
TRACING THE LAW ON ARREST IN INDIA

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ABSTRACT

This article presents a comprehensive analysis of arrest and its procedures under various provisions of the criminal procedural law in India, focusing on its legislative intent, practical implementation, and evolving judicial interpretation. The study examines the arrest laws in India, including prompt preventive action, which it offers to the investigating agencies for the purpose of criminal investigation. However, it also highlights significant drawbacks such as misuse of discretionary powers, potential violation of fundamental rights, and lack of accountability. By critically analyzing and evaluating these issues, the article identifies key lacunae in the current framework, such as inadequate safeguards, poor implementation of Supreme Court guidelines, and insufficient oversight mechanisms. Furthermore, a comparative perspective is provided by analyzing arrest law in India with laws in other foreign jurisdictions, drawing lessons from their emphasis on due process, judicial supervision, and rights-based policing. The article concludes by offering pragmatic reforms, suggestions aimed at balancing state authority with civil liberties to ensure justice, transparency, and public trust in the criminal justice system.

Introduction

The criminal justice system serves as the foundation of societal law and order, aiming to maintain justice by balancing the enforcement of legal principles with the safeguarding of individual rights. However, challenges arise at various stages with stages within the system, particularly from a human rights perspective, where the arrest stage is often deemed the most critical.¹ Arrest is a key component of the criminal justice system, as it significantly impacts personal liberty and initiates the criminal justice process.² The term “arrest” is derived from the French word “Arreter”, meaning “to stop” or “to stay”, symbolizing the restriction of an individual’s movement.³ In essence, an arrest refers to the act of lawfully detaining a person, typically for the purpose of initiating criminal prosecution.⁴

In India, while the term “arrest” is not explicitly defined in any statute, its essence can be inferred from Section 46 of the CRPC, 1973, which outlines the procedure for making an arrest. This section provides that an arrest, which involves the restraint of a person’s liberty, may be effected by physical contact or by the individual voluntarily submitting to the custody of the arresting authority.⁵ The interpretation of arrest is further clarified through various judgments of the Supreme Court. While the authority to arrest is primarily vested in law enforcement agencies, under specific circumstances, private security personnel and even citizens may exercise this power.⁶

Background

While the broad scope of arrest powers under Indian law aims to maintain public order and ensure justice, this often conflicts with individual freedoms, leading to heightened scrutiny of their misuse despite the procedural safeguards in place.⁷ Unlawful and arbitrary arrests, frequently conducted without adequate justification, have led to serious violations of

¹ Dr. Gurudev Sahil, ‘A comparative study on the law of arrest and rights of arrested persons’ [2023] JETIR Vol 10, Issue 5 pg. 1 para 1.

² Halil Akbas, ‘Power of Arrest: Definition, Legal Justification, and Authority’ [2020] pg. 1, para 2. https://link.springer.com/referenceworkentry/10.1007/978-3-319-69891-5_8-1 accessed on 14 June, 2024

³ B. Uma Devi, ‘Detention and criminal justice system: a study in the context of the constitution’ [2013] pg. 7.

⁴ Glanville Williams, “When is arrest?” [1991] The modern law review, Vol 54, Issue 3, pg. 408, para 5. 4.

⁵ Pillai KNC, R.V. Kelkar’s Criminal Procedure [2020] 7th ed, pg. 68, para 5.

⁶ Halil Akbas, ‘Power of Arrest: Definition, Legal Justification, and Authority’ [2020] pg. 1 para 2. https://link.springer.com/referenceworkentry/10.1007/978-3-319-69891-5_8-1 accessed on 14 June, 2024

⁷ D.C. Pandey, ‘Search for an Action Against Illegal Arrest’ 22 [1980] JILI, Vol 22, No. 3, pg. 329, para 3.

fundamental rights, particularly the Right to Life and Personal Liberty⁸ enshrined in the Indian Constitution. Reports such as the National Police Commission's Third Report (1980) reveal the troubling prevalence of unnecessary arrests, which not only fuel corruption within the police force but also contribute to prison overcrowding.⁹ Judicial interventions, such as the landmark case of *Maneka Gandhi v. Union of India*¹⁰, have reaffirmed the constitutional principle that any deprivation of personal liberty must follow a procedure that is "fair, just, and reasonable."¹¹ However, there remains a substantial disconnect between these legal safeguards and their implementation in practice. Arrests often have severe repercussions, including the loss of employment, license suspension, eviction, and prolonged detention, even in instances where formal charges are never brought.¹² Given the widespread issues related to the power of arrest, it is crucial to evaluate whether the current legal framework sufficiently curtails arbitrary police actions or whether further reforms are required. This paper seeks to emphasize the necessity of ensuring that any action infringing upon an individual's life or personal freedom adheres to a fair, just, and reasonable process. It critically examines arrest practices in India, identifying shortcomings in the relevant legal provisions while drawing on the findings of various commissions, committees, and judicial decisions. Furthermore, the paper aims to address the ongoing problem of arbitrary and unlawful arrests, advocating for the protection of fundamental rights and the promotion of transparency and accountability within the criminal justice system.

Mapping the history of the law of arrest in India

The idea of an arrest has changed significantly over history. In ancient India, arrest was not codified but rather governed by customary practices and the prevailing legal philosophies of the time. Texts like *Manusmriti* and *Arthashastra* by Kautilya provided detailed provisions, laws, and procedures for detention, reflecting the early legal frameworks.¹³ The concept of arrest in this period often involved social status, with a focus on maintaining societal harmony rather than individual rights. There seemed to be a humanistic approach to arrest as certain

⁸ Indian Constitution, 1950, art. 21

⁹ M. Afzal Wani, 'Tracheotomy of infernality in arrest and detention laws: a gender perspective' [2011], JILI Vol. 53, pg. 227-253.

¹⁰ *Maneka Gandhi vs Union Of India*, (1978) 1 SCC 248, pg. 284, para 7.

¹¹ Satyajit Mohanty, 'Factors Influencing Arrest Discretion Of Police In India; A Socio-Legal Study Of Indian Police' pg. 3, para 1, [https://www.policefoundationindia.org/images/resources/pdf/MOHANTY_-_ARREST_DISCREION_BEHAVIOR_POLICE_IN_INDIA_30_JULY_\(1\).pdf](https://www.policefoundationindia.org/images/resources/pdf/MOHANTY_-_ARREST_DISCREION_BEHAVIOR_POLICE_IN_INDIA_30_JULY_(1).pdf) accessed 15 June 2024.

¹² Eisha Jain, 'Arrests as Regulation' [2015] 67 Stan L Rev 809 pg. 2 para 1.

¹³ Devendra Kumar Arora. 'Harmonising Liberty and Security in Social Order' [2013] 7 SCC J-6, pg. 15, para 1.

categories of persons were granted immunity from being arrested. At times, the police were excessively harsh in their treatment of suspects, using severe methods to extract confessions, which occasionally led to the death of the accused.¹⁴ Thereafter, the emergence of British colonial rule marked a significant shift in the legal landscape of India. The establishment of the East India Company brought English common law principles to India, starting with the Regulating Act of 1773¹⁵. This period saw the formalization of legal procedures, including the concept of arrest. Drafted by Lord Macaulay, the Criminal Procedure Code (CrPC) of 1898 laid down comprehensive laws governing arrests, emphasizing due process and the rights of the accused. The provisions of arrest of persons in India are regulated through due process as given in Chapter 5 under sections 41 to 60 of the Code of Criminal Procedure of India, 1973.

The Code has seen multiple revisions over time. Following independence, the Law Commission carried out an in-depth examination of the earlier code, culminating in the recommendations of its 41st report, submitted in September 1969. These suggestions formed the basis for the newly drafted Criminal Procedure Code, which came into effect on April 1, 1974.¹⁶ Since then, the Code has been significantly amended to keep pace with evolving societal needs and legal practices, particularly in relation to arrest procedures. Notable Supreme Court rulings, such as *D.K. Basu v. State of West Bengal* and *Arnesh Kumar v. State of Bihar*, have laid down crucial safeguards to curb arbitrary arrests and custodial violence, thereby upholding the constitutional rights guaranteed under Articles 21 and 22 of the Indian Constitution.¹⁷ The experience of seventy years of Indian democracy highlighted the need for a thorough review of our criminal laws, including the Code of Criminal Procedure, to ensure they align with the evolving needs and aspirations of the people. This need for change was reflected in the Bharatiya Nagarik Suraksha Sanhita, 2023, which replaced the Code of Criminal Procedure, 1973.¹⁸ The continuous evolution of arrest laws in India reflects the nation's ongoing efforts to balance state authority and individual rights within its constitutional framework.

¹⁴ Dr. DP Verma, Dr Ramesh Chandra Chhajta, 'Human Rights of Arrested Person in Ancient India: An Appraisal' [2014] Vol 19, Issue 12, IOSR-JHSS, pg. 88.

¹⁵ Regulating Act of 1773.

¹⁶ Committee on Home Affairs, Rajya Sabha, TWO HUNDRED FORTY SEVENTH REPORT ON THE BHARATIYA NAGARIK SURAKSHA SANHITA, 2023.

¹⁷ *D.K. Basu vs. State of West Bengal* (1997) 1 SCC 416, *Arnesh Kumar Vs State of Bihar* (2014) 8 SCC 273

¹⁸ Committee on Home Affairs, Rajya Sabha, TWO HUNDRED FORTY SEVENTH REPORT ON THE BHARATIYA NAGARIK SURAKSHA SANHITA, 2023.

Bharatiya Nagarik Suraksha Sanhita, 2023

The Indian criminal justice system, as it currently operates, has its roots in the colonial era, specifically drawing from the legal framework established during the British Raj.¹⁹ One of the key legal instruments from that time was the Code of Criminal Procedure, 1898²⁰, which served as the foundation for the later Code of Criminal Procedure, 1973 ("CrPC"). Recently, this longstanding framework has been replaced by the Bharatiya Nagarik Suraksha Sanhita, 2023 ("BNSS"), which is designed to streamline the criminal justice process, reduce the duration of trials, and enhance the investigatory powers of the police.²¹ It introduces a modernised approach to criminal investigations by emphasizing the use of technology and forensic sciences, while also streamlining procedural aspects like lodging information and serving summons through electronic means.²² However, within this technologically advanced framework, the broad and extensive power of arrest under Indian law remains a critical area of concern, as it frequently intersects with and potentially infringes upon individual freedoms.²³ This individual freedom can be taken away as the police have the power to arrest a person without a warrant.²⁴ This power comes from the BNSS, which allows a police officer to make an arrest without a magistrate's order or a warrant if someone is found committing a cognizable offence.²⁵ The act classifies offences into two categories: cognizable and non-cognizable offences. The distinction between cognizable and non-cognizable offences lies in the police's authority to arrest without a warrant. In the case of cognizable offences, the police have the authority to investigate and arrest without prior approval from a magistrate. In contrast, non-cognizable offences require the permission of a competent magistrate before the police can begin an investigation.²⁶

¹⁹ PIB Delhi, 'Union Home Minister and Minister of Cooperation, Shri Amit Shah Replied to the Discussion on the Bharatiya Nyaya (Second) Sanhita, 2023, the Bharatiya Nagarik Suraksha (Second) Sanhita, 2023 and the Bharatiya Sakshya (Second) Bill, 2023 in the Lok Sabha Today, the House Passed the Bills after Discussion' (Press Information Bureau, 20 December 2023) <<https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1988913>> accessed on 16 June 2024.

²⁰ Code of Criminal Procedure, 1898.

²¹ Primacy to Suraksha: Understanding the Bharatiya Nagarik Suraksha Sanhita, 2023 (scc online times, 5 May, 2024) <<https://www.scconline.com/blog/post/2024/05/05/bnss-that-is-to-replace-crpc-explained-with-key-highlights/#:~:text=The%20BNSS%20mostly%20preserves%20the,implement%20timelines%20for%20procedure%2C%20etc>> accessed on 16 June 2024.

²² Bharatiya Nagarik Suraksha Sanhita 2023 <<https://prsindia.org/billtrack/the-bharatiya-nagarik-suraksha-sanhita-2023>> accessed on 16 June 2024.

²³ Sunil Goel, *Courts Police, Authorities & Common Man* (Srishti Books 1st edn 2005) pg. 122.

²⁴ Sunil Goel, *Courts Police, Authorities & Common Man* (Srishti Books 1st edn 2005) pg. 122.

²⁵ Bharatiya Nagarik Suraksha Sanhita 2023, s. 35.

²⁶ (Cognizable and non-cognizable offences)

Recognizing the practical limitations of police presence, the law extends the authority to arrest to private individuals and Magistrates, who must subsequently report such arrests to the nearest police station, ensuring proper legal oversight and record-keeping.²⁷ During an arrest, the police officer or individual making the arrest must physically touch or restrain the person unless the person willingly submits, except in the case of a woman, where submission is assumed upon oral notification unless circumstances require otherwise, and only a female officer may touch the woman.²⁸ Further, if a person resists or attempts to flee, necessary force may be used to effect the arrest.²⁹ The phrase 'all means necessary' can also be interpreted as permitting the use of unrestricted force to apprehend a fleeing accused.³⁰ Lastly, handcuffs may be used based on the offense's severity, particularly for habitual offenders or those involved in serious crimes like terrorism, murder, or human trafficking.³¹ However, by diluting the scope of this section, as can be seen in BNSS, this provision might be contrary to the case of *Sunil Batra vs. Delhi Administration*³², which heavily critiqued the indiscriminate use of handcuffs. The excessive use of handcuffs in public is not only unnecessary but also humiliating. It offends basic human dignity, embarrasses individuals, and goes against the values we uphold in our society. This underscores the broader issue that arrests pose significant threats to individual liberty and human rights, thereby necessitating a thorough examination of the rights and protections afforded to arrestees.

Though the powers of arrest are often misused for various purposes and are sometimes arbitrary, they also make up an important tool in the process of crime control in India to protect the larger interests of the society. Hence, the Supreme Court in *Nandini Satpathy v. P.L. Dani*³³, quoting Lewis Mayers, stated that "to strike a balance between the needs of law enforcement on the one hand and the protection of the citizen from oppression and injustice at the hands of the law-enforcement machinery on the other is a perennial problem of statecraft. Over the years, the pendulum has swung to the right."³⁴ Therefore, it can be said that while considering human rights, it is essential to balance the opposing interests of both the individual and the

<https://digitalscr.in/bzadiv/circulars/misc_circulars/uploads/Cognizable_Noncognizableoffences_sections.pdf> accessed 19 June 2024.

²⁷ Bharatiya Nagarik Suraksha Sanhita 2023, s. 40 & 41.

²⁸ Bharatiya Nagarik Suraksha Sanhita 2023, s. 43(1).

²⁹ Bharatiya Nagarik Suraksha Sanhita 2023, S. 43 (2).

³⁰ Sriya Shubhalaxmi Mishra, 'A Safety-valve for death: section 46 of code of criminal procedure and inadequate accountability' *The Daily Guardian* (Delhi, 2022).

³¹ Bharatiya Nagarik Suraksha Sanhita 2023, S. 43(3).

³² *Sunil Batra vs. Delhi Administration* 1980 SCC (Cri) 777, para. 54.

³³ *Nandini Satpathy v. P.L. Dani* 1978 2 SCC 424, para. 15.

³⁴ *Nandini Satpathy vs Dani (P.L.) And Anr* on 7 April, 1978 2 SCC 424, para. 15.

society.³⁵ To protect the life and the liberty of arrested persons, the Constitution has laid down Article 21 which mandates that “no person shall be deprived of his life or personal liberty except according to procedure established by law.”³⁶

In addition, International Human Rights instruments like the Universal Declaration of Human Rights (1948) and the International Covenant on Civil and Political Rights (1966) recognize laws protecting individuals against illegal and arbitrary arrest.³⁷ Reflecting these international standards, the Indian Constitution and the BNSS, 2023, also establish rules to safeguard the rights and liberties of those arrested in India. As per Article 20(3), the Indian constitution guarantees every person the right against self-incrimination. It states that any person who has been accused of any offence shall not be compelled to be a witness against himself.³⁸ The same was reiterated by a decision of the Supreme Court in the case of *Nandani Satpathy v. PL Dhani*, wherein it was held that no one can forcibly extract statements from the accused and that the accused has the right to keep silent during the course of investigation.³⁹ Moreover, in *D.K. Basu v. State of West Bengal*, the Supreme Court also issued some directions to be followed as preventive measures in all cases of arrest or detention stating that the person who has been arrested or detained and is being held in custody in a police station interrogation centre or other lock-up, shall have the right to have one friend or relative or other person known to him or having an interest in his welfare to be informed about the arrest and the place of his detention unless the attesting witness of the memo of arrest is himself such a friend or a relative of the arrestee.⁴⁰ An entry shall also be made in the diary as to who was informed of the arrest.⁴¹ In *Joginder Kumar vs State of U.P.*, the Supreme Court held that a person arrested has the right to inform any of his friends, relatives, or family members of his choice, about his detainment. The police officer shall also inform the arrested person about his rights when he is being brought to the police station.⁴² Additionally, when he is produced before a Magistrate or at any time during the period of his detention in custody, the arrestee may request the medical examination

³⁵ Dipak Das, 'Human Rights: An Analysis with Reference to Role of Police in case of Arrest and Detention in India' (2015) 6 Indian JL & Just 1, para 3, pg. 2.

³⁶ Indian Constitution, 1950, art. 21.

³⁷ Sangita Bhalla, 'Implementation of International Standards on Arrest in India' (1998) 18 JL & Soc'y 57, para 2, pg. 58.

³⁸ Indian Constitution, 1950, art. 20(3).

³⁹ *Nandini Satpathy v. P.L. Dani* 1978 2 SCC 424, para. 57.

⁴⁰ *D.K. Basu Vs State of West Bengal* (1997) 1 SCC 41.

⁴¹ *D.K. Basu Vs State of West Bengal* (1997) 1 SCC 41.

⁴² *Joginder Kumar vs. State of UP*, (1994) 4 SCC 260, para. 21.

of the body either to establish the commission of any offense against his body or to disprove the commission of any offense by him.⁴³

Every person who is being arrested by an officer, without any warrant, is entitled to know the full particulars of the offence for which he is being arrested, and the police officer is duty-bound to tell the accused such particulars and cannot deny it.⁴⁴ The BNSS states that an individual who has been arrested must provide notice to his or her acquaintances, relatives, and other members of his or her immediate family.

Similarly, the Constitution of India also confers this as a fundamental right. Article 22 (2)⁴⁵ provides that “no person who is arrested shall be detained in custody without being informed as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and be defended by a legal practitioner of his choice”. Irrespective of the fact that whether the arrest was made with or without a warrant, the person who is making such an arrest must bring the arrested person before a judicial officer without any necessary delay. Every individual who has been arrested is required to make their initial court appearance within the first twenty-four hours following their arrest, as mandated by Section 78 of the Sanhita.⁴⁶ This initial court appearance must take place. When calculating the number of hours that make up an afternoon, it is very crucial to factor in the amount of time that is spent travelling from the area of detention to the magistrate's courtroom.⁴⁷

Lastly, the Constitution under Article 14 guarantees the right to equality before the law.⁴⁸ The BNSS also provides that for a trial to be fair, it must be an open court trial.⁴⁹ Though the right to a speedy trial has not been mentioned in the constitution, however, the SC in the Hussainara Khatoon case has made it mandatory that the investigation in the trial must be conducted “as expeditiously as possible.”⁵⁰ This was supported by the Supreme Court in the case of Sheela

⁴³ The Code of Criminal Procedure, s. 54.

⁴⁴ Dr. Kalpana Sharma, ‘What Are the Rights of an Arrested Person?’, LC II, para 2, pg. 1, [https://lc2.du.ac.in/DATA/Rights%20of%20Arrested%20person%20\(Dr.%20Kalpna%20Sharma\).pdf](https://lc2.du.ac.in/DATA/Rights%20of%20Arrested%20person%20(Dr.%20Kalpna%20Sharma).pdf) accessed 3 September 2024.

⁴⁵ Indian constitution, 1950, art. 22(2)

⁴⁶ Bharatiya Nagarik Suraksha Sanhita 2023, S. 78.

⁴⁷ Bharatiya Nagarik Suraksha Sanhita 2023, S. 78.

⁴⁸ Indian constitution, 1950, art. 14.

⁴⁹ <https://districts.ecourts.gov.in/sites/default/files/1st%20Topic.pdf>.

⁵⁰ <https://districts.ecourts.gov.in/sites/default/files/1st%20Topic.pdf>.

Barse v. State of Maharashtra⁵¹ where it was held that legal assistance must be made available to prisoners in jails, whether they be under-trial or convicted prisoners.

Critical analysis

The law of arrest in India, rooted in various legislative acts and judicial pronouncements, has been designed to an extent to ensure that an individual's personal liberty remains protected. The focus has primarily been on preventing misuse and compensating the victims while allowing genuine use of the power to continue freely.⁵² There has been a substantial transformation in legal thought, reflecting a fundamental shift in criminal jurisprudence. Now, the accused is viewed as a patient rather than an incurable diseased body that must be removed from society.⁵³ As mentioned earlier, the BNSS provides a wide range of powers to police to arrest without a warrant and it might result in arbitrary arrest. To ensure that illegal and arbitrary arrest does not take place, Sanhita specifies that police shall enter the details specifying the reason and materials that necessitated the arrest.⁵⁴ Further, no arrest can be made routinely on a mere allegation of the commission of an offense made against a person.⁵⁵ In the case of DK Basu v. State of West Bengal⁵⁶, the Supreme Court issued several directions that need to be followed as preventive measures for illegal arrest. The court ruled that non-compliance with these directives would result in the responsible official facing departmental action and potential punishment for contempt of court. Contempt proceedings could be initiated in any High Court within the relevant jurisdiction. The court emphasized that these directions flow from the right to life and personal liberty enshrined in articles 21 and 22(1) of the Constitution and need to be strictly followed.⁵⁷ The power of arrest without a warrant should be exercised only after conducting some investigation to ensure the authenticity and reasonableness of the complaint.⁵⁸ In Arnesh Kumar v. State of Bihar⁵⁹, the Supreme Court reviewed the amended provision on

⁵¹ Sheela Barse v. State of Maharashtra, 1987 SCC (Cri) 759., para. 5.

⁵² M. Afzal Wani, 'Tracheotomy of infernality in arrest and detention laws: a gender perspective' [2011], Vol. 53, pp 234, accessed 14 June 2024.

⁵³ M. Afzal Wani, 'Tracheotomy of infernality in arrest and detention laws: a gender perspective' [2011], Vol. 53, pp 227, accessed 14 June 2024.

⁵⁴ (<https://delhipolice.gov.in/doc/standing-order/330.pdf> Standing order no. 330/2019 - guidelines for arrest) accessed 17 July 2024.

⁵⁵ M. Afzal Wani, 'Tracheotomy of infernality in arrest and detention laws: a gender perspective' [2011], Vol. 53, pp 240, accessed 14 June 2024.

⁵⁶ (1997) 1 SCC 416.

⁵⁷ M. Afzal Wani, 'Tracheotomy of infernality in arrest and detention laws: a gender perspective' [2011], Vol. 53, pp 237, accessed 14 June 2024.

⁵⁸ Joginder Kumar v. State of U.P. (1994) 4 SCC 260 7.

⁵⁹ Arnesh Kumar Vs State of Bihar (2014) 8 SCC 273

arrest and sought to further curb the problem of unnecessary arrests and detention. The requirement to document reasons for arrest acts as a deterrent against the abuse of police power. In addition, the use of force should be avoided while effecting an arrest. In case of forcible resistance to arrest, minimum force to overcome such resistance may be used. However, care must be taken to ensure that injuries to the person being arrested are avoided.⁶⁰ As far as practicable, women police officers should be involved in cases where the individuals being arrested are women. Additionally, the arrest of women between sunset and sunrise should be avoided.⁶¹ These measures aim to ensure the dignity, safety, and rights of women during the arrest process, promoting gender-sensitive policing practices. The BNSS provides power to private persons to arrest which may be beneficial as the police is not omnipresent.⁶²

Despite the legal measures thus provided, the remedial actions do not seem to be commensurate with the realities of the situation. The episodes of unwarranted intrusions and interferences on the freedom of a person continue to pour in⁶³ and hence have been long subjected to critical scrutiny.⁶⁴ In India, the police organization forms one of the vital and strongest pillars of saving the democratic structure of the country. As a result of the persistent accumulation of unlimited powers vested with the police in India, a few officers still indulge in various unlawful practices such as indiscriminate arrests, use of torture, disappearances, summary and arbitrary executions, etc.⁶⁵ Arbitrary or illegal arrest means any arrest involving the element of inappropriateness, injustice, or lack of predictability.⁶⁶ The National Police Commission, in its Third Report, referring to the quality of arrests by the police in India, mentioned the power of arrest as one of the chief sources of corruption in the organization. The report suggested that, by and large, nearly 60 percent of the arrests were either unnecessary or unjustified and that such unjustified police action accounted for 43.2 percent of the expenditure of the jails.⁶⁷ Despite being more than two decades old, the position of arrest in India has not improved and consists of several loopholes that need to be investigated. The expression in provisions of the code such as "concerned in any cognizable offense", "against whom a reasonable complaint is

⁶⁰ (*Guidelines regarding arrest*) <<https://nhrc.nic.in/sites/default/files/guidearrest.pdf>> accessed 17 July 2024.

⁶¹ The code of criminal procedure, s.46.

⁶² The Bharatiya Nagarik Suraksha Sanhita, s.40.

⁶³ D.C. Pandey, 'Search for an Action Against Illegal Arrest', [1980] Vol. 22, No. 3, para1, pg. 329

⁶⁴ Shimona Singh Kulhara, 'Law of Arrest and Rights of Arrested Person – A Critique in Light of Judicial Pronouncements', pg. 66.

⁶⁵ Protection against arbitrary and summary executions has been provided by 'Iminciplas on Effective Prevention and Investigation of Extra Legal, Arbitrary and Summary Executions', 1989. For text cf. *ibid.* pg. 409 (Hereinafter referred to as *Principles on Executions*).

⁶⁶ Sangita Bhallia, 'Implementation of International Standards on Arrest in India' (1998) 18 JL & Soc'y 57

⁶⁷ National Police Commission, Third Report on Corruption in Police 31 (1980).

made that he is "concerned in a cognizable offense"; "credible information", "suspected of being "concerned in any cognizable offense" leave behind an extensive scope for exploitation.⁶⁸ The generality of language and the consequent wide discretion vested in police officers is indeed enormously threatening and has been the very source of abuse and misuse.⁶⁹ The vast discretion of the police to arrest a person even in the case of a bailable offense, whether cognizable or non-cognizable, and its further authority to make preventive arrests often results in abuse of power. It may not be forgotten that these vast discretionary powers are vested with the persons equipped with firearms, which are becoming more and more sophisticated with each passing day, and who have, so far not been accountable for their acts.⁷⁰ In *D.K. Basu V. State of West Bengal* (1996)⁷¹ the Supreme Court set guidelines on the rights of the accused while being arrested or in custody, stating that handcuffing violates all standards of decency. Handcuffing is the last resort and should not be followed as a custom.⁷² Additionally, in the cases of *Prem Shanker Shukla v. Delhi administration* and *Citizen for democracy Vs State of Assam*, the court ruled that the use of handcuffs or leg chains should be avoided and if at all, It should be resorted to strictly in accordance with the law, which has repeatedly explained and declared the use of handcuffs as unconstitutional under Article 21.⁷³ However, Section 43(3) of the BNSS, introduces powers for the police to use handcuffs, keeping in mind the nature and gravity of offense upon arrest.⁷⁴ The parliamentary standing committee in its report is also seen expressing that is of the view that 'economic offenses' which has been taken into account in the aforementioned section, should not be included in this category as this term encompasses a wide range of offenses, ranging from petty to serious, and therefore, it may not be suitable for blanket application of handcuffing in all cases falling under this category.⁷⁵ This section can, therefore, be said to be more in line with the colonial mindset of punitive control of the state

⁶⁸ M. Afzal Wani, 'Tracheotomy of infernality in arrest and detention laws: a gender perspective' [2011], Vol. 53, para 2, pg 231.

⁶⁹ M. Afzal Wani, 'Tracheotomy of infernality in arrest and detention laws: a gender perspective' [2011], Vol. 53, para 2, pg 231.

⁷⁰ M. Afzal Wani, 'Tracheotomy of infernality in arrest and detention laws: a gender perspective' [2011], Vol. 53, para 2, pg 231.

⁷¹ 1997 (1) SCC 416.

⁷² Policy Opinion CJ and others, 'BNSS Introduces Handcuffs and In-Absentia Trials, Widens Preventive Detention and Police Custody – the Leaflet' (The Leaflet – An independent platform for cutting-edge, progressive, legal, and political opinion., 24 August 2023) <https://theleaflet.in/bnss-introduces-handcuffs-and-in-absentia-trials-widens-preventive-detention-and-police-custody/> accessed 17 July 2024.

⁷³ 'Ready Recknor on Handcuffs' pg 1 <https://bprd.nic.in/uploads/pdf/202401290402420399932Handcuffs.pdf> accessed 27 June 2024.

⁷⁴ 'Ready Recknor on Handcuffs' pg 1 <https://bprd.nic.in/uploads/pdf/202401290402420399932Handcuffs.pdf> accessed 27 June 2024.

⁷⁵ Committee on Home Affairs, Rajya Sabha, TWO HUNDRED FORTY SEVENTH REPORT ON THE BHARATIYA NAGARIK SURAKSHA SANHITA, 2023, 2023, pg. 12.

as opposed to the citizens⁷⁶, and also, in the teeth of humanitarian guidelines established by the Supreme Court and needs to be critically examined.⁷⁷

In addition to the aforementioned incongruities in the criminal codes, there are also complaints that the police power of arrest is being used either to extort money and other valuables or at the instance of an enemy of the arrestee. This power is being resorted to in civil disputes also based on a false allegation against a party at the instance of his opponent.⁷⁸ According to the report of the Law Commission of India, whenever the arrest is found to be illegal, unwarranted, or unjustified, the man is sometimes set free but nothing happens to the police officer who has unlawfully interfered with the liberty of the citizen. This position has indeed led to the embodiment of some police officers abusing their powers and harassing citizens for various oblique reasons.⁷⁹ Departments encourage arrests through broken windows or zero-tolerance policing philosophies⁸⁰ and use arrest numbers as a measure of productivity and a basis for overtime pay for a higher number of arrests in India, including several unjustified or unreasonable arrests by the officers, to upgrade their job profiles and performances. Therefore, arrest decisions sometimes seem arbitrary- even vindictive- and that is a considerable source of citizen frustration with the police in India.⁸¹

Having critically analysed the arrest provisions in India, it becomes important to place these findings in a broader context by comparing them with another established legal system. The UK, with its historical influence on Indian law, offers a valuable point of reference. By examining the similarities and differences between the two, we can better understand how India's arrest procedures measure up against international standards and where there may be room for refinement.

⁷⁶ Committee on Home Affairs, Rajya Sabha, TWO HUNDRED FORTY SEVENTH REPORT ON THE BHARATIYA NAGARIK SURAKSHA SANHITA, 2023, pg. 78.

⁷⁷ Priyanka Agarwal, 'BNSS introduces handcuffs and in-absentia trials, widens preventive detention and police custody' (The Leaflet Constitution First, June 26, 2024), <https://theleaflet.in/bnss-introduces-handcuffs-and-in-absentia-trials-widens-preventive-detention-and-police-custody/> accessed 27 June 2024.

⁷⁸ Priyanka Agarwal, 'BNSS introduces handcuffs and in-absentia trials, widens preventive detention and police custody' (The Leaflet Constitution First, June 26, 2024), <https://theleaflet.in/bnss-introduces-handcuffs-and-in-absentia-trials-widens-preventive-detention-and-police-custody/> accessed 27 June 2024.

⁷⁹ 177th Law Commission of India Report, *Law Relating To Arrest*, pg 32 (2001) Chapter One (s3waas.gov.in) accessed 26 June 2024.

⁸⁰ George I. Kelling & William J. Bratton, 'Why We Need Broken Windows Policing', CITY J. (Winter 2015), <http://www.city-journal.org/html/why-we-need-broken-windows-policing-13696.html>, accessed 25 June 2024.

⁸¹ Rachel A. Harmon, 'Why Arrest' (2016) 115 Mich L Rev 307, para 2, pg. 353.

United Kingdom and India

In the United Kingdom, the person arrested shall not be kept in police custody for more than 24 hours without being charged at the court of competent jurisdiction.⁸² However, if a person is arrested in the UK under the Terrorism Act 2000, the arrested person can be detained for fourteen days without being charged.⁸³ The 24-hour police detention followed by an arrest is a legal requirement, and it is the absolute maximum in both India and United Kingdom. The findings show that the UK's legal framework is far better than the ones in India. In the UK, the Police and Criminal Evidence Act (PACE Act 1984) and Criminal Justice Act 2003 specify the rights of the arrested person. The key assurance is that the arrested person is informed about the reason for arrest by the arresting police officer.⁸⁴ Section 28(1) of the PACE Act states that where a person is arrested, the arrest is not lawful unless the person arrested is informed that he is under arrest as soon as it is practicable after his arrest. It is the right of the arrested person to know the grounds for being arrested and it is the legal duty of the police to inform the person that he is under arrest and grounds for his arrest.⁸⁵ In *R v. Iqbal*, it was held that: "a man who was handcuffed by the police in connection with a criminal offence was not under arrest because he was not told that he was under arrest and the officer did not consider that he was making an arrest."⁸⁶ Furthermore, when an arrest is made in the UK, the police must identify themselves as the police, inform that the person is being arrested, what crime they think the person has committed, explain why it is necessary to arrest and explain that the person is not free to leave. Additionally, in the case of juveniles, the police must contact the parents, guardian, or carer as soon as possible after the person's arrival at the police station while in the case of an adult, the next of kin must be informed. The 'statutory rights' that are accessible to a person arrested and detained in police custody is the most important part of the PACE Act.

⁸² Bangladesh ratified the UNCAT in 1998, while India is only a signatory state but not ratified. The United Kingdom ratified the Convention in the same year as Bangladesh, in 1998. Retrieved from <https://indicators.ohchr.org/>, Accessed on 07.03.2020.

⁸³ Md Sohel Rana, Nadhratul Wardah Salman & Saroja Dhanapal, 'Legal Framework of Arrest and Post-Arrest Safeguards: A Comparative Analysis as to the Law of Bangladesh, India, and the United Kingdom' [2021] Vol.29, No.2, IIUMLJ 363, para 1, pg. 374.

⁸⁴ Md Sohel Rana, Nadhratul Wardah Salman & Saroja Dhanapal, 'Legal Framework of Arrest and Post-Arrest Safeguards: A Comparative Analysis as to the Law of Bangladesh, India, and the United Kingdom' [2021] Vol.29, No.2, IIUMLJ 363, para 2, pg. 369.

⁸⁵ Md Sohel Rana, Nadhratul Wardah Salman & Saroja Dhanapal, 'Legal Framework of Arrest and Post-Arrest Safeguards: A Comparative Analysis as to the Law of Bangladesh, India, and the United Kingdom' [2021] Vol.29, No.2, IIUMLJ 363, para 2, pg. 369.

⁸⁶ *R v. Iqbal* [2011] 1 Cr App R 24.

These rights are not specified in India and accordingly, the police do not have any legal obligations to provide these kinds of custodial safeguards.

Before conducting an arrest, it is necessary for the police in the UK to show their identity to the arrested person. In the UK, after the arrest, the individual is taken into the police custody at the police station. Once having been taken to the police station, the arrested person has the right to receive a paper where he should be told of his rights, which is the most significant part of the UK law.⁸⁷ When the police arrested someone, they will caution the arrested person, this is when they say, "you do not have to say anything, but it may harm your defence if you do not mention when questioned something which you later rely on in court."⁸⁸ This is commonly known as 'Miranda Warning' which is developed through the judgment of *Miranda v. Arizona*⁸⁹ in 1966. This means that the arrested person can remain silent when questioned by the police. In India, the Constitution also grants this privilege under Article 20(3) to the suspect or accused person. It is the arrested person's constitutional right not to be put upon himself to be a witness. The provision reads as follows: "no person accused of any offence shall be compelled to be a witness against himself." Furthermore, sections 24, 26 and 27 of the Indian Evidence Act and sections 162, 163(1), 315 and 342(a) of the Criminal Procedure Code also prohibit forced confession or testimony as these are inadmissible in court and protect the suspect or accused from such confession. The Supreme Court of India also directed that an accused person cannot be coerced or influenced into giving a statement pointing to his/her guilt and the accused person must be informed of his/her right to remain silent and of the right against self-incrimination.⁹⁰

In India, it is necessary to observe scrupulously the constitutional and legal requirements for producing an arrested person before a magistrate within 24 hours of arrest.⁹¹ Section 57 of the Criminal Procedure Code refers to the issue of time in custody. Moreover, in deciding the *Khatri* case, the Bombay High Court has held that a police officer would be guilty of 'wrongful detention' if he failed to comply with the requirements of delivering the accused within 24 hours before the magistrate. Whereas, in the United Kingdom, the arrested person shall not be kept in police custody for more than 24 hours without being charged at the court of competent jurisdiction.⁹² The torture prohibition is universal and is practised in several countries,

⁸⁷ CODE C of the PACE Act 1984 part 3.1; 3.2; 3.7; 3.7A.

⁸⁸ Being arrested: www.gov.uk.

⁸⁹ *Miranda vs. Arizona*, 384 US 436 [1966].

⁹⁰ *Nandini Satpathy vs. P.L Dani* 1978 2 SCC 424.

⁹¹ *Khatri*, [1981], 5.

⁹² PACE Act 1984, s. 41.

including both UK and India, as it is also guaranteed and granted by different international Conventions or Protocols.⁹³

While the arrest provisions in both India and the UK are mostly aligned in terms of fundamental principles, the comparison has also brought to light certain areas where procedural efficiency and safeguards could be enhanced. To ensure that the arrest procedures remain effective and just particularly in the face of evolving legal challenges and societal expectations, a few reforms could be considered. The following suggestions aim to address these areas and further strengthen the balance between law enforcement and individual rights.

Suggestions

Arrest involves restriction of liberty of a person arrested and therefore, infringes the basic human rights of liberty. Nevertheless, the constitution of India as well as International human rights law recognize the power of the state to arrest any person as a part of its primary role of maintaining law and order.⁹⁴ Reforming arrest laws in India, particularly in light of the Bharatiya Nagarik Suraksha 2023, necessitates multifaceted approach aimed at enhancing the protection of individual rights while ensuring effective law enforcement. The National Police Commission in its Third Report, referring to the quality of arrests by the police in India, mentioned power of arrest as one of the chief sources of corruption in the organization.⁹⁵ The Higher Judiciary and law commission has suggested far reaching changes in the criminal laws to maintain a balance between the liberty of the citizen and the societal interest in maintenance of law and order.⁹⁶ The Royal Commission had earlier suggested restrictions on the power of arrest based on the "necessity principle". The two main objectives of this principle are that police can exercise powers only in those cases in which it was genuinely necessary to enable them to execute their duty to prevent the commission of offences and to investigate crime. The commission was of the view that such restrictions would diminish the use of arrest and produce

⁹³ India is only a signatory state but not ratified. The United Kingdom ratified the Convention in the same year as Bangladesh, in 1998. Retrieved from <https://indicators.ohchr.org/> , Accessed on 07.03.2024.

⁹⁴ NHRC Guidelines regarding arrest

<https://police.py.gov.in/NHRC%20Guidelines%20Regarding/NHRC%20Guidelines%20Regarding%20arrest.PDF>.

⁹⁵ M. Afzal Wani, 'Tracheotomy of Infernality in arrest and detention laws: a gender perspective' (Journal of the Indian Law Institute, 2011) 239 < <https://www.jstor.org/stable/43953504>> accessed on 13 July 2024.

⁹⁶ P.J. Alexander, 'Some recommendations from the law commission of India on arrest and detention (*Asian Human Rights commission*) < <http://www.humanrights.asia/resources/journals-magazines/article2/vol-01-no-02-april-2002/some-recommendations-from-the-law-commission-of-india-on-arrest-and-detention/>> accessed on 14th July, 2024.

more uniform use of powers.⁹⁷ It is imperative to take appropriate legislative measures for making such changes in law as may be necessary to prevent abuse/misuse of the power of arrest.⁹⁸ An important proposal about improvement in law of arrest and custody and its better implementation is of the authorization to the members to civil society to visit police stations. There should be a specific rule or provision in the BNSS creating an obligation on the officer in charge of the police station to permit such persons to visit to ensure that no persons are kept in the police stations without keeping a record of such arrests.⁹⁹

One of the other plausible suggestions to strengthen safeguards against arbitrary arrests is to be provide clear definitions of offenses warranting arrest thereby preventing misuse of arrest powers by the law enforcement officials. The police personnel are to be given effective training against misuse or abuse of the power of arrest. This will act as good, practical guidelines for clean police conduct, strict and right enforcement of law.¹⁰⁰ There is requirement of power between the police as per rank for doing the investigation on the basis of punishment which is laid down in the Indian Penal Code. It is suggested that the criminal offences which are punishable up to 10 years and above and also death sentence shall be handed over for the purpose of investigation to the Deputy Superintendent of police or Deputy Commissioner of police.¹⁰¹ In case of bailable offence, it is required to make a provision in the BNSS, so that accused may be released on bail by concerned police station through a Constituted board consisting of Investigating officer of the case and others. The meeting of such board must be held on prescribed time in the evening of every day, and if bail is not granted by such police station, reason for refusal must be sent to the learned court along with necessary papers on the next day. Introduction of provisions for judicial oversight of arrests by requiring police to seek prior approval from a magistrate for certain categories of arrests, especially those that may infringe on individual liberties is also deemed necessary. This measure will ensure checks and balances in the arrest process.

⁹⁷ M. Afzal Wani, 'Tracheotomy of infernality in arrest and detention laws: a gender perspective' [2011], Vol. 53, para 3, pg. 239.

⁹⁸ Law Commission of India, Working Paper on Law of arrest 5-6 (2001)

⁹⁹ M. Afzal Wani, 'Tracheotomy of infernality in arrest and detention laws: a gender perspective' [2011], Vol. 53, para 3, pg. 239.

¹⁰⁰ Dipak Das, 'Human Rights: An Analysis with Reference to Role of Police in case of Arrest and Detention in India' (2015) 6 Indian JL & Just 1 para 2, pg. 3.

¹⁰¹ Dipak Das, 'Human Rights: An Analysis with Reference to Role of Police in case of Arrest and Detention in India' (2015) 6 Indian JL & Just 1 para 3, pg. 3.

Particular attention must be given to protecting the vulnerable groups during arrests. Implementing specific guidelines to safeguard marginalized communities, including women, children, and LGBTQ+ individuals, is crucial in preventing discrimination and abuse during arrests. Lastly and most importantly, a mechanism for periodic review of arrest laws is essential to assess their effectiveness and make necessary adjustments in response to evolving societal needs. Implementing a robust system for collection of data and analysis related to arrests will enable the identification of patterns and inform future reforms, ultimately contributing to a more just and equitable legal framework in India.

Conclusion

The law of arrest, both domestically and internationally, balances the state's interest in maintaining public order and security with the individual's rights to liberty and due process. This delicate balance is fundamental to ensuring that while the state can enforce the law and protect its citizens, it does not do so at the expense of individual freedoms. However, in many situations, the implementation of arrest laws hinder individual rights to liberty rather than protecting them. This issue often stems from remnants of colonial-era criminal jurisprudence, which granted extensive powers to the police. These powers, if unchecked, can lead to abuses and arbitrary detention, undermining the very principles of justice and due process that they are supposed to uphold. As discussed earlier, There were several amendments in 2008 and 2010 that took place but it seems to be done on paper only. This research paper has discussed meticulously about Indian laws on arrest and talked about other two countries - UK and Australia. Both the countries, despite their advanced legal systems and strong human rights frameworks, also face challenges in balancing police powers with individual rights. Both countries have laws intended to prevent arbitrary detention and protect due process, but these laws are not without their loopholes. Through this paper, we tried to comprehensively analyse the domestic and foreign procedures on arrest, discuss the effectiveness of the amendments done so far and provide the changes which need to be made thereon.