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PROCEDURE OF ARREST IN INDIA AND U.S.A

By: Rohit Arora

Abstract

This article basically describes about the procedure of arrest in India as well in USA. If any person done any act which is illegal in the eyes of law shall be liable for punishment and while arresting someone it is very important that such right should not be violated which is given to the detainee. Arrest is the exception of the golden rule of liberty. This power is used by the police officials and some other person also which is given in the law.

Keywords

Arrest, Criminal Law, Custody, Procedure of Arrest

Introduction

The Constitution of India is the supreme law in India which provides some precious rights to the person who lives in India in which some rights also given to arrested person by the Code of Criminal Procedure, 1973. The meaning of arrest is to apprehend someone or keep in the custody by legal authority. It is not necessary that arrest can only be done by police officer but it may also be done by any private person in whose presence the cognizable offence has been committed and without unnecessary delay, shall hand over to the nearest police station. But private person can't put that person in his custody. Here, custody doesn't include any physical restraint for the purpose of ransom but includes the detention of any person who has committed the offence which is prohibited and punishable under the law.

The Magistrate, whether Executive or judicial also has the power to arrest any person if any offence has been committed in his presence, within his local jurisdiction. Somehow, the provision of arrest is the contravention of article 21 of Constitution of India because it seizes the liberty of that person for that time¹. But on the other hand, it also provides certain remedies to the arrested person such

¹ Constitution of India, 1949

as bail in the bailable offences which is the right of arrested person and the court shall presume in trial that the arrested person is innocent until proven guilty. There are certain other remedies also given by the law to safeguard the rights of the arrested person which is further discussed. The decision of arrest generally taken by the presiding officer of the court on the basis of information obtained from the police officer or the complainant and he would issue a warrant of arrest which is written, signed and sealed by the court². There are certain circumstances in which the arrest has to be made without any delay or avert the danger of sudden outbreak of crime. In those cases, the decision of arrest is to be taken by the person other than presiding officer of the court. It mandates the police to make arrest of any person without violating their human rights.

Certain provisions were also added in the amendment of CrPC in 2009 which came into effect in 2010 and resulted to intercede the rights of the arrested person and in such cases where the arrest is not required, issuing a notice directing to that person against whom the reasonable complaint has been made. Police officer can make preliminary enquiry before registering an F.I.R to authenticate the genuineness of the complaint. By this, unnecessary arrest can be prevented.

In the landmark case of **Joginder Kumar v. State of U.P.**,³ Hon'ble Supreme Court observed that "The National Police Commission in its Third Report referring to the quality of arrests police in India mentioned power of arrest as one of the chief sources of corruption." The report also suggested that, nearly 60% of the arrests were either unnecessary or unjustified and that such unjustified police station accounted for 43.2% of the expenditure of the jails.

Purpose of arrest

The primary purpose of the arrest is to ensuring the presence of the accused during trial and judgement. An arrest is also mandatory to deter him from committing any other crime in future and also set an example for those potential offenders who may try to commit such illegal acts. To decrease the crime in our country we have adopted the reformatory theory of punishment so that the accused can be transformed himself to the law abiding person. It is also necessary to put fear in person's mind that "If you try to commit any offence or illegal act, then you should be ready for its consequences."

Laws of Arrest in U.S.A

² Code of Criminal Procedure, 1973

³ AIR (1994) 4 SCC 260

The meaning and purpose of the arrest is same whether it is in the India, U.S.A, or in any other country but procedure of arrest might be different because every country has its own procedure to deal with the situation to control crime. In the states of U.S.A the procedure of arrest is slightly different but rights of the detainee are same as mentioned below:-

- When such person has taken into the custody, he must be informed that if he answers anything while questioning, then such statement may be used against him in the trial,
- Such person has the right to remain silent,
- Right to consult with the lawyer before and during questioning,
- If he can't appoint a lawyer then they will appoint for him to represent in court,
- These rights can be used by detainee at any time.

Preliminary Examination

A preliminary examination shall be held within the time given by the judge or magistrate to determine whether there is any probable cause to believe that such offence has been committed by him or not. The date for the preliminary examination shall be fixed by the judge or magistrate at the initial appearance of the arrested person. With the consent of the arrested person, the date is fixed by the judge or magistrate for the preliminary examination.⁴

Miranda v. State of Arizona⁵

U.S Supreme Court in its decision specified a code of conduct for police during interrogations of criminal suspects. In this case, the Hon'ble U.S Supreme Court ruled that when law enforcement officers question the person who has been taken into the custody, must inform them about their rights which is provided by the constitution. Right to counsel and to remain silent is one of the main rights given to the detainee. If any evidence has been gathered after getting answers from that person can't be used against him unless officers followed Miranda Rights.⁶

Use of Handcuffs May Constitute Custody

Generally, while making a lawful arrest, law enforcement officials are only allowed to use minimum force to take the person into custody. If the situation is out of control and it is difficult to tackle with such situation then officers may use excessive force to overcome the resistance.

⁴ USCODE-2011 -title.pdf, point 3060

⁵ 386 U.S.436 (1966)

⁶ Miranda v. Arizona Summary, available at Britannica.com (last visited on 03 April, 2022).

Rules followed by the police officials while making an arrest is based on the jurisdiction. Arrest simply means when such person feels that he/she is not free to leave. Basically, it can't be said that the handcuffs are necessary to use while taken such person into custody. But this contrivance is usually followed by the police officials to protect themselves.⁷

Maximum time period to be detained by the Law Enforcement Officials

Generally, in case of 36 hour rule, a person has to be brought before the judge. Another rule of 48 hours states that the person cannot be detained more than 48 hours in the custody after arrest has been made.⁸ Such time period has been given to law enforcement officials for the administrative tasks.

Procedure followed by the Law Enforcement Officials while making arrest

Ever since such person is arrested, his right to liberty ends. There are several procedures made for the police officials while making a legal arrest so that the rights of the person remain protected. There are slightly different procedures from one jurisdiction to another. These add-on procedures might be made for the safety of the police officials. There are some circumstances in which police officials may make an arrest:-

- When the crime is committing in front of the officials,
- When the arrest warrant has been issued by the judge,
- When there is reason to believe that such person has been committed a crime,
- Rest it depends upon the circumstances of the case.

But while making an arrest, the police officials must ensure that basic rights of the person should not be violated because arrest is always an exception.

Laws of Arrest and Rights of Arrested person in India

If any person commits an offence, then he shall be liable for punishment. If police officer thinks that such offence is cognizable then they have authority to arrest such person without warrant and if that offence is non-cognizable then have to take prior permission from the court and after getting permission from the court they can arrest such person who is accused of such offence.

These are some rights mentioned below which is given to the arrested person:-

⁷ www.findlaw.com/what-procedures-must-the-police-follow-while-making-an-arrest/ (last visited on 10 April, 2022)

⁸ <https://bk-lawgroup.com/blog/how-long-can-police-hold-someone-in-custody-following-arrest/> (last visited on 16 April, 2022)

- CrPC, 1973 provides that no person who is arrested shall be detained in custody without being informed him the grounds of the arrest and the information of arrest has to be given to relative or friend of that person.
- The arrested person also has the right to consult with the legal practitioner of his choice during the interrogation. If he can't afford the services of the legal practitioner by own then, free legal aid must be given to him.
- The arrested person has right to be silent during the course of investigation because no one can extract words from the accused although any kind of statement given by the accused to the police officer is not admissible in the court.
- If any police officer misuse their power such as Brain mapping, Third-Degree Torture or other kind of such techniques which is immoral, illegal in the eyes of law, the arrested person can complaint about this torture directly to the magistrate because that kind of things may lead to custodial deaths.
- If the accused has committed any bailable offence then in that case he is entitled to get the information about the bail on the payment of the surety bond.
- If the accused has committed any offence whose punishment is less than 7 years then in that case, no arrest is required and police officer shall issue a notice to that person against whom the complaint was made or credible information was received. Such notice contains the appearance of that person before the police officer or at any place as may be specified in the notice. Here, it is the duty of such person to comply with the terms specified in such notice.
- When the person is arrested either with warrant or without, then the arrested person shall be presented within 24 hours⁹ before the magistrate without any unnecessary delay exclusive the time necessary for the journey from the place of arrest to the Magistrate's Court.
- After the arrest has been made, that person shall be examined by the medical practitioner in the services of the government hospitals and if such medical practitioner is not available in that case, any other registered medical practitioner will examine him.

⁹ Sec. 57 of Code of Criminal Procedure, 1973

- The panel of doctors who are appointed by Director of Health Services shall examine such person who is in the judicial custody in every 48 hours and record such injuries, if happened.
- If any hurt or torture faced by the accused during interrogation by the police officer then the accused has right to demand the compensation after making the complaint to the magistrate against such police officers.
- If the arrested person do not presented in before the court **within twenty- four hours** then the remedy of writ 'Habeas Corpus' is available for him.
- Any confession made by arrested person in police custody shall not be admissible as evidence in the court.¹⁰

Special guidelines while arrest to woman

- No woman shall be arrested after the sunset and before sunrise. Under some exceptional circumstances, if it is mandatory to arrest the woman then woman police officer will take prior permission from the **Judicial Magistrate First Class** within whose jurisdiction the offence has been committed and arrest is to be made.¹¹
- In case, if the arrest of woman is made then such woman should be guarded by female police officers.
- If there is no female police officer present at the time of arrest and it is necessary to arrest that woman then male police officer can arrest her during day light and he must mention the reason of such arrest made by him.¹²
- If it is necessary to search a female, then the body search shall be conducted by another female police officer.
- The arrested woman kept in female lock-up, in case if there is no separate lock-up then such woman should be kept in separate room.
- It is necessary if arrested person is woman, then woman medical practitioner is required for her medical examination.

¹⁰ Guidelines provided in the case of D.K. Basu vs. State of West Bengal(AIR 1997 SC 610)

¹¹ Book of code of criminal procedure, 1973 by Kelkar

¹² See at <http://www.legalserviceindia.com/legal/article-2177-no-woman-shall-be-arrested-after-sunset-before-sunrise.html> (last visited on 10 April, 2022)

- No woman or any child below 15 years of age shall be called to police station or any other place except their place of residence for questioning.
- Restraint in case of pregnant woman should be at last resort.
- Police officer must ensure the safety of such pregnant woman and foetus during arrest.
- No woman shall be restrained during labor.

Duties of Police Officer

A police officer serves to maintain the law and order in local areas by protecting the life of citizens and their property, preventing crime, reducing the fear of crime and also improves the quality of life for all citizens.¹³

- Every police officer while making an arrest shall bear an accurate, visible and clear name tag, so that easily identification can be made.
- The police officer shall in all such cases, where the arrest is not required which means those offences whose punishment is less than 7 years, issue a notice to him in which such conditions is to be given.
- While making an arrest, the memorandum of arrest shall be prepared by police mentioning name of such person, charge, place and signed by at least one witness who is respected member of such locality who is present at the time of such arrest or may by any member of family or neighbour and countersign by the person arrested.
- If the arrest is made without warrant, then the officers in charge of police stations shall report to the District Magistrate or, if he directs, to the Sub-divisional Magistrate.
- Information of arrest is to be given to the relative or friend of that person.
- Police officer will record the information of such arrest in the general diary or station diary.

The information consists –

1. Name and address of that arrested person,
2. Name, rank and badge number of the arresting officer,
3. The time and date of arrest and when the person brought to police station,
4. Reasons/grounds of the arrest,
5. Any property recovered from that person,

¹³ Section 41B, Code of Criminal Procedure, 1973

6. Names of the person to whom the information of arrest has been given.

- Such record must be maintained in the police control room in every district and also at the control room in the Police Headquarters at the State level.¹⁴
- The police officer also ensures the health and safety of the arrested person.
- No unnecessary restraint is to be made unless it is required.

If any police officer fails to comply with these guidelines then such police officer shall be liable for departmental action and shall also be liable for the Contempt of Court before the Hon'ble High Court having such jurisdiction.

Duties of Magistrate

The police officer after arrest to the accused within **twenty- four hours**, such arrested person shall be presented before the court. These are some guidelines issued by the Hon'ble Supreme Court:-

- The Magistrate will check the report, whether the reason of arrest mentioned by the police officer or not.
- The Magistrate will ensure that whether the arrest made by police officer is mandatory or not, if he thinks that the arrest is not mandatory then he will release such person.
- If the Magistrate satisfies by the reason given by police officer then he will also record the reasons that why he is allowing that arrest and granting the permission of further detention, otherwise Magistrate shouldn't give them the order of further detention and he should grant bail to that arrested person.

If the Judicial Magistrate fails to record the reason of authorizing the detention, then the concerned Judicial Magistrate shall be liable for the departmental proceedings by the Hon'ble High Court.

Overcrowded prisons

Nowadays, the total numbers of prisons in India are 1,306 in which the available capacity for prisoners is almost 4, 14,033. But at this time, the inmate population are 4, 88,511 by which the total occupancy rate is 118.0% and under trial prisoners are 3, 71,848¹⁵. This data shows that how

¹⁴ Section 41C (1) Code of Criminal Procedure,1973

¹⁵ As per the data issued in 2020, Dec27 by NCRB (National Crime Records Bureau) regulated by the Ministry of Home Affairs, Government of India

the prisoners are living in the prisons which are overcrowded, even they don't have proper place to sleep. Because of which, they usually fight. The environment of prisons is directly affecting those minds who are not so hardened criminals. There are two types of people who come out of jail after serving their sentence, firstly, those who don't want to commit any crime in future and want to live a good life. Secondly, those who went after committing less serious offences and seeing the other hardened criminals with them got more motivation. The second type of people are the most dangerous creature for the entire society. Whoever commits any crime is necessary to be liable for such punishment which is prescribed by the law but it doesn't mean that whoever is committing any offence, must be arrested by the lawful authority. The problems of overcrowded prisons are unjustifiable arrest and another one is pendency of cases in various courts. Almost 47 (4.7 crore) million cases are pending in Indian courts¹⁶. Between 2010 and 2020, pendency across all courts grew by 2.8% annually¹⁷. These are the main reasons of the problem of overcrowded prisons.

The apex court also issued various guidelines on the inhuman conditions in prisons by passing landmark judgements. The guidelines basically focus on the 'Under trial prisoners'. According to the Supreme Court, the Under Trial Review Committees (UTRCs) headed by the District & Session Judges should meet every quarter and they should also look into the aspects pertaining to effective implementation of sec. 436, 436A of CrPC. So that, under trial prisoners can be released at the earliest and those who are not able to furnish their bail bonds due to poverty are not subjected to be imprisoned only for this reason.

Hon'ble Supreme Court of India view on Arrest

The Hon'ble Supreme Court always looks for a wider view of Article 21 of Indian Constitution which deals with the Protection of life and personal liberty of the citizen. According to the Hon'ble Supreme Court, "Arrest is an exception and bail is the rule". Arrest is not a punishment; it is a tool to ensure the presence of person at the required place. Arrest is the balance between the individual right and social need, where public right becomes heavier than the individual right then in those cases the arrest is needed. The general rule is that police officer must arrest with warrant.

The police officer may arrest without warrant in case of preventive arrest or after the offence has

¹⁶ See at, <https://m.economicstimes.com/news/india/over-4-70-crore-cases-pending-in-various-courts-govt/articleshow/90447554.cms> (last visited on 15 April, 22)

¹⁷ See at, <http://prsindia.org/policy/vital-stats/pendency-and-vacancy-in-the-judiciary> (last visited on 13 April, 2022)

been committed. Preventive arrest can be done if police officer satisfied that such arrest is necessary to prevent such person from committing any further offence. Any cognizable offence committed which punishment is less than seven years, in such case if conditions of section 41(1) (a)-(e) completed¹⁸, then arrest without warrant can be made. Arrest shouldn't be the regular matter. Police officer shouldn't use unnecessary force to restraint. Handcuffs should be avoided. If arrest has been made then remedy of bail is always open inailable offences and in non-ailable offences, it is the discretion of the court whether the bail should grant in non-ailable offences or not. The main focus of the court is on the liberty of the person, it shouldn't be deprived because of the arrest unless it is mandatory. The Supreme Court also held that narco-analysis, polygraph, lie-detector test and brain mapping tests on an accused are illegal and it amounts to an unwarranted intrusion into personal liberty.¹⁹

Conclusion and Suggestions

To arrest someone is simply means to deprive such person from his personal liberty which is given by the constitution as a right to all the citizens of our country. Arrest is an exceptional step taken by the police to prevent the further crime. Arrest is not a sweet fruit which is enjoyed by the detainee. Arrest shouldn't be done as routine manner. The procedure of arrest followed in the India and U.S.A is almost similar. Many guidelines related to arrest are also given by the Hon'ble Supreme Court of India in various cases such as D.K Basu case²⁰, Arnesh kumar²¹ case etc. The criminal justice system is largely depends on the working of police officials. To reduce the crime and maintain the social order, police force plays an important role. Various amendments were also be made to improve the efficiency of the police and maintain the balance between the individual liberty and social order while police officials exercising the power of arrest. Such power should not be misused by the police officers which is given to them for the safety of the people and to maintain the social order.

¹⁸ Code of Criminal Procedure, 1973

¹⁹ See at <https://m.economictimes.com/news/politics-and-nation/nacro-lie-detector-test-brain-mapping-illegal-rules-sc/articleshow/5896174.cms> (last visited on 09 April, 2022)

²⁰ AIR 1997 SC 610

²¹ AIR 2014, 8 SCC 273