VOLUME 1 | ISSUE 1 2020

INTERNATIONAL JOURNAL OF ADVANCED LEGAL RESEARCH

CRITICAL ANALYSIS OF ARREST AND MAGISTERIAL POWERS

By Aayush Akar and Hitesh Gangwani

INTRODUCTION

Arrest means deprivation of a person of his liberty by a legal authority or at least by apparent legal authority.[1] Process of arrest, entitled the authorities to curtail or interfere with individual freedom by physical restrain. However, in broader sense arrest plays a very vital role in our Criminal Justice Administration as the arrest of accused ensures prevention of further criminal activity, the effective conduct of Investigation and most importantly ensures availability of the accused of the trail or consequent proceeding of the Court. But, on the other hand, unnecessary and misuse of powers of arrest hits at the core of individual liberty, which is enshrined under Article Twenty One of the Constitution[2], due to which unreasonable and arbitrary arrest violates the fundamental right of an individual. Therefore, through various statutory provisions and judicial pronouncements, Law of Arrest ensures fine balancing between the liberties of the arrestee and on the other hand interest of the community.

The CrPC has not described the term arrest, whereas in Black's Law Dictionary defines arrest as "*The restraint of a person's authority through some lawful authority*". Therefore, in literal sense arrest can be termed as taking a person into lawful custody. Here, the term legal custody is one of the pre-requisite of arrest, which can be illustrated through an example that, when a Policemen apprehends a thief and confine him, his act come under the ambit of arrest,

*Students of National Law University Odisha, Cuttack.

[1] K. N. Chandrasekharan Pillai, R. V. Kelkar's Criminal Procedure, 6th Edn. EBC, 2014.

[2] The Constitution of India 1950, a 21.

© 2020 International Journal of Advanced Legal Research

whereas on the other hand when a thief apprehends an innocent and confines him, his act come under the offence of wrongful confinement. Therefore, only lawful authority can arrest.

Article Twenty One states that "*No person shall be deprived of personal liberty except according to the procedure established by law*", in lieu of which arbitrary and unreasonable arrest infringes the fundamental right of an individual, further in *Maneka Gandhi v. Union of India*[3], Apex Court held that procedure established by law must be just and reasonable, therefore, any arrest which does fulfil the criteria of just, fair and reasonable is also violative of the fundamental right of an individual.

Therefore, in lieu of the above consideration, it can be said that personal liberty has so intrinsic character in human's life that no democratic and free society can afford to violate it. So legal provisions of arrest have special significance in our society.

WHO CAN ARREST

The arrest could be done through Policeman, magistrate or any citizen, the individual can also arrest the accused, but it can only be done by complying with the provisions specified in this Code. This Code exempts armed services members from being arrested for anything performed by them in the course of their official duties or after receiving the government's consent (section Forty Five).[4]

ARREST DONE BY THE PRIVATE INDIVIDUAL

Under section Forty Three of this Code[5], any private individual can arrest an individual without a warrant only if the person is a convicted offender under section Eighty Two of the Code and the person is in his presence committing a non-bailable and cognizable offence.

ARREST DONE BY MAGISTRATE

Section FortyFour[6] states that any magistrate can arrest any individual where the offence should be committed in his presence than he can arrest the person or orders Police to arrest.

ARREST DONE BY POLICE OFFICER

The Policemen can detain (arrest) without a warrant under section FortyOne (One) to 151of this Code and under a warrant section Seventy Two to Seventy Four deals with it, when the

[3]*Maneka Gandhi v Union of India* 1978 AIR 597.
[4]The CrPC 1973, s45.
[5]The CrPC 1973, s43.
[6]The CrPC 1973, s44.

© 2020 International Journal of Advanced Legal Research

magistrate ordered the Police to arrest the accused can be arrested under section FortyFour and in the case of non-cognizable than under section FortyTwo of this Code.

POST-ARREST PROCEDURE

As earlier discussed, that, Law of Arrest is to balance on such scale that it fulfils dual role firstly,to keep social harmony by confining the wrongdoers, Secondly, to safeguard the accused from unnecessary and arbitrary arrest procedure. Therefore, Post-Arrest procedure in the CrPC, 193 is such that it fulfils the above-mentioned dual role. Below are some of the Post-Arrest procedure provided in Code-

SEARCH OF ACCUSED[7]

Section Fifty One mentions Search of the accused, according to this section a Policemen to search an accused under certain circumstances. If a Policemen thinks that the accused may have something's which can be useful for investigation, then Policemen can search the accused, but in case of the accused is female than search can only be made by a female without infringing the decency. If while exercising this right if Policemen found any stolen or incriminating item form the accused then Policemen can seize them under Section 102 and produce before the Court. Under Section Fifty One there is no such provision that search must be done in presence of a witness, but the rules made under the "Police Act" mandates that search must be done in the presence of a respectable and independent witness.

To safeguard the accused from arbitrary search apart from the presence of witness this section provides that articles seised must be properly accounted, and receipt should be provided to an accused mentioning the articles taken in possession.

In *Kamal Bhai Jethmal v. State of Maharashtra*[8],it was held that mere irregularity in searching will not vitiate the search-evidence inadmissible.

SEIZURE OF OFFENSIVE WEAPONS[9]

Section Fifty Two mentions Seizure of Offensive Weapons, according to this section Policemen or any other person who has arrested the person, is authorised to seize offensive weapons and later forward it to the Court or person authorised by this Code.

---

[7]The CrPC 1973, s 51.
[8]*Kamalabai Jethmal v State of Maharashtra,* AIR 1962 SC 1189.
[9] The CrPC 1973, s 52.

© 2020 International Journal of Advanced Legal Research

It is pertinent to note that under this seizure can be made by any person who is authorised under the Code.

MEDICAL EXAMINATION OF ACCUSED AFTER ARREST[10]

Section Fifty (Three) mentions medical examination of accused after Arrest, whenever a reasonable suspicion can be drawn that on examination of accused, evidence can be obtained. Further, this section accused can also be coerced by the Senior Policemen to submit himself/herself for medical examination. Due to this provision, a question arises that whether Section Fifty (Three) amounts to an infringement of Fundamental Right of the Accused, as Article Twenty (Three) provides safeguard from self-incrimination, whereas under Section Fifty Three of the Code the accused is coerced for medical examination. The Top Court in case of *State of Bombay v. Kathi Kalu Oghad*[11]replied in negative and held that Section Fifty (Three) is not an infringement of Article Twenty (Three) as an accused cannot be coerced to be a witness against himself merely because he was asked to undergo a medical test in lieu of section Fifty (Three).[12] By analysing the above line of reasoning by SC it is obvious that both the interests of the society and accused need to be balanced, favouring anyone will be detrimental in interests of Justice.

Further, Section Fifty (Three) provides "examination of the person", giving a broader notion to the examination, therefore, an examination of the accused does not restrict to body and skin only but also to the organs of the body. Therefore, this section provides and authorise for an examination of a person's blood, semen, urine etc. which are necessary for the case. In the case of *Neeraj Sharma v. State of UP*[13],Allahabad High Court held that "*the Police powers for taking samples of blood etc. could be exercised by the Magistrate*".

To elaborate on the meaning of the term "registered medical practitioner" and "examination", the CrPC Amendment act (2005) inserted section Fifty Three(A), Fifty Four (Two) and Fifty Four (A). Where Section Fifty Three(A) empowers Police office to compel medical PR actioner to examine the person accused of rape, further section Fifty Four (Two) provides that

[10] The CrPC 1973, s 53.
[11] *State of Bombay v Kathi Kalu Oghad* AIR 1961 SC 1808.
[12] *Anil A. Lokhande v State of Maharashtra,* 1981 CriLJ 125,130 (Bom): *Ananth Kumar Naik v State of A.P.,* 1977 Cri LJ 1797 (AP); *Jamshed v State of UP,* 1976 Cri LJ 1680 (All)
[13] *Neeraj Sharma v. State of UP* 1993 Cri LJ 2266 (All).

© 2020 International Journal of Advanced Legal Research

a copy of the medical examination report shall be furnished to the magistrate through the investigating Officer and also be given to the accused.

REPORT OF ARRESTS TO BE SENT TO DISTRICT MAGISTRATES[14]

Section Fifty Eight provides that Officer in charge of Police station shall send the report to the District Magistrate, in which all persons arrested without a warrant is mentioned and further also mentioning that bail is granted to them or not. This section serves dual purpose firstly, it ensures that situation regarding grave offences has been acknowledged to District Magistrate, which will help in proper administration, secondly, it ensures transparency and protect the interest of the accused from arbitrary arrest and ensures that whether Police is exercising their powers properly or not?

PERSON ARRESTED NOT TO BE DISCHARGED EXCEPT ON BOND AND BAIL[15]

Section Fifty Nine provides Discharge of person apprehended, according to this section when a person has been arrested by a Policemen, he shall only be discharged on bail, or by his bond or under the order of Magistrate. Under the order of Magistrate as per this section refers to the order given by Magistrate under Section Sixteen of CrPC when investigation cannot be completed within Twenty Four hours.

PROCEDURAL SAFEGUARDS OF ACCUSED

While there are many legislative and regulatory safeguards to protect a person's freedom and life, the Apex Court has consistently observed that the occurrence of abuse and death in Police custody has become a troublesome problem. Therefore, to counter the danger of abuse of arrest authority, India's Top Court gave many guidelines in several cases. In this chapter, we are going to discuss each instance where the Apex Court gave guidelines.

GUIDELINES FOR HANDCUFFING

In the case of "*Citizens for Democracy v. State of Assam and Ors*"[16], the Top Court gave guidelines for handcuffing.

[14] The CrPC 1973, s 58.
[15] The CrPC 1973, s 59.
[16] *Citisens for Democracy v State of Assam* AIR 1996 SC 2193.

© 2020 International Journal of Advanced Legal Research

- The Apex Court ruled that handcuffs or other fetters could not be imposed on an inmate either sentenced or under-trial while in prison or while being transferred or transited from one prison to another or from prison to Court and back.
- On their own will, the Policemen and the prison officials shall have no power to direct the hand-cuffing of any prisoner in the nation or during the transition from one prison to another or from prison to trial and back.
- Where the Police or prison officials have well-founded reasons that an offender is likely to escape the prison or from custody, the prisoner shall be brought before the competent Magistrate and an application for authorization to handcuff the offender shall be taken from the Magistrate concerned.
- Furthermore, the Court ordered that any breach by any rank of Police in the nation or personnel of the jail department of any of the directives issued by the Apex Court be subsequently punished under the "Contempt of Courts Act" besides other penalties mentioned under the statute.

GUIDELINES FOR ARREST OF WOMEN

In the case of "*State of Maharashtra* v *Christian Community Welfare Council of India*"[17], the Apex Court reversed the ruling of Bombay High Court. To preserve the integrity of women, Bombay High Court held that without the presence of the female Officer and, in no case, no women shall be imprisoned after sunset or before the sunrise. The Top Court however acknowledging the rationale behind the judgment delivered by the High Court and held that strict adherence to the rule would, in the circumstances in question, create practical problems for the investigation agency and may provide space for the avaricious offender to circumvent the legal process. Furthermore, Top Court noted that although it is indeed requisite to protect the female from the Police misdeeds when the need for detention arises, it is not always reasonably possible to have the presence of woman Policeman. The Top Court while altering the verdict of the High Court maintained the status quo of the Judgement of the High Court. It stated that all efforts should be made for the presence of lady constable but when lady constable is not available and arrest of women is deemed to be necessary to impede

[17] *State of Maharashtra v Christian Community Welfare Council of India* AIR 2004 SC 7.

© 2020 International Journal of Advanced Legal Research

investigation then the arrest is allowed at any time of day by the Policemen but he has to give lawful reasons for the arrest either after or before an arrest.

GUIDELINES FOR POLICEMEN FOR MAKING ARREST AND FOR MAGISTRATE

In the case of "*Arnesh Kumar v. State of Bihar*"[18], the Top Court held that disgruntled wives are using Section 498 (A) to harass their innocent husband. "*Arrest brings humiliation, curtails freedom and cast scars forever. Power to arrest greatly contributes to its arrogance so also the failure of the Magistracy to check it. Not only this, the power of arrest is one of the lucrative sources of Police corruption*".

- The Top Court held that no detention would be made solely even though the offence is non-cognizable and bailable. One thing is the presence of the right to detain, the rationale for exercising is quite another.The Policemen must be able, besides the authority to arrest should justify the reasons for this.
- No detention may be rendered on a mere accusation of commission of a crime against an individual in a daily manner. It might be reasonable and prudent for a Policeman that no detention is made without legitimate satisfaction regarding the authenticity of the accusation made after some inquiry.
- The Court put more emphasis on Section Forty One (One) (B) where arrest by a Policeman cannot be solely made if he has committed any offence which is up to seven years of imprisonment including fine. He can arrest individual after making a proper inquiry, accused with tamper with evidence or will threat or cause harm to the witness.

The Top Court gave the guidelines for magistrate in cases of arrest of accused. They are as follows-

- The magistrate has to make sure that the arrest of the accused is made lawfully before authorizing detention under Section 167 CrPC."*If the arrest effected by the Policemen does not satisfy the requirements of Section Forty One of the Code, Magistrate is duty-bound not to authorise his further detention and release the accused*".

[18]*Arnesh Kumar v State of Bihar* (2014) 8 SCC 273.

© 2020 International Journal of Advanced Legal Research

- The Policemen while in writing to the magistrate will state reasons to conclude arrest of accused and if the magistrate is satisfied with the facts and reasons presented by the Police then only he will authorise the detention of accused.
- Magistrates are not allowed to use mechanic use of mind and are not bound by the materials forwarded by the Policemen.

The Top Court finally approved these guidelines in the case of "*Social Action Forum for Manav Adhikar v. Union of India*"[19].

GUIDELINES FOR RIGHT AGAINST SELF INCARNATION

In the case of "*Nandini Satpathy v. P L Dani*"[20], the Top Court observed that "Article Twenty(Three) of the Constitution" stipulates that no person is coerced to be a witness against him/herself. "Section 161 (Two) CrPC" imposes an obligation on an individual to respond to all questions truly and accurately, except those that determine personal guilt to an arresting officer. The Top Court agreed that a conflict exists between a societal involvement in crime detection and an alleged offender's constitutional rights. They added that particularly when criminal acts were increasing and offenders were outwitting investigators the Police had a hard job to do. Notwithstanding this, it is of utmost importance to protect the fundamental rights, the Court stated. To protect these rights, we could not afford to write off the apprehension of Police torture leading to coerced self-incrimination. The person being questioned is entitled to have a lawyer if accuse wishes. When an arrested party is under detention, he or she must be informed of the right to take legal help i.e. consult a lawyer at the period of interrogation. Women in infringement of Section 160 (One) CrPC will not be summoned to the Police station for interrogation.

GUIDELINES TO CURB MISUSE OF ARREST

In the case of "*Joginder Kumar v. State of UP*"[21], the Apex Court laid down the directives to avert the misuse of the power of arrest.

[19] *Social Action Forum for Manav Adhikar v Union of India* Writ petition (civil) no. 73 of 2015.
[20] *Nandini Satpathy v P L Dani* 1978 SCR (3) 608.
[21] *Joginder Kumar v State of UP*1994 AIR 1349.

© 2020 International Journal of Advanced Legal Research

- The Court said that arrests could not be accomplished routine manner. On the grounds of some initial inquiry, the Policeman making the detention should give the rationale behind making an arrest.
- An accused person should be permitted to notify a friend or family of his or her arrest and place of arrest. The investigating officer must notify the accused person of such a right when brought to the Police station and therefore must create an entry in the station diary as to who has been made aware.
- The Magistrate is required to check whether all the conditions are complied with or not.

GUIDELINES FOR PROCEDURE OF ARREST, CUSTODIAL VIOLENCE AND COMPENSATION

In the case of "*DK Basu v. State of West Bengal*"[22], the Top Court gave eleven point guidelines for procedure of arrest and to curb misuse of the arrest.

- No violent methods would be used by the Policemen to gather information.
- The Police Officers conducting detention and doing interrogation must carry with their designations which could be realistic and identifiable. Details of all Officers doing interrogation of accused shall be maintained in a station diary.
- The memo of arrest made the Policeman indicating the time and location of the detention. At least one testimony who is either a family member of the accused or a reputable individual from the place where the arrest was made should attest to it. The memo must also be signed by the accused.
- The accused has the right to notify as soon as possible of the arrest and detention to his friend, family member or any other individual concerned of his/her welfare. This right shall be made known to the detained person as soon as he/she is detained.
- During questioning, the accused person has the right to approach the lawyer but not throughout the questioning.
- Through telegraph, the next relative or friend of the accused should be informed of the time, location of detainment and custody within eight to twelve hours if they live outside the district.

[22] *DK Basu v State of West Bengal* (1997) 1 SCC 416.

© 2020 International Journal of Advanced Legal Research

- From the District Legal Aid Organization and nearby Police station, the information of the arrest should be provided.
- Police Officers are mandated to make an entry in a station diary regarding the location of detention of accused.
- The accused should be examined by a medical practitioner at the time of detention if necessary. All physical wounds to the accused person should be reported in the "inspection memo" which should be signed both by the accused and the Policeman making the detention. Copies of the memo must be given to the person in custody.
- The accused should be subject to a medical assessment every Forty Eight hours by a qualified practitioner who has been appointed by the State Ministry of Health. Copies of all documents about the detention, such as a memo of arrest, would be sent to the magistrate for the record.
- The police control room in all districts and the state offices must be provided, where data regarding arrest is shown prominently.

Administrative action and contempt for Court proceedings should be brought against Officers who do not comply with the above guidelines.

GUIDELINES FOR ARREST OF JUDICIAL OFFICER

In the case of "*Delhi Judicial Service Association v. State of Gujarat*"[23], the Top Court held that *"no person whatever his rank or designation may be, is, above law and he must face the penal consequences of infraction of criminal law. A Magistrate,* Judge *or any other Judicial Officer is liable to criminal prosecution for an offence like any other citizen"*. The Top Court gave seven guidelines in this case-

- If a Judge is to be prosecuted for some crime, it should be done as when the situation may be, under permission from the District Court Judge or the High Court.
- Where the facts of this case require immediate detention, technical or formal detention may be made by the judicial officer of the subordinate Court.
- The detained Judicial Officer shall not, without the orders of the District and Session Judge if available taken to the Police station.

[23] *Delhi Judicial Service Association v State of Gujarat* 1991 4 SCC 406.

© 2020 International Journal of Advanced Legal Research

- The Judicial Officer shall receive instant services for interaction, with the District and Sessions Judge, with his relatives, legal counsel and Judicial Officials.
- No declaration or panchanama shall be drawn up, no medical examinations can be performed by the Judicial Officer under detention unless the Legal Advisor or an equivalent or senior Judicial Office is present. The District Judgeand the Chief Justice of the High Court shall be notified of the facts of the detention immediately.
- The handcuffing to the judicial officer is not allowed unless the need arises to effect the physical arrest and in this case, an instant report will be made to District Judge and the Chief Justice.

RIGHTS OF ACCUSED

An arrest can be explained as the dispossession of liberty by a supreme authority or a person authorised by the Government to do the same. The legal system in India is established on the platform of "*innocent till proven guilty*", it is one of the fundamental principles of the Indian Judiciary. Police have vested with the power to detain any person in the case about cognizable offences. Though the Police are vested with various powers to arrest there is a certain restriction also, the restriction is given to protect the interest of society and the person who is arrested. An accused is entitled with few rights and these rights are given to protect themselves from the powers vested with government and the basic of the rights are given in the constitution

"**RIGHT TO KNOW THE GROUNDS OF ARREST**"

In the Indian Constitution, there are several rights vested to the arrestee and one of them is stated in Constitution under "Article Twenty Two (Two)",[24]it mentions that it is an obligation of the person who has detained individual to give or inform the reason for the arrest to an arrestee as soon as may be feasible and the detainee has to permit to meet and defend his/her choice of lawyer.

"Section Fifty (A)[25]", state that the Policemen or any person detaining the accused shall have to give the reason for detention it can be either in oral or written if the senior officer has

[24]The Constitution of India, 1950, a 22 (2).
[25]The CrPC 1973, s50A.

© 2020 International Journal of Advanced Legal Research

delegated the arrest of a person to subordinate under "Section Fifty Five"[26] and that subordinate officer shall inform the person to be arrested of the content of the written order provided by the senior Policemen stating the crime or other reason for which the arrest is to be made before making the arrest. Failure to comply with the clause would make the detention illegal. Thirdly, "Section Seventy Five"[27], states that the person enforcing the warrant need to tell content thereof and if required then serve the detainee with a warrant, if the substance of the warrant is not communicated to the arrestee than the arrest will be illegal.

"**INFORMATION REGARDING THE RIGHT TO RELEASED ON BAIL**"

This right is given under "Section Fifty (Two)[28] and it states as whenever Policemen arrest any person without a warrant in the bailable offences than the Police have to give information to the arrestee that he has the right to be released on bail.

"**RIGHT TO BE PRODUCED BEFORE THE MAGISTRATE WITHOUT DELAY**"

Whenever Police detain the person without a warrant or any other person who is executing the warrant, the person (detainee) need to be bought in front magistrate as soon as possible. "Article Twenty Two (Two)" layout for the arrested to be produced before the Magistrate or Sub Magistrate (on the orders of the Magistrate) within a time frame of Twenty Four hours not including the time vested in travel to and from the destination. In the case of "*Roshan Beewi and ors. v. Joint Secretary to Government of India*"[29], the Court held that prolonged delay in infringement of "Article Twenty Two (Two)" makes such detention illegal and hence any statement recorded from such accused or persons should be held to have been tainted with illegality as having been extorted under duress, coercion or undue influence and such a statement should not form the basis of the subjective satisfaction to be drawn by the detaining authority.

"Section Fifty Six", [30] states that the Officer who has arrested the person without a warrant has to take the arrestee before a judge or before the senior officer of the Police station without

[26]The CrPC 1973, s55.
[27]The CrPC 1973, s75.
[28]The CrPC 1973, s50 (2).
[29]*Roshan Beewi and Ors. v Joint Secretary to Government of India* 1984 (15) ELT 289 Mad.
[30]CrPC 1973, s56.

© 2020 International Journal of Advanced Legal Research

undue delay. "Section Seventy Six" [31] states that the arrestee to be bought before the Court without undue delay, the person enforcing the warrant shall have to bring the arrestee before a magistrate within Twenty Four hours. In the case "*Bhim Singh v. State of J & K*[32]", the Court stated that there was a deliberate and malafide intention of the Policemen to restrain the politician from exercising his right to attend the session of the legislative assembly and hence in the process of keeping him detained did not produce him before the magistrate of that particular jurisdiction the Police has violated the section Fifty Six and Seventy Six of this Code.

RIGHT TO CONSULT A LEGAL PRACTITIONER

"Article Twenty Two (One)[33]" of the Constitution states that the person arrested need not be denied for the "*right to consult a lawyer*" of his/her choice. Therefore, as the Top Court has laid down in one the pronouncement that the state must provide legal aid not form the trial but from when the detainee first brought before the judge, and Top Court also stated that failure to comply with this will affect the trial "Section Forty One (D)". This section states that the person against whom the proceeding is going has the right to defend by the legal practitioner of his/her choice.

"**RIGHT OF FREE LEGAL AID**"

The Top Court has stated the various guidelines about the free legal aid to the economically deprived persons as per "*Khatri v. State of Bihar*[34]".

"**RIGHTS AT A TRIAL**"

Under Article Fourteen[35] "*The Constitution guarantees the right to equality before the law*". This Code states that there has to be an open court trial so that trial will be fair. This rule has been made so that the conviction should not be done secretly, in certain rare situations the trial can be conducted in camera. The Constitution guarantees an accused the right to a timely trial so that no injustice is caused to the accused.

[31] CrPC 1973, s76.
[32] *Bhim Singh v State of J & K* 1984 (2) SCALE 370.
[33] The Constitution of India, 1950, a 22(1).
[34] *Khatri v. State of Bihar* 1981 AIR 1068.
[35] The Constitution of India, 1950, a 14.

© 2020 International Journal of Advanced Legal Research

RIGHT TO REMAIN SILENCE

This right has not been mentioned in the Codes or the Constitution explicitly but derives its power and authority from the Code and the Indian Evidence Act. The Justice Malimath Committee writes about the origin of the right to remain silent and added a new dimension to the "Article Twenty (Three)"[36]and interpreted it as to refuse to give an answer against one's self and incriminate oneself in the absence of a proper charge. It is a well-established right according to the judgment delivered by the Court in the *Nandini Satpathy v. P.L. Dani*[37]. It mentioned clearly that the accused cannot bepressured to respond to questions simply because, when considered in isolation and confined to that a particular case, they are not implied and are thus entitled to keep his mouth shut if he has fair prospectsof exposing him to guilt in an actual or inevitable charge.

MISCELLANEOUS RIGHTS CONFERRED ON ACCUSEDS

- **Right to have decent health and safety care system**-Section Fifty Five (A)[38]of the Code" states that maintaining decent and reasonable health and safety care system is the sole responsibility of the person or the Police official so to say who has the custody of the accused.
- **Right to not be in custody without legal arrest**- "Section Forty Nine of the Code[39]" states that the Policemen must not restrain the accused without a legal arrest. In the case, "*DK Basu v. West Bengal and Ors*"[40], it further enumerated certain guidelines for a procedural arrest of the accused to overcome the issue of custodial deaths and illnesses and to safeguard the accused from unnecessary inhuman conduct of the Policemen and held him accountable for non-performance of duty.
- "**Right of not being detained for more than Twenty Four hours without judicial scrutiny**"- The arrestee needs to be bought before the magistrate within Twenty Four hours irrespective with a warrant or without warrant the detention. Section Fifty Seven of this

[36] Constitution of India, 1950, a 20 (3).
[37] *Nandini Satpathy v P L Dani* 1978 SCR (3) 608.
[38] The CrPC 1973, s55A.
[39] The CrPC 1973, s49.
[40] *DK Basu v State of West Bengal* (1997) 1 SCC 416.

© 2020 International Journal of Advanced Legal Research

Code[41], states that detention of the accused in Police custody should not exceed Twenty Four hours. Article Twenty Two (Two) of Constitution also deal with this right and states that person detained in Police custody has too bought before the magistrate within Twenty Four hours. This right has been created so that the Police will not be able to compel the detainee for extracting information. In the landmark pronouncement *Khatri v. State of Bihar*[42], the Top Court has instructed the Police and the state to ensure this legal and constitution obligation (that the detainee to be bought before the magistrate within Twenty Fourhours) need to follow carefully.

PREVENTIVE DETENTION: IS IT NECESSARY EVIL?

There are various provisions under the Indian Constitution and CrPC which protect the Rights of Accused, such that neither the personal liberty of the accused in unnecessarily nor the broader societal interest is compromised. But fortunately or unfortunately our Constitution framers provided the preventive Detention in our Constitution and form independence till now it's constitutionally valid, due to which it paved the way for the arbitrary, unreasonable arrest. Though Prevention Detention fulfils the certain purpose of broader society interest it's no doubt that they fulfil this interest at the sake of liberty of some individuals. It is worth to note that in Preventive Detention there is no criminal trial, this absence of criminal trail takes away the right of Accused and close the gates of Judicial Scrutiny.

WHAT IS PREVENTIVE DETENTION?

Preventive Detention in a literal sense means that detaining a person, to prevent him from doing an act which poses a threat and is undesirable, like acts which put the security of India or state in peril, harming public order hindering the essential supplies and services essential to community and many more.

Prevention Detention in a lot way different from Punitive Detention, as Punitive Detention is the general rule in our Criminal Justice Administration whereas Preventive Detention, on the other hand, is an exception. The major differences between Preventive Detention and Punitive Detention are-

[41]The CrPC 1973, s 57
[42]*Khatri v. State of Bihar* 1981 AIR 1068.

© 2020 International Journal of Advanced Legal Research

- Punitive Detention refers to the detention after the commission for the act, whereas in the case of prevention Detention no such act has been committed it serves an apprehension for the commission of an act.
- Punitive Detention is authorised by law to fix the liability for the commission for crime whereas Preventive Detention authorises by law to prevent the commission of the crime.
- In Punitive Detention, detention is only after trial except for cases where there is the prima case is made out, but on the other hand in Preventive Detention there is no criminal trial.[43]

IS PREVENTIVE DETENTION CONSTITUTIONAL?

Personal Liberty enshrined under Article Twenty One; Rule of law upheld in our Democratic society. These fundamental ideas are very difficult to reconcile with the provision of preventive detention enshrined under Article Twenty Two in our constitution. Throughout the times' various academicians, Judges, lawmakers find it very difficult and challenging to justify preventive detention in our society.

But to make it precise apart from considering the fundamental principle of the constitution. Various Lawmakers and Judges have a consensus view that"*Preventive Detention is no doubt evil but is a necessary evil*". Therefore, apart from certain safeguard Preventive Detention in a form of necessary evil is still upheld in our Constitution.

In the case of *Maneka Gandhi v. Union of India*[44], Apex Court held that procedure established by law must be just and reasonable, the further theory of mutual exclusivity of Fundamental Rights was rejected. But still, it is a mystery for legal scholars that why preventive detention is constitutional if the procedure needs to be established to be just, fair and reasonable. Further, if Fundamental Rights in our constitution are not mutually exclusive then how come Preventive Detention is constitutional when it violates other fundamental rights of an individual.

[43]'Preventive Detention' <http://www.legalserviceindia.com/legal/article-751-preventive-detention.html> accessed 19 April 2020.
[44]*Maneka Gandhi v Union of India* 1978 AIR 597.

© 2020 International Journal of Advanced Legal Research

RIGHTS OF ACCUSED IN CASE OF PREVENTIVE DETENTION

When we talk about Right of Accused in Preventive Detention it is not much different from the rights ensured to an accused under punitive detention. In a case of preventive Detention accused has mainly two rights which are ensured in ArticleTwenty Twoare-

- Communication for the grounds of Detention
- Opportunity making a representation against an order of Detention.

In case of preventive detention, there is another important right according to which no person can be detained for a period longer than three months without the authorization from the Advisory, but one of the major flaws which make this right an illusion only that authorization of the advisory board can also be dispensed with the parliament by law. Apart from these, there are no rights provided to the accused, due to which accused can be put in custody beyond Twenty Four Hours without the authorization of the magistrate.

But, to prevent the tyranny of Justice, Top Court through various judgments tried to protect the accused from arbitrary and unreasonable preventive detention. For this, SC allowed Courts for Judicial Review of the Detention Order and held that there should be reasonable nexus between detention and detention order, non-existent or irrelevant or misconceived order with no reasonable nexus for the detention are liable to strike down.[45]

PUBLIC SAFETY ACT, 1978[46]

Public Safety Act, 1978 is one of the major examples in a contemporary time where we can understand the repercussions of preventive detention in a free democratic society. Public Safety Act, 1978 is an administrative detention law which authorises detention of a person up to two years without any charge and trial. Under this act, Two Former CM'S of Jammu and Kashmir, Mhebooba Mufti and Omar Abdullah are detained and authorised for house arrest. As, under this act people can be arrested and detained without a warrant, for an unspecified period, therefore sometimes these acts are termed as lawless act. The reason why such an act is termed as a lawless act because these acts not only violates the constitution but also violates the basic standard of International Humans Right Law.

---

[45] *Shafiq Ahmed v DM, Meerut* (199) 4 SCC 556; *State of Punjab v Sukhpal Singh* (1990) 1 SCC 35; *Pebam Ningol Mikoi Devi v State of Manipur* (2010) 9 SCC 618.

[46] Knappily, 'Public Safety Act: The Lawless Law | Knappily' (*Knappily - The Knowledge App*) <http://knappily.com/law/public-safety-act-the-lawless-law-320> accessed 17 April 2020.

© 2020 International Journal of Advanced Legal Research

- Under this act, people can be detained for maintenance of "public order", which is quite a vague term and give an open-hand to authority for arbitrary detention. One of the basic tenants of law is that the law must be quite accessible so that people can know how the law limits their conduct. Which is not so in this case.
- The accused has the right to know the reasons for his arrest. Further, the UN Human Rights Committee stated that this right also extends in the case of preventive detention. But, under S. thirteen of the Public Safety Act, the detaining authority can detain the person for up to Ten days without even knowing the personal reasons for his arrest[47]. Further, authority can also without information which it considers "*to be against the public interest to disclose*".
- S.Sixteen (Five) of the public safety act, states that legal counsel cannot represent the detained person before the authorised board.[48] This provision strikes at the core of the criminal justice system as the arrested should not only have to be represented by legal counsel but also of his choice.
- Under this act, there is no such provision fur judicial review, else the task is on Advisory Board for review of the detention order. As government exerts control over the advisory board therefore it lacks independence. Therefore, the accused is bereft of his basic right of being adjudicated by an independent and impartial body.

  Further, there is another provision too under this act, which violates the basic tenants of our constitution and basic universal rights of an individual. We can better understand the situation how this act creates a tyranny of Justice, through a detention case in 1982 by Supreme Court, where Court said: "*danger looms large that the normal criminal trials and criminal Courts set up for administration justice will be substituted by detention laws often described as a lawless act".* Therefore, it can be concluded that Pubic Safety Act seems to be more Public Safety Threat Act, further in Twenty First century where we talk ballot free, democratic society there is no such need of Prevention Detention as a necessary evil, else it seems an unnecessary evil which paves the way for the oppression of public. Further, who says that these laws serve the *"broader societal interest"* must remember that the "*Cure of Disease cannot be worse than the disease itself!*".

[47] The Public Safety Act 1978, s 13.
[48] The Public Safety Act 1978, s16 (5).

© 2020 International Journal of Advanced Legal Research

CONCLUSION AND SUGGESTIONS

The CrPC 1973, provides for certain safeguards, but so far the power of arrest provided to the Police has been misused. This is assumed until now that the Policemen use the power to harass individuals who have been detained to extort money from them. There have been allegations that the Policemen have refused to warn the accused persons of the proceedings against them and have not equipped them with sufficient means of protection. Thus, bringing revisions to the Criminal Justice Administration is very crucial so that the State knows that its primary responsibility is to seize and reform the guilty party and not penalise him.

We would like to give suggestions for preventing misuse of arrest in CrPC-

- There is a requirement to provide proper training to the Police personnel for basic human values so that they will not misuse the arrest provisions and will not harass the accused person.
- Efforts should be put by Police personnel in changing ways of handling inquiry and interrogation so that there will be no fear in the mind of the accused.
- At some point in time of interrogation, the legal counsel of accused should be allowed so that Police will avoid third-degree methods.
- The public should be informed of the NHRC recommendations for the procedure of the arrest so that Policemen would not misuse the power of arrest.
- Administrative and departmental inquiries should be made against those Officers who are misusing the power of arrest.

© 2020 International Journal of Advanced Legal Research