrest must be under legal authority.
- Seizure and detention of the person is must.
- The arrestee must be in lawful custody of the person arresting him/her.
- There must be physical restraint and mere oral declaration is not arrest.

The court held that state is vicariously liable and the act resulted in violation of fundamental right to life. In the case of *Arnesh Kumar v. State of Bihar*, Section 498A of IPC was questioned. The court came up with the view that in case of Section 498A no direct arrest will be made unless Section 42 of CrPC is satisfied. The arrest will be made on the ground of section 41(b) (ii) and all details must be forwarded to the magistrate. Magistrate while authorizing the detention shall pursue the report.

It was also laid down that failure to compliance with guidelines might lead to departmental actions and also charges of contempt of court might be put on. The guidelines were laid down to ensure that the rights of wife and husband go hand in hand and to ensure that 498A of IPC is not exercised arbitrarily.

In a very recent case of *Ramadugu Omkar v. Sri Ashok Naik*, petitioner filed against respondent for arresting him without any notice under section 41-A thereby violating the guidelines of *Arnesh Kumar* case. The Supreme Court held that in cases where arrest is not made under section 41(1), a notice must be issued in order to ensure that the accused to appear when needed. Thus, it would provide unnecessary arrest of any person.