

ARREST VIS-À-VIS FUNDAMENTAL RIGHT OF CONSTITUTION OF INDIA: A STUDY

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Abstract

An attempt has been made by the research scholar to study the relevant statutory provisions under the Criminal Procedure Code, 1973 for arrest, and for protection and violation of the fundamental rights guaranteed under the Indian Constitution. The researcher has observed some irregularities for the arrest procedure and thereby custody. The police authority sometimes arrests persons unnecessarily to threaten and without following the procedure. After the arrest they inflict the torture to the arrestee. There are number of examples and cases in India. Even the Human rights Reports and other NGOs reports also reveals the same, which needs to be curtailed. The accountability of the police machinery for every arrest must be increased. Therefore the researcher has made an attempt to study the provision of arrest given under the Criminal Procedure Code 1973, and the Fundamental Rights enshrined under the Constitution of India.

Keywords: Arrest, Fundamental Rights, Article 20(3), Article 21, Article 22 of Constitution of India, Criminal Procedure Code, 1973.



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The word arrest is not defined anywhere in any/or Code such as Criminal Procedure Code, Indian Penal Code or other enactment dealing with criminal offences. 'Arrest' means taking a person in custody under legal authority. Arrest takes place when one is taken in custody and restrained from liberty. Arrest is curtailment of liberty. Arrest consists of touching and confining a person's body with a view to detain him.¹It means arrest should be

¹Halsbury's Law of England, (4thEdn.), Vol.11, p.73, para 99; Stroud's Judicial Dictionary, (4thEdn.), Vol.1, p.184; Concise Oxford Dictionary, (2002), p.74; P.R. Aiyar, Mahajan, AIR 1994 SC 1775: (1994) 3 SCC 440: 1994 Cr.L.J. Copyright © 2022, Scholarly Research Journal for Interdisciplinary Studies

made by actual physical touching and confining a body of a person with an object to detain him wherein his liberty is curtailed and kept him in custody. Arrest can be done by any legal authority. Now the question is who possesses this legal authority to arrest any person? Only the police Or Magistrate? The answer is any one that may be police, magistrate or even a private person can arrest a person. Sections 41,42,43 & 44 of the Code of Criminal Procedure, empowered and bestowed the Police officer, Magistrate or a private person the right of arrest.

Para 21 of the *State By vs. K.N. Nehru*² the Madras High Court observed that,

.....In Vol. 11 of the 4th Edn.ofHalsbury's Laws of England the term "arrest" has been defined in Para 99 in the following terms:

"99. Meaning of arrest.-Arrest consists in the seizure or touching of a person's body with a view to his restraint; words may, however, amount to an arrest if, in the circumstances of the case, they are calculated to bring, and do bring, to a person's notice that he is under compulsion and he thereafter submits to the compulsion."³

The object of arrest is necessarily be- (i) For securing attendance of an accused at trial; (ii) as a preventive or precautionary measure; (iii) for obtaining correct name and address; (iv) for removing obstruction to police; (v) for retaking a person escaped from custody.⁴

There are certain provisions made under sections 41 to 46, 57, 60A, & 151 in Chapter-Vthof Criminal procedure Code. Sections 41, 41A & 41B govern the procedure of arrest by police without warrant.

Whoever commits any cognizable offence in-front of or in presence of police officer; or against whom any reasonable complaint is received; or the police officer is convinced to arrest if there is a necessity to prevent any person from commission of any offence; or for investigation of offence; and other conditions are satisfied given under section 41 (a) to (h) then the police officer can arrest that person without warrant.

Under section 41A the police officer shall issue notice of appearance for existence of any suspicion of cognizable offence against a person. If that person complies the conditions

2269; Union of India Vs. Padam Narain, (2008) 13 SCC 305: AIR 2009 SC 254 See also Takwani, Criminal Procedure, (3rdEdn.), LexisNexis, (2011), p.16,43

² State By vs. K.N. Nehru on 3 November, 2011 (Madras High Court), para 21 Available at: <https://indiankanoon.org/doc/1663390/> (visited on 5.07.2022)

³ Supra 2 see also Halsbury's Laws of England Vol. 11 of the 4th Edn.

⁴ R.V.Kelkar, *Lectures on Criminal procedure*, 20 chapter 3, (Eastern book Company, 4thEdn., Reprint 2011).
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of the notice the police should not arrest that person. If the police authority wants to arrest the said person then the police officer shall record the reasons for his arrest.

Under Section 41B of Cr.P.C. the detailed procedure of arrest and duties of officer making arrest are given regarding identification, preparation of a memorandum of arrest, and regarding the information to the relative or a friend of arrestee.

The police officer may arrest a person under Sec.42 of Cr.P.C. for the refusal to give the name and residence, if a person is trying to commit an offence which is non-cognizable or he has committed a non-cognizable offence.

Any private person can arrest any person under Section 43 of Cr.P.C. if said person commits a cognizable offence and a non-bailable offence.

Under Sec.44 of Cr.P.C the magistrate within his local jurisdiction, can arrest or he may order any person to arrest an offender who has committed any offence in his presence.

Special protection is given to the Armed Forces from arrest under section 45 of Cr.P.C.

The procedure for arrest of a woman by a female or lady police officer, including arrest after sunset and before sunrise. Further the arrest of other person is given under section 46 of Cr.P.C.

The arrest to be made strictly in accordance with the Criminal Procedure Code, 1973. This is the mandatory provision made under the Sec.60A of the Cr.P.C.

Further under Sec.151 the arrest can be done by the police officer to prevent the commission of cognizable offence.

There are certain provisions for the rights of accused at the time of arrest and after arrest, made under the Criminal procedure Code and Constitution of India.

Rights of arrested person

A) Rights of arrestee under Criminal Procedure Code:

A statutory right under the procedural law is given to the person who is arrested that, during the interrogation the arrestee can meet his advocate.⁵

Every arrested person has a right to bail and to know the grounds of his arrest. The police officer should inform the arrested persons the same immediately at the time of arrest.⁶ Further under Sec.51 it is mandatory to the police officer or person who is arresting a person to inform about the arrest to a relative of an arrestee or to a nominated person, friend of other person as may be disclosed by arrestee.

⁵ Sec.41D of Criminal Procedure Code, 1973 (2 of 1974).

⁶ Sec.50 of Criminal procedure Code, 1973 (2 of 1974).

The person who is to be arrested has a right to see his warrant of arrest while the police officer wants to arrest the person or while executing arrest warrant.⁷

Rights of arrestee under the Constitution of India:

- i) No person accused of any offence shall be compelled to be a witness against himself.⁸
- ii) No person shall be deprived of his life or personal liberty except according to procedure established by law⁹
- iii) Protection against arrest and detention in certain cases¹⁰

Under Art.22 of the Constitution several rights and protections against arrest and detention are given for specific cases. It is the fundamental right of an arrestee to be informed the grounds of his arrest, to consult and to be defended by a legal practitioner of his own choice.¹¹ The arrestee should be produced before the nearest magistrate within 24 hours of his arrest.¹² No law provides for preventive detention for more than a period of 3 months unless permitted and assented by the Advisory Board¹³

Law of Arrest

National Police Commission of India's 3rd report has also suggested in its report at page 32 also that:

*"...An arrest during the investigation of a cognizable case may be considered justified in one or other of the circumstances:-(1) The case involves a grave offence like murder, dacoity, robbery, rape etc., and it is necessary to arrest the accused and bring his movements under restraint to infuse confidence among the terror stricken victims. (2) The accused is likely to abscond and evade the processes of law. (3) The accused is given to violent behaviour and is likely to commit further offences unless his movements are brought under restraint. (4) The accused is a habitual offender and unless kept in custody he is likely to commit similar offences again. It would be desirable to insist through departmental instructions that a police officer making an arrest should also record in the case diary the reasons for making the arrest, thereby clarifying his conformity to the specified guidelines...."*¹⁴

⁷ Sec.75 of the Criminal Procedure Code, 1973 (2 of 1974).

⁸ Art.20(3) of Constitution of India.

⁹ Art.21 of Constitution of India.

¹⁰ Art.22 of Constitution of India.

¹¹ Art.22(1) of the Constitution of India.

¹² Art.22(2) of the Constitution of India

¹³ Art.22(4) of the Constitution of India

¹⁴ Law Commission of India Consultation paper on law relating to arrest Part-I - Law of Arrest pdf available at: <https://lawcommissionofindia.nic.in/reports/177rtp2.pdf> [Visited on 11.03.2021 at 4:03pm.]

The number of preventive arrests made under sections 107 to 110 and 151 of Criminal Procedure is unusually large. The percentage of arrests in bailable offence is also unusually large ranging from 30% to more than 80% .¹⁵

According to The National Police Commission's Third Report, 60% of total arrests were uncalled for and were excessive. The report also states that 42% of the expenditure in the jails was over persons who shouldn't have been arrested in the first place.¹⁶

From the above facts and figures it can be seen that there is a misuse of power of the arrest due to the vagueness of the language used in the Code of Criminal Procedure. Viz. the words like reasonable, credible, reasonably and if it appears to such officer in the sections 41, 42 and 151 resp. in India.¹⁷

In order to avoid the increasing incidence of violence and torture in custody; the misuse of power of arrest and to have a fair adaption of the procedure of arrest the Hon'ble Hon'ble Supreme Court has given the guidelines in the landmark case of *D.K.Basu v/s State of West Bengal*¹⁸.

The police while arresting any person he should wear accurate, visible and clear identification and name tag; Arresting police officer must prepare a memo of arrest at the time of arrest of a arrestee which should include the date and time of arrest attested by at least one witness who may be either family member of any respectable person of the locality; the arrestee has right to inform his relative friend or well-wisher to be informed regarding his arrest. Where the friend or relative of the arrestee lives outside the district they must be informed regarding date, time and place of arrest within 8 to 12 hours of the arrest; Arrestee must be informed about his rights; the entry must be made in the police diary at the place of detention about the arrest; inspection memo of the arrestee should be prepared and signed by the person arrestee as well as the arresting police officer and provide the copy of the same to the arrestee; The arrestee or detainee must be examined by a medical practitioner or Doctor after every 48 hours during detention; Copies of all such documents should be given to area Magistrate; The arrestee has a right to meet legal practitioner or Advocate during the

¹⁵ Supra 14

¹⁶ Article by Randeepdahiya. Legal Service India E-Journal, Available at :<https://www.legalserviceindia.com/legal/article-1355-the-use-and-misuse-of-power-of-police-to-arrest-an-in-depth-study-in-the-light-of-supreme-court-decisions-and-law-commission-reports.html> [Visited on 4.01.2022 at 3:06pm]

¹⁷ Article by Randeepdahiya. Legal Service India E-Journal, <https://www.legalserviceindia.com/legal/article-1355-the-use-and-misuse-of-power-of-police-to-arrest-an-in-depth-study-in-the-light-of-supreme-court-decisions-and-law-commission-reports.html> [visited on 4.01.2022 at 3:06pm].

¹⁸ AIR 1997 SC 610 (para 36-40)

interrogation; Within 12 hours of the arrest of a person or arrestee the information regarding the arrest must be informed to every police control room of district and state headquarters.¹⁹

Many times it is seen that the police authority is misusing the power of the arrest granted under the Criminal Procedure Code, 1973. The arrest of any person made on the allegations may be of a cognizable offence or non-bailable offence curtails the personal liberty which is guaranteed under Art.21 of the Constitution of India. Article 21, itself says that the personal liberty should not be curtailed without following the established procedure of the law. Here at the time of the arrest and in custody, the arrestee's personal liberty is curtailed without following the established procedure of law and without following the trial and conviction of the person under the allegations & charges labelled against him.

After arrest the police officer gets the custody of an arrestee. Later on when a arrestee is produced before the court they again demand the custody of the arrestee for further investigation and inquiry. Here to the police uses the torture method and compels the arrestee to be a witness against himself, which is prohibited under Article 20 clause (3) of the Constitution of India.

Any arrest or detention can harm the reputation of a person as well as his self-esteem. Therefore the arrest should not be made in mechanically or in a routine manner only on mere allegation of a crime or offence. In order to protect the fundamental rights enshrined under the Constitution of India and the provisions of Criminal Procedure Code, 1973 such as strict compliance of sections 41A, 60A, & 172 (Entry of every investigation in a Diary) must be done.

Conclusion

The arrest may be made only when there is a necessity that the accused's movement should be restricted or when there is threat that, the accused may abscond and evade the process of law. Or unless the arrested accused is a habitual offender. Or In order to protect the arrestee himself. Or where there is need and necessity to secure evidence or preserve evidence relating to the offence.

Hence the strict compliance of Sections 41A, 60A, & 172 of the Criminal Procedure Code, 1973 must be made by arresting authority or the police officer which will definitely protect the Fundamental Rights of the arrestee guaranteed under Articles 20(3), 21 & 22 of the Indian Constitution, and it would also avoid arbitrary arrest.

¹⁹ *D.K.Basu v/s State of West Bengal*, AIR 1997 SC 610 (para 36-40).
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