



# A comparative study on the Law of arrest and rights of arrested Persons

## Authors :

1. **Dr. Gurudev Sahil\***  
**Assistant Professor**
2. **Mrs. Shraddha Yadav**
3. **Mr. Ravi Kumar Yadav**

## ABSTRACT

*In the majority of nations, there are issues with the criminal justice system at every stage of operation. From a human rights perspective, the most critical stage is the stage of the arrest. The majority of the time, those who are awaiting trial are detained in prison for a longer period of time than the whole number of years allowed for their offense. The biggest human rights violations occur at this point, which undermines the criminal justice system's ability to function.*

*When a crime is reported, it hardly ever results in a record being kept of it in our country. And even if it is reported, its true gravity is almost never recorded, and instead, a considerably less serious version frequently shows up in the police files. This is especially true when crimes against weaker sectors of society are involved, as is supported by the reports of the national commissions for women, Scheduled Castes and Scheduled Tribes, and minorities. If the issue of human rights breaches is to be seriously addressed, this situation must be corrected by mandating that the police report crimes without having to send members of the public from pillar to post.*

## Introduction

The word 'Arrest' in an ordinary sense means seizing (someone) by legal authority and taking them into custody. A person in restraint is said to be under arrest depending upon the legality of the restraint. In Stroud, the word 'arrest' has been defined as one taken and restrained from liberty<sup>1</sup>.

In Black's Law Dictionary the word "arrest" has been defined as follows:

"Arrest means to deprive a person of his liberty by legal authority. Taking under real or assumed authority, custody of another for the purpose of holding or detaining him to a criminal charge or civil demand....."<sup>2</sup>

The international Human Rights and national commission on human rights have also focused on various rights of persons under arrest and arrested persons and, there are certain articles which state the rights of arrest and the rights of the arrested person.

### Law of arrest in England

Initially in England there were many sources of arrest, both statutory and at common law. When the Police and Criminal Evidence Act 1984 passed, most powers of arrest have been codified. Under the present law the power of arrest falls within two main categories, namely:

- 1) those which may be exercised by anyone and
- 2) those which may be exercised solely by police.

The Common law rules that a person should be informed that he is being arrested and the ground for the arrest is now embodied in the police and criminal Evidence Act 1984.. However, a person being arrested cannot complain if such information is not given to him if he produces a situation which makes it practically impossible for this to be or if he runs away. However, the Codes of practice issued pursuant to the provisions of the Police and Criminal Evidence Act 1984 require that person arrested must generally be cautioned unless it is impracticable to do so by his condition or behaviour at the time or he has already been cautioned immediately. The Codes of Practice lay down that the caution shall be in the following terms:<sup>3</sup>

Though this caution is to be given under the Code of practice and is not a statutory caution yet failure to do so could well result in an application to the Court that any evidence from the accused is disallowed as unfair in view of the provisions of sections 76 and 78 of the Police and Criminal Evidence Act 1984.<sup>4</sup>

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<sup>1</sup> Mallick M.R, Bail, "Law and Practice 9".(2008)

<sup>2</sup> Black's Law Dictionary, 5<sup>th</sup>., vol.II, para 99.

<sup>3</sup> Supra note 2 p.23.

<sup>4</sup> Ibid

Even a member of the public has got the power of arrest in case of a breach of peace. Any person has got the power of arrest for breach of peace under the common law. Both a constable and a citizen have the power of arrest for breach of the peace.

Under the present statute, the police in England are given extensive powers of arrest for all offences, both arrestable offences and non-arrestable offences. What arrestable offences have been defined? Moreover, there is a general power for any person to arrest anyone in relation to an arrestable offence. The circumstances under which such general power of arrest is given to any person is contained in section 24 of the police and criminal evidence Act, 1984. In that section, it has also been provided that a constable has also the similar power of arrest in arrestable offences. Even in respect of non-arrestable offences, the constable has given the power of arrest under section 25 of the police and criminal evidence act, 1984. Provision has also been made for bringing the arrested person to the police station promptly. Even under the law of England no person can be detained for more than 24 hours at any police station at any police station. Thereafter on an application to the superintendent of police further detention can be made for 12 hours more and within 36 hours of arrest the person arrested has got to be brought before the magistrate's court and thereafter only the magistrate can detain him again for 24 hours and can extend such period for 12 hours more.<sup>5</sup>

### **Law of arrest in America**

Since arrest and detention involve seizure of the person, in America they are subject to the Fourth Amendment requirement there was a need as there was probable cause to rationalize the Government interference with the privacy of an American Citizen.<sup>6</sup>

The American Supreme court has pointed out that warrantless arrest or arrest without warrant in the house of the suspect can be made in exigent circumstances and be justified in the following circumstances, namely -

1. The offence is grave
2. The suspect is reasonably believed to be armed
3. The police have a high degree of probable cause
4. There is especially strong reason to believe that suspect is on the premises
5. Entry may be made peacefully.<sup>7</sup>

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<sup>5</sup> *Ibid*

<sup>6</sup> *Supra note 2 p.24*

<sup>7</sup> *Dormant v United States 435 F 2d 385(DCCIR 1970) at P. 392-393.*

## RIGHTS OF ARRESTED PERSON

Internationally, the Universal Declaration of Human Rights, 1948 has recognized the inherent dignity of human beings. The provision of the document which is concerned with right now is as follows:<sup>8</sup>

- Article 3 expressly declares that everyone has the right to life, liberty and security of person.
- Article 5 declares that no one shall be subject to torture or cruel, inhuman or degrading treatment or punishment.
- Article 8 states that everyone who is the victim of an act that violates his or her fundamental rights as guaranteed by an institution or by the law has the right to an appropriate remedy by law.
- Article 9 states that nobody shall be the victim of arbitrary detention, arrest, or expulsion.
- Article 10 clearly states that everyone has a right to full equality in a fair and public hearing by a tribunal that is independent and impartial in determining his or her rights and obligations as well as the validity of any criminal charges brought against them. Hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.
- Article 11 provides for right to be presumed innocent until proved guilty according to law in a public trial in which he has had all the guarantees necessary for the defense when a person is charged with a penal offence.

The above laws have been incorporated in the constitution of India either expressly or impliedly under part III. This is well evident from the following rulings by the apex court of the country which interpreted the rights to be included under article 21 of the constitution.<sup>9</sup>

## RIGHT AGAINST HANDCUFFING

Handcuffs are detrimental and are an embarrassment of the highest degree as well as inhumane. Handcuffs are a sheer violation of Human Rights and are a violation of Art-19 i.e. freedom of movement under the Constitution of India. Extreme cases should only warrant the use of handcuffs with a statement of the reason for the same.

The Supreme court in *D. K. Basu v. State of W.B.*<sup>10</sup> has given various guidelines to the police which have to be followed during arrest:

That the police officer carrying out the arrest should prepare a memo and should be attested by at least one witness. The signature of the arrestee should also be there along with the time and the date of arrest. period of 8-12 hours has been given to inform the time, place of arrest and place of custody of the relative.

<sup>8</sup> *The protection of Human Rights Act, 1993.*

<sup>9</sup> Jain Rashee, "A study of Human Rights for students; Prisoners Rights".pg;87-97(2001)

<sup>10</sup> (1997)1SCC 416:1997 SCC(Cri)92 and section 50-A



## AMERICA: RIGHTS OF ARRESTED PERSON

In the decision of *Munn v. People of Illinois*, the US Supreme Court declared that life is not simply an animal existence. Because they are being accused of a crime, the accused or person who has been arrested cannot be refused the same. A person's fundamental rights cannot be taken away from him or her just because he or she is in police custody or has been detained.

It is true that the State's Law gives the accused more protections than it does for regular individuals. Therefore, procedural guidelines should be followed to execute in-depth inquiries into unlawful transactions in safeguarding the rights of the accused.<sup>11</sup>

The accused is automatically granted certain rights when he/ she is accused of criminal activity. During the process of investigation and trial if the law is not observed then the accused can be freed on the basis of the mechanics, fairly than based on his or her innocence. Thus, due to this reason law enforcement personnel, judges and prosecutors are vigilant and cautious to follow the law throughout the whole procedure.

The privilege against self-incrimination is one of the accused's most significant rights. It prevents police or prosecutors from pressuring a defendant to implicate themselves. As a result, it also forbids law enforcement officials from coercing a suspect into making a confession by using force. Although the accused has the right to remain silent, this right is underexplored. Most of the persons arrested for crimes are not aware of this right and that they need not answer any questions. The minute the accused has been notified of his rights - which will include of the right to remain silent - whatever he says can and will be used against him in court.<sup>12</sup>

## ENGLAND: RIGHTS OF ARRESTED PERSON.

In England, a person is not taken into custody in handcuffs. Most European nations consider the use of handcuffs and manacles in the great majority of arrests to be barbaric and completely unnecessary. The accused is communicated that he/she is under arrest and has certain rights. The Primary and vital step is that before the suspect is taken and held in custody or has voluntarily arrived at the police station, he or she must be apprised of their right to free legal assistance.

The officer in charge has a duty to inform the suspect of his rights and that they are ongoing and may be exercised at any time while they are being held. The suspect or the arrested person should be allowed to inform someone of his arrest and to consult privately with an advocate. A poster advertising the right to legal aid must be prominently displayed in the charging area of every station.

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<sup>11</sup>Thompson Steve, Rights of accused in Crimina law,23rd October 2006 also available in <http://voices.yahoo.com/rights-accused-criminal-law-96584.html?cat=17>

<sup>12</sup> *Ibid*

The Police and Criminal Evidence provides: -

-A lawyer is always dutybound to inform the arrestee that his role is to defend him and make the arrestee understand that his services are free to ask at this stage. He should also advise the arrestee in any police consultation.

-The police can take the fingerprint if only the arrestee allows it. Until the approval of the arrestee, police are not allowed to take photographs as well.

## **AUSTRALIA: RIGHTS OF ARRESTED PERSON**

In Australia, Miranda rights essentially don't exist. However, by virtue of Section-79A(3)(b), it is the duty of the police officer to inform the accused that their words can be used as evidence. Australia, like many other nations, upholds the right to silence, meaning thereby, remaining silent is never seen as evidence of concealed guilt. Charged should be framed within four hours of the arrest of an accused. Upon arrest, fingerprinting and photographs are also taken when a person is arrested to record the attendance. In some cases. The DNA sample is also taken but the law is clear on the point that it should be taken only with the consent of the arrestee.<sup>13</sup>

According to Section- 79A(3)(a), the police officer must inform the arrested person of his rights. Where an arrested person is not in a condition to comprehend their rights, the process of informing that person of their rights should be repeated, once the arrested person is ready to do so, this has also been stated in the case of *Robinett v. Police*<sup>14</sup>.

Under Section 79A(1)(b)(1) of the Summary Offences Act 1953, the right has been given to the person who has been arrested on suspicion to have a solicitor, a relative or a friend present during interrogation. The police also owe a duty to inform the arrested person of his right to bail which is given under Section 13(1) of the Act. Reasonable force can be used where the police consider it necessary has been given under Section 81(2)(b) of the Act. There is a clear provision which has been incorporated that all procedures must be carried out humanly, with care and as far as reasonably practicable to avoid offending cultural values, religious beliefs, infliction of harm, humiliation or embarrassment.

that might lead to information that could be incriminating: you do not have to say anything.

## **CRITICAL STUDY**

The National commission of police and the law commission Report in 2000 on the law of arrest have both identified that indiscriminate arrest by the police is the chief source of corruption in India. The

<sup>13</sup> *Your Rights when arrested*. Available at <http://www.findlaw.com.au/articles/4165/your-rights-when-arrested.aspx>

<sup>14</sup> (2000)78 SASR 85 at 94:[2000] SASC 405

police cannot arrest for the mere allegation of offence. The court has given a land mark judgement in *D.K Basu v state of Bengal*<sup>15</sup> and has laid down all the necessary guidelines which police must abide by during the course of arrest but most of the time it becomes a right given to a citizen on paper and not in reality.

US laws of arrest have always been criticized as against human rights as handcuffing is a part of the arrest. However, when we look into the Indian Context, it is often seen that the provision given in the paper and in reality, always differ. Police are often unaware of the procedure that they have to follow, most of the time the arrestees are often tortured in order to make them give confessions regarding the offences for which they are the suspects. Most of the under-trials and arrested people are not made aware of their rights and even for petty offences they are kept behind bars. This fact is also seen in *Hussainara khatoon v.State of Bihar*<sup>16</sup>, Bihar's prison is filled with undertrials. and the reason for them being behind the bars is either for petty cases or in some cases for a grievous offence. It is also against the provision of the International Covenant on Civil and Political Rights 1966.<sup>17</sup>

The fact that police frequently employ handcuffs is also evident in the recent case of *Soumen Biswas v. State of West Bengal*<sup>18</sup>, As far as decades ago, the Supreme Court in *Prem Shankar Shukla v. Delhi Administration*<sup>19</sup> declared that it is unlawful to handcuff or otherwise hold a prisoner who is awaiting trial in prison fetters or chains in violation of Article 21 of the Constitution. An ill student leader who was being tried was tied to his hospital bed at North Bengal Medical College, in a shocking demonstration of disregard for our constitutional ethos and dedication to human rights jurisprudence.

Mostly, inmates are subjected to cruel and inhumane treatment in prisons. The fact that one prisoner faced fear due to the forced insertion of a stick in his anus was addressed in the case of *Sunil Batra v. Delhi Administration*<sup>20</sup>, in this case, the court held that even an under trial is a human being and thus entitled to have all the rights to live as a human being.

Though many committees have come up so far like Prison Enquiry Committee 1836, the Second jail enquiry Committee in 1862, the third jail enquiry Committee 1877, and the Prison Act,1894<sup>21</sup>, the right of the undertrials and prisoners always remain a myth. Court's busy calendar, prolonged police investigation and unsatisfactory bail system are the basic reasons to keep under trial prisoners inside the jail.<sup>22</sup>

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<sup>15</sup> AIR 1997 SC 610.

<sup>16</sup> AIR 1979 SC 1377

<sup>17</sup> S.K.Sharma, "Distributive Justice of Prisons:Human Rights of Prisoners and Undertrials' in K.D.Gaur,Criminal Law and Criminology",2003,New Delhi,Deep and Deep Pyblications,p.676.

<sup>18</sup> AIR 2013 Calcutta 199

<sup>19</sup> AIR 1980 SC 1535

<sup>20</sup> (1988) 75 SCC 392

<sup>21</sup> Dr.Singh Kumar Arun," Human rights of the prisoners in India:Myth and Reality" IJJS Vol.1 march 2012

<sup>22</sup> Ibid

Moreover, when it comes to balancing the individual and community interest, individual interest is often sacrificed which in fact should be balanced without any bias toward both the interest.

## CONCLUSION:

In order to make the law of arrest effective the police officers making arrests should be well versed with all the legal provisions relating to arrest and should also be updated on the subject of the guidelines and Supreme Court judgments concerning the arrest. The arrestee should be treated with fairness and should be given all the rights which have been given and recognized by law. The police officer should be cautious beyond the ordinary while making an arrest of the women and children.

They say Justice should not only be done but should also seem to be done. Justice means to balance the interest of the individuals and the community. That being one of the complex tasks, it is seen that very frequently individual liberty may have to be sacrificed to promote the safety of the community, particularly with instances of rising domestic and interstate violence and crime. However, in the light of the recent NHRC guidelines, the police are bound to follow certain guidelines and this regularly fetters their functioning at least in the city areas the procedures are followed stringently.

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