

INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS



Open Access, Refereed Journal Multi-Disciplinary
Peer Reviewed

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PROEDURE OF ARREST UNDER BNSS

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ABSTRACT:

The BNSS also known as *Bharatiya Nagarik Suraksha Sanhita, 2023* replaced the old criminal code i.e. CrPC- Criminal Procedure Code, 1973. The BNSS act came into effect on 1st July 2024. The legislative body decided to repeal the long running CrPC from the British era that was outdated and needed some changes. There was an urgent need to modernize the criminal justice system and address the shortcomings in the existing legal framework. However, there are not any major changes done in the BNSS, but there are some changes that has enhanced the justice system and secured the rights of the citizens. The BNSS has focused on the use of technology in providing justice to the public, for ex- using technology during investigations, using advanced machineries to collect evidence etc. The BNSS contains total 531 sections as compared to CrPC which contained total 484 sections¹. The BNSS works as an upliftment for CrPC, ensuring the enforcement of laws and protecting the citizens from any discrepancy.

Under this research we have talked in detail about the procedure of arrest under BNSS and how is it different from provisions that was given under CrPC. This paper talks about various aspect of arrest i.e. how arrest is made, rights and duties of police officer during arrest, rights of the arrested person etc. Additionally, this paper at last recommends some suggestions for effective enforcement and maintaining law and order with the balancing of fundamental rights of individuals.

KEYWORDS:

BNSS, Arrest, The Indian Constitution, Article 20, Article 21, Tihar Jail.

¹ Substantial Changes Between CrPC and BNSS: A Comprehensive Overview, Khurana & Khurana (August 02, 2024, 7:02 AM), <https://www.khuranaandkhurana.com/2024/08/02/substaniial-changes-between-crpc-and-bnss-an-comprehensive-overview/#:~:text=The%20BNSS%20mostly%20preserves%20the,implement%20modernisation%20for%20procedure%20etc.>

INTRODUCTION:

The concept of arrest is of great jurisprudential value. It is an effective way for maintaining discipline in the society while protecting the individual's liberty and dignity. Arrest is not defined in the BNS or BNSS (earlier IPC and CrPC respectively). In terms of layman arrest can be sum up as – 'It is an apprehension or restraint or deprivation of one's own personal liberty.' The meaning of arrest can be derived from section 43²- "Arrest how made". In the landmark judgement of *State of Haryana V. Dinesh Kumar*³, the court differentiated between custody and arrest- in every arrest there will be custody but vice versa cannot happen. The provisions of arrest under in BNSS is given under Chapter V- "Arrest of Person", starting from section 35 till section 61. The main purpose of arrest is to bring an individual before the court, suspected of any crime, for trial and punishment. The arrest also helps in preventing the suspected individual to abscond from the custody, to stop him from committing future crimes and last but not he least, arrest helps in maintaining the presence of the individual during the trial.

Further in this paper, we are going to break down that how the process of arrest works. In this regard we will talk how arrest is done, who has the right to arrest, can arrest be done with or without warrant, duties of the officer making the arrest etc.

JURISPRUDENTIAL ASPECT OF ARREST:

"Bail is a rule and Jail is an exception"- There is a distinction between in the nature of bailable and non-bailable offence. In bailable offence accused has the right to be released on bail, howsoever, he has to furnish the provided bail or bail bond. On the other hand, in non-bailable offence accused do not have any right, it is one the discretion of the court to grant him bail or not. The court will start with the tilt of the mind that it will grant bail as court follows the rule of bail is a rule and jail is an exception. The court will hear the case and primary proof of burden lies on the prosecution as why bail should not be granted. Thereupon the defense has to proof that why bail should be granted. In bailable offence balancing is already done by the parliament and in non bailable offence parliament has not decided from before rather it has been left to the courts to decide after considering the facts and circumstance of the case and also societal interest will be balanced with individual interest. The court will consider that

² Bharatiya Nagrik Suraksha Sanhita, 2023, No. 46, Acts of Parliament, 2023 (India).

³ State of Haryana V. Dinesh Kumar, AIR 2008 SC 1083 (India)

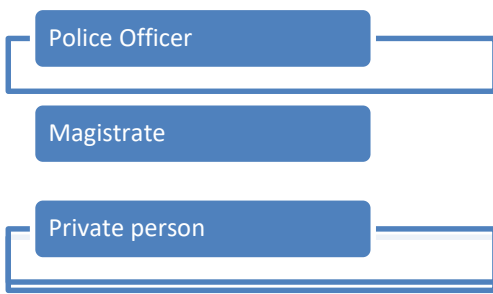
whether the liberty of accused will affect the societal interest or not.

HOW ARREST IS MADE (Section 43, BNSS):

Under this section, the mode of arrest has been prescribed. In legal sense arrest means taking the custody of another person under the eyes of the law. As discussed above in the introduction, the primary purpose of the arrest is to detain the suspected person in respect to a criminal charge to prevent him absconding from the custody and to prevent him from committing the future offences. Custody and arrest are opposite words and not synonyms⁴. The detail mode of arrest is given as follows:

- (A) While making the arrest, the police officer making the arrest or other person (magistrate or private person) should actually touch or confine the body of the arrested person.
- (B) If the person who is being arrested, forcibly restrain himself from being arrested, such police officer or any other person shall use any means or all means in making the arrest.
- (C) Use of handcuffs- while keeping in mind the nature and gravity of the offence, such police officer or any other person should use handcuffs if:
 - The suspected victim is a habitual offender.
 - Who has escaped from custody.
 - Who has committed crime in relation to terrorist act, sexual offences against children, human trafficking etc.
 - The women should not be arrested after sunset and before sunrise. The arrest of a woman would be made by a female police officer taking prior permission from JMFC within whose local jurisdiction the arrest has to be made.

WHO ALL CAN ARREST:



⁴ Thaniel Victor V State AIR, 1991 MHC 2416 (India)

1. **By police officer-** The police officer under section 35⁵ can make an arrest without a warrant and order from the magistrate. The arrest can be only made in respect of cognizable offence. The powers given to the police officer under this section is exposed to the other provisions mentioned in this *Sanhita*. For instance, if the police officer cannot investigate a non-cognizable case without the order of the magistrate, then in respect of such case the police officer have no right to make arrest under Section 35. Against a person whom reasonable complaint has been made or a credible information has been received or a reasonable suspicion exist that the suspected person has committed a cognizable offence, then on the basis of such complaint, information and suspicion, the police officer can make the arrest. If the police officer is making an arrest on the basis of information, then the facts of such information should be definite. Before arresting, the police officer should fact check the information. However, if a police officer makes a wrongful arrest under a bona fide mistake, he shall be protected for such mistake. If the arrest of person is not required under sub section (1) of section 35, a notice would be issued to such person and it would be mandatory for him to appear before the police officer or any place that is prescribed in notice⁶.
2. **By Magistrate-** Under section 41 of BNSS, any magistrate whether judicial or executive can make the arrest. If the offence has been committed in front of the magistrate within his local jurisdiction, he himself may arrest that person or order someone to arrest. After arresting the person, the magistrate has also power to commit the offender into the custody. Under sub-section (2), the power of committing is not given. It has been done deliberately. This is because in sub-section (1), the offence has been committed in the presence of the magistrate, therefore he has knowledge of both circumstances and facts of the offence⁷. Whereas in sub-section (2), the offence has not been committed in front of the magistrate, only the arrest is made in his presence.
3. **By Private Person-** When the police or magistrate cannot make the arrest, the role of private person comes up. Under section 40⁸ of BNSS, a private person can make the arrest. The arrest can only be made if the offender has committed a non-bailable and cognizable

⁵ Bharatiya Nagrik Suraksha Sanhita, 2023, No. 46, Acts of Parliament, 2023 (India).

⁶ Arnesh Kumar V. State of Bihar AIR, 2014 SC 2756 (India).

⁷ Damini Singh Chauhan, can a magistrate arrest a person If yes what is the procedure? Legal Service India, <https://legalserviceindia.com/legal/article-2195-can-a-magistrate-arrest-a-person-if-yes-what-is-the-procedure-.html>

⁸ Bharatiya Nagrik Suraksha Sanhita, 2023, No. 46, Acts of Parliament, 2023 (India).

offence in the presence of a private person. The arrest by a private person is necessary in order to stop the offender from committing any offence.

RIGHTS OF AN ARRESTED PERSON:

- 1. *Right to Know***- every person has right to know the ground on which he/she has been arrested. It is a basic right that everyone deserves to know. If a person who has been arrested without a warrant, he should be immediately informed of the particulars of the offence and the grounds of his arrest⁹. If the offence is of bailable nature then he has the right to be released on the bail. The right to know the full particulars about his offence is his constitutional right. Article 22(1) of the constitution of India no person shall be detained in the custody without being informed of the grounds of his arrest¹⁰. Under section 48 of BNSS, it is the duty of the police officer or any other person who is making the arrest to make sure that the relatives or any friend of the arrested person should be informed by about the arrest and also about the place where the arrested person is being held. Such friends or relatives can also be nominated by the arrested person. If the police officer has a warrant to arrest the person, it is the duty of the officer to show the warrant and then make the arrest.
- 2. *Right to be taken to the magistrate within 24 hours***- after the arrest has been made, the arrested person should be taken to magistrate without any unnecessary delay. The arrested person should not be detained in the custody for more than 24 hours, except in some circumstances where the case is reasonable¹¹.
- 3. *Examination of arrested by a medical practitioner***- Under section 53¹² of, if the arrested person has been subject to any kind of violence in the police custody he shall demand an examination by a registered medical practitioner prescribed by the central or state government.
- 4. *Right to have a legal representative***- under the provision in the *Sanhita*, if the person is in police custody he/she has every single right to be defended by a pleader of his own choice. The accused should have a reasonable opportunity to be heard. This can be derived from the general rule of law i.e. Audi Alteram Partem¹³, which means to hear other side. It is the natural justice that is given to the offender. This principle ensures that the offender will

⁹ Bharatiya Nagrik Suraksha Sanhita, 2023, No. 46, Acts of Parliament, 2023 (India).

¹⁰ INDIA CONST. art. 22, amended by The Constitution (One Hundred and Fourth Amendment) Act, 2019

¹¹ Gulam Mohammad V. State of MP AIR 1959, MP, 147

¹² Bharatiya Nagrik Suraksha Sanhita, 2023, No. 46, Acts of Parliament, 2023 (India).

¹³ CK Takwani, Lectures on Administrative Law 187 (Eastern Book Company 2024).

have enough time to prepare his defense and he should not be left unheard. However, the police or state or magistrate shall not provide a lawyer to the accused. They only will provide necessary arrangements to engage a lawyer to the accused¹⁴.

POWERS WHILE MAKING ARREST/POST ARREST PROCEDURE:

1. ***To ascertain name and residence-*** under section 39¹⁵ of, if any person who has committed non-cognizable offence in presence of a police or has been only accused of committing such offence, the police officer has a right to demand name and residence of that offender. If the offender refuses to give such information or he gives false information, which according to the officer is false, then the officer has the right to ascertain that information. If the name and residence of the offender has been ascertained then he shall be released on a bond or bail-bond.
2. ***Search of the arrested person-*** section 49¹⁶ of the BNSS makes provision regarding the search of the arrested person. Such arrest can be only made when the police officer after arresting a person under a warrant which does not provide for the taking of a bail, or under a warrant which provides for taking of the bail. All the articles that would be found during the search shall be put in a safe place, except necessary wearing items found upon the offender. Receipts of all the seized articles should be shown to the police officer.
3. ***To seize offensive weapons-*** after the arrest has been made, it is the duty of the police officer or any other person to immediately seize all the offensive weapons that has been with the arrested person and transfer all the weapons to the court.
4. ***Examination of accused/offender by a medical practitioner-*** under the section 53 of BNSS, examination includes examination of the following:
 - 4.1 Blood
 - 4.2 Blood stains
 - 4.3 Semen's and swabs in case of sexual offences
 - 4.5 Sweat
 - 4.6 Hair samples
 - 4.7 Such other tests- in the landmark judgement of *Selvi V State of Karnataka* ¹⁷, the court upheld the constitutional validity of article 20(3) and 21. Here the SC defined the

¹⁴ Tara Singh V. The State AIR, 1951 SC 441

¹⁵ Bharatiya Nagrik Suraksha Sanhita, 2023, No. 46, Acts of Parliament, 2023 (India).

¹⁶ Bharatiya Nagrik Suraksha Sanhita, 2023, No. 46, Acts of Parliament, 2023 (India).

¹⁷ Selvi V. State of Karnataka, AIR 2010 SC 1974

such other tests which includes- polygraph tests, brain mapping, narcotics test etc. The SC contended that use of such neurological test violated an accused person's right against self-incrimination under Article 20(3)¹⁸, and their right to life and personal liberty under Article 21 of the Constitution. The court held that the personal autonomy of a person should be given an utmost importance, whether he wants to speak or not. It is his personal choice to give a personal statement and it should not be interfered while keeping in mind that he has protection under article 20(3).

What if any person volunteer for such other tests?

Article 20(3) of the Indian Constitution does not kick in and these tests are not unconstitutional, if a person himself volunteers, but these tests have no evidentiary value and can be only used as a discovery statement under *Bharatiya Sakshya Adhiniyam*.

CrPC V. BNSS- A COMPARITIVE OVERVIEW OF ARREST:

The shift from Criminal Procedure Code (1973) to *Bharatiya Nagrik Suraksha Sanhita (2023)* saw a transition from colonial based law to public oriented criminal justice system. The code that only focused on how punishment should be given and law and order should be maintained, the *sanhita* focuses on providing both punishment and giving justice to the people. However not many major changes have been done in the *sanhita*, but aim respect of provisions of arrest *sanhita* introduces and refine some reforms that aims to improve the transparency, accountability and protection of rights of citizens.

First of all, the division of arrest- arrest with or without warrant, arrest in case of cognizable and non-cognizable offence- remains untouched in the BNSS. The foremost section of BNSS i.e. section 35 has repealed the section 41 and 41A of CrPC¹⁹, 1973 but it is still attached to the core principles of arrest by police officers without arrest.

The *Sanhita* has designated a police officer not below the rank of the Assistant Sub-Inspector of Police for maintaining name and other relevant information about the arrested person. Earlier in the CrPC it did not mentioned the specific post of the police officer, rather it caused to display on a notice board outside the control rooms of police stations.

¹⁸ INDIA CONST. art. 20(3), amended by The Constitution (One Hundred and Fourth Amendment) Act, 2019

¹⁹ The Criminal Procedure Code, 1974, No. 2, Acts of Parliament, 1974 (India)

BNSS promotes of keeping records in electronic forms like videography, electronic communication with the Judges and police officers. It aims at enhancing a modern procedural framework compared to CrPC.

To sum up, BNSS has been introduced to redefine or restructure CrPC in a more effective and efficient way. However most of the provisions has not been changed, but the attempt to repeal the code was necessary in order to fill the longstanding gap that was there in the code.

SAFEGUARDS AGAINST ARBITRARY ARREST- Case Analysis of DK Basu

V. State of West Bengal²⁰:

Jai Bhim, a tremendous film starring *Surya*, a south actor showcases the real world of custodial deaths in the police custody. This film not only grabbed the attention of cinema lovers, but it also spread among the political and civil society circles. This film talks about a poor tribal man who falsely get accused of robbery and goes missing from the police station. The film shows that how the general public comes under the wrath of violence of the police custody.

Before the judgment of the mentioned case, people who were in the police custody were deprived of their right mentioned under Article 21 of the Indian Constitution. Article 21 states that no person shall be deprived of his life or personal liberty except according to the procedure established by law²¹. Prior before this case there were lot of custodial deaths and a lot of miss happening to the people under the police custody. In the landmark judgment of *DK Basu* case while referring to the case of *Neelabati Bahera v. State of Orissa* AIR 1993 SC 1960, the court contended that the accused or the detainees should not be deprived of their fundamental rights mentioned under Article 21 of the Indian Constitution. In regards to this the apex court issued some guidelines keeping in mind the arrest and detention of accused. Whosoever will not adhere to these guidelines, will be strictly punished:

1. The police officer who is making the arrest and also handling the interrogation shall wear accurate, visible and clear identification and name tags with their designations. It is mandatory that the details of such police officer be mentioned in a register.

²⁰ D.K. Basu v. State of West Bengal, 1997 6 SCC 642.

²¹ P M Bakshi, The Constitution of India 74 (17 ed. 2020).

2. A memo of arrest should be prepared by the police officer and at least one witness should sign the memo. The witness should be either a family member, a relative or even a friend. The arrested person should also sign the memo.
3. At least one friend or any relative should have the information that the offender has been detained or is in the police custody.
4. The arrestee shall have the right to be represented by a legal counsel.
5. After the arrest all necessary details should be mentioned in a case diary which would include the place of detention, will disclose the name of his next friend or relative who is informed about the arrest and the details of the police official who has made the arrest.
6. The arrested person has also the right to be medically examined by a registered practitioner in case he believes that he has been subjected to violence during his stay in the police custody or while he was locked up in jail. In every 48 hours the arrestee shall be medically examined by the practitioner, prescribed by Director of the Health Services of concerned state.

SUGGESTIONS:

As we have seen how the process of arrest is so big and divided into various sub-parts making the justice system easier. However, in present day also, there are certain gaps that is needed to be filled. The following suggestions will make sure that the provisions of arrest are not only theoretical in nature but also a live reality for the public:

- First of all, all the concern police officers or any other person who would be making arrest, should have a proper training for it. They should not only be focused on the bare provisions mentioned in the act, rather they should have also knowledge about constitutional ethos. Workshops on human dignity, liberty, freedom etc. should be conducted. Because of this they would have a knowledge on custodial violence and arbitrary arrest.
- All the legal aid groups or NGOs should campaign informing the citizens their rights they can exercise during arrest. This would play a major role in decreasing unlawful arrests.
- A proper digital infrastructure should be established both at courts and polices stations. All records and evidences should be kept in an electronic form.

CONCLUSION:

To sum up, arrest is of great criminal jurisprudential importance. The idea behind to repeal the outdated code was to change the criminal justice system and give it more transparency and accountability. While most of the provisions remains unchanged, BNSS has tried to reflect the constitutional and judicial values.

In India there are many loopholes while making arrest. Generally, people who are poor or uneducated, they get easily arrested as they do not know about their rights and many police officers misuse their power while arresting for their own benefit or for someone else. In other matters they just try to shut down the case by arresting the wrong person. Due this and also an increase in crime rates, the most famous central jail of India- “Tihar Jail” has been overcrowded in recent years, because of which many inmates have been suffering from illness and mental health issues²². Recently the Chief Minister of Delhi, Rekha Gupta has allocated Rs 10 Crore budget for the new jail complex, aiming to reform and rehabilitate prisoners.

Many changes regarding the procedures of arrest and post arrest have been and will be continue in future. But as long as people in a country like India do not know about their rights, they will remain in this loophole and jails will be overcrowded like Tihar.

²² Gulam Jeelani, Tihar Jail being shifted: Delhi govt's relocation plan | Famous inmates of South Asia's largest prison, The Mint (March 26, 2025, 08:24 AM), <https://www.livemint.com/news/india/tihar-jail-being-shifted-know-delhi-bjp-government-bold-relocation-plan-who-are-famous-inmates-budget-cm-rekha-gupta-11742950715766.html>