
RIGHTS OF ARRESTED PERSONS AND MISUSE OF POWERS BY POLICE: AN ANALYSIS OF THE INDIAN LEGAL FRAMEWORK

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ABSTRACT

The Indian legal framework encompasses a complex assortment of constitutional and statutory provisions alongside various judicial precedents that are aimed at protecting and guaranteeing rights of the arrested individuals. Arrests are essentially a police activity. However, despite the said provisions, the continued misuse of powers by police justifies the significant concerns regarding fairness, accountability and human rights violations. The question at hand is not why the arrests are made by the police but rather about the lack of safeguards checking the misuse of the power to arrest. The arguments in favour of arrest do not justify the current arrest practices. This paper shall delve into various aspects related to rights of the arrested individuals, misuse of power by police and reflect on an urgent need to lay down safeguards while listing down probably recommendations.

Keywords: Rights of arrested individuals; Principles of Fair Trial; Police powers; Accountability; Constitutional provisions; Bharatiya Nagarik Suraksha Sanhita, 2023

RESEARCH QUESTIONS

This paper looks into the following research questions;

1. What are the powers granted to the Police with respect to arrest and instances of their misuse?
2. Whether the rights of the arrested persons are actually implemented and whether they are sidelined by the misuse of powers by the police?
3. What mechanisms need to be laid down to safeguard rights of the arrested persons and avoid the misuse of powers by the police, to promote fairness and accountability in the criminal justice system?

RESEARCH OBJECTIVES

This paper has formulated the following objectives;

1. To analyse the existing legal framework in India with respect to the rights of arrested persons
2. To examine instances of misuse of powers by the police while undertaking the process of arrest
3. To highlight the impact of police misconduct on the criminal justice system
4. To propose probable recommendations for legislative and procedural reforms with the aim of enhancing the protection of rights of arrested persons and prevention of misuse of powers by police.

INTRODUCTION

The Supreme Court in the case of *State of Haryana v. Dinesh Kumar*¹, highlighted the meaning of the term ‘arrest’ as given in the Halsbury’s laws of England.

¹ State of Haryana v. Dinesh Kumar, 2008 3 SCC 222.

“The word arrest when used in its ordinary sense means the apprehension or restraint or the deprivation of one’s personal liberty. When used in the legal sense, an arrest consists in the taking into custody of another person under authority empowered by law for the purpose of holding such person to answer such criminal charge or to prevent the commission of such criminal offence.”.

In *State of Punjab v. Ajaib Singh*², the Supreme Court characterized the term arrest in Article 22 of the Indian Constitution as, *“demonstrating physical limitation of a man under the power of the law resulting from accusations of a crime”*.

The essential elements as per the above definition is that there must be an intent to arrest under the authority. Now, since the government has such vast resources and powers to arrest individuals, the individuals have been entitled to protection from the government’s abuse of its power. These are the rights of the arrested persons. Article 22 of the Indian Constitution also lays down fundamental rights for arrested persons. For example, an arrested person needs to be mandatorily informed of the grounds of his arrest and the availability of his right to bail.

The second concept that this paper looks into are the powers bestowed upon the police in matters of arrest. Arrest is categorized into two parts;

1. Arrest with warrant [**Section 35(2) BNSS**]-

A warrant issues by a magistrate or a judge is necessary for arrest to be made, usually followed for non-cognizable offences.

2. Arrest without a warrant [**Section 35(1) BNSS**]-

Police can arrest without a warrant, usually in cases for cognizable offences.

Section 39 of BNSS lays down the arrest procedure in instances where a person fails to provide his name or address.

Now, as stated earlier, police essentially are associated with arrest but under **Section 40 and Section 41 of BNSS**, a private individual or a magistrate can also arrest a person respectively.

² State of Punjab v. Ajaib Singh, AIR 1953 SC 10.

Certain specific conditions have been laid down in this regard but for this research paper, only misuse of arresting power by the police shall be taken into account.

Lastly, it is significant to point out that the rights of arrested persons are also a component of principles of fair trial. Therefore, there is a strong link that exists between upholding rights of arrested persons and our pursuit to building a fair and just trial system. For example, protection against illegal arrest is both a right of the arrested person and an important principle of fair trial.

LITERATURE REVIEW

A Brief Overview on Arrest, Procedure of Arrest and Right of the Arrested Person-Satabdi Gupta³

This paper provides a brief overview of the laws and procedures related to arrest in India. The paper covers the definition, meaning of arrest; procedure for arrest, including arrest with a warrant, arrest without a warrant; duties of police officers while making an arrest and lastly, the rights of arrested persons, including but not limited to, right to be informed about grounds of arrest, right to be released on bail, right to consult a legal practitioner and so forth. The paper fails to provide any quantitative data or statistics to back up its points. It also fails to include case studies or a comparative analysis for better in-depth research into the topic.

Critical Analysis of Arrest by Police without Warrant & its Misuse in India-Sakshi Singh⁴

This paper examines the provisions of Criminal Procedure Code, namely Sections 41, 42 and 151 that empower the police to arrest without a warrant but have been misused in the present day. It highlights how the use of terms like 'reasonable', 'credible' and 'appears to the police officer' are used, laying down opportunities for ambiguity and subjectivity. The paper fails to provide a comprehensive analysis on relevant studies and court rulings that can be a favourable

³ Satabdi Gupta, *A Brief Overview on Arrest, Procedure of Arrest and Right of the Arrested Person*, 4 INT'L J.L. MGMT. & HUMAN. 531 (2021).

⁴ Sakshi Singh, *Critical Analysis of Arrest by Police without Warrant & Its Misuse in India*, 3 INDIAN J.L. & LEGAL RSCH. 1 (2021).

attempt to answer the research question. Secondly, the paper does not delve into existing literature to look for additional recommendations and their probability.

ANALYSIS

Chapter V of the Code of Criminal Procedure, now BNSS lays down provisions for ‘Arrests of Persons’. The vastness of powers bestowed on the Police in matters of arrest speaks plentiful on the issue at hand. We shall analyse some of the provisions to understand the problem and discover solutions.

POLICE MAY ARREST WITHOUT A WARRANT

Section 35 of BNSS grants police the power to arrest without warrant in cases of cognizable offences. It lays down twin conditions;

1. Against whom-
 - a) a complaint has been made or
 - b) some credible information has been received or
 - c) a reasonable suspicion exists that there was a commission of a cognizable offence
2. The police officer must have reason to believe on the basis of above a) to c) and must think that arrest is necessary-
 - a) prevent person from committing any further offence
 - b) for proper investigation
 - c) prevent tampering of evidence
 - d) prevent person from tampering with witnesses
 - e) without arrest, the person’s presence cannot be ensured

Now, there exist other grounds of arrest as laid down in Section 35 clauses (c) to (f).

The prominent question here is with respect to ‘some credible information’; ‘reasonable suspicion’; ‘police officer has reason to believe’- these terms do not have concrete definitions anywhere. This is where room for subjectivity exists. One police officer may consider a young man visibly nervous around a crime scene to be a suspect and say arrest him for further procedure while another police officer might consider such man to be a mere disturbed spectator. With the generational evolution and changes, the mindset and thought process has also changed throughout, leading to possible distinct interpretations and point of views that may arise in one situation. Such provisions are laid down to enable the police to maintain law and order. However, in reality, these powers are arbitrarily used by the police throughout the nation⁵.

POLICE CANNOT ARREST WITHOUT A WARRANT- NON-COGNIZABLE OFFENCES

As per Section 35(2) when read with Section 39, no person involved in a non-cognizable offence can be arrested except under a warrant or order of a Magistrate, despite above laid essentials under Section 35 related to complaint, credible information and suspicion are fulfilled.

Section 39 further is related to arresting a person for a non-cognizable offence;

1. such person refuses to reveal his name and address or
2. such person reveals a name and address but police have reason to believe that the same was false

Clauses (2) and (3) determine the release of such a person but simultaneously, it shall be noted that the subjectivity of the police officer exists in the very first stage itself irrespectively.

PROCEDURE FOR ARREST- SECTION 36 BNSS

As per Section 36 of BNSS, there are certain guidelines that need to be followed by a police officer while making an arrest. It is important to note here that despite there being such a provision which even existed in the CrPC, there were multiple instances of discrepancies by

⁵ Shvena Neendoor, ‘Can the Police Arrest you Before you Commit an Offence’ (LawyersClubIndia, 29 June 2022), <https://www.lawyersclubindia.com/articles/can-the-police-arrest-you-before-you-commit-an-offense-15008.asp>.

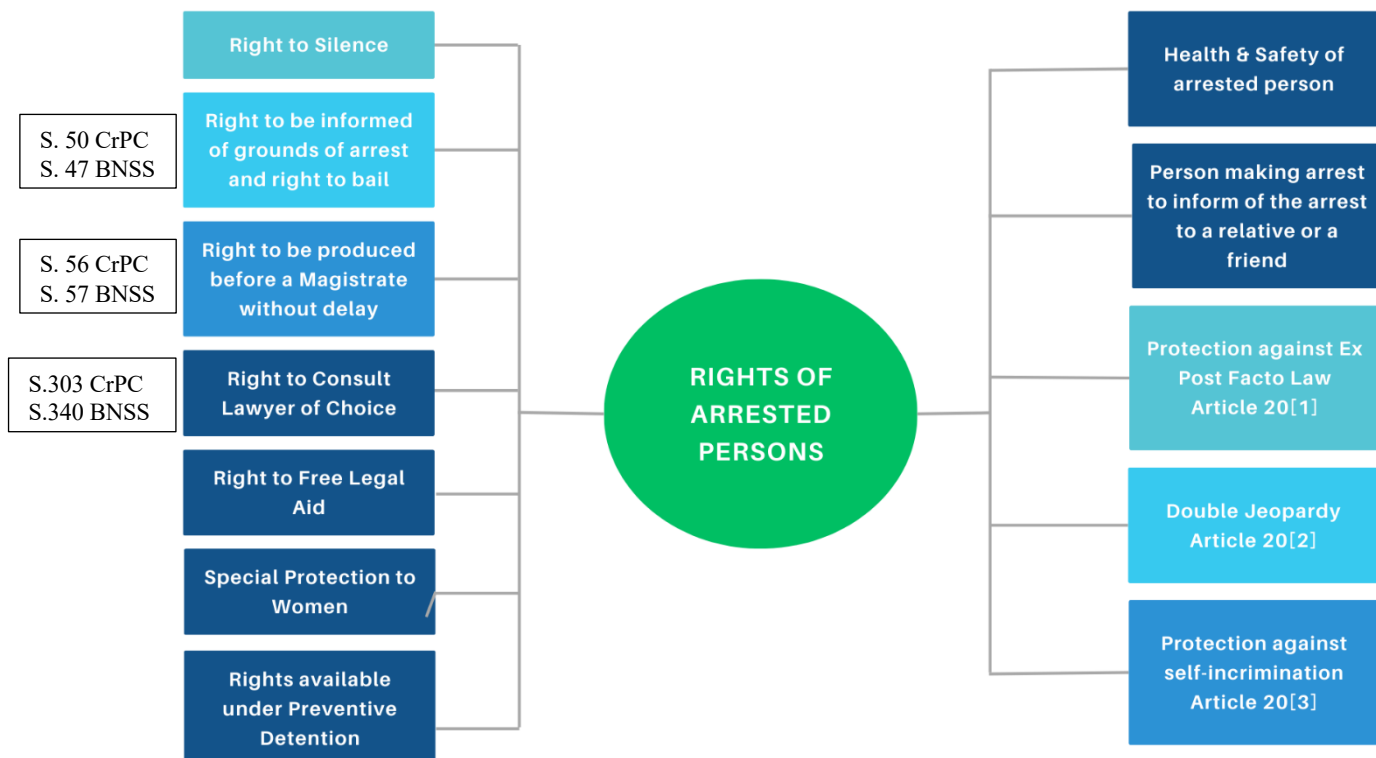
the police. The courts felt the urgent need to address the concern and thus, came into picture the famous **DK Basu Guidelines**, which shall be discussed below.

RIGHTS OF ARRESTED PERSONS

Indian Constitutional provisions and BNSS provisions have laid down certain rights that are exclusively available to the arrested persons. As per Article 22 of the Indian Constitution, the rights guaranteed are Fundamental Rights by nature. These rights are basic in nature and owing to Article 21 of the Indian Constitution which states that no person shall be deprived of his life or personal liberty, these rights fall in consonance with the ideals of our lawmakers, hence, raising the significance of the rights.

The intention of the legislature resonates in the principle,

‘Hundreds of guilty may escape but not one innocent shall go to jail.’



This paper shall look into some of the rights in detail and provide instances of violations by police.

Right to Silence

The Right to Silence arose from the principles of common law. In simple words, it basically

means that no court can conclude that a person is guilty if he has not answered any of the questions. The Justice Malimath Committee had explicitly stated that in a society where any person can be arbitrarily held guilty of any charge, it is important to acknowledge the right to silence⁶. In *Nandini Sathpathy v. P.L. Dani*⁷, the court explicitly stated any statement or confession made to a police officer is not admissible as evidence, thus, raising the significance of this lesser known right. The Indian Constitution on similar notes, under Article 20(3) ensures protection against self-incrimination.

Right to be informed of Grounds of Arrest and of Right to Bail

The primary necessity of a lawful arrest is to inform the arrested person the reasons of arrest as provided under Section 47, BNSS. The section uses the term 'shall' indicating that it is a mandatory section and non-compliance of the same would amount to a blatant disregard of procedure established by law. The supplying of all the required information seeks to help the arrested person understand his grounds of arrest. In *Madhu Limaye v. State of Maharashtra*, the court held that any detention shall become unlawful if the grounds are not proper or sufficient.

Simultaneously, it shall be noted that Article 22 of the Indian Constitution provides for the status of fundamental right to any arrested person under any law to be informed of his grounds of arrest in the language understood by him. Further, under Section 48 of BNSS, earlier S.50A of CrPC, the person making the arrest was under the obligation to inform a relative of a friend of the arrested person about the arrest. To facilitate proof of the same, an entry shall be made in a register as certified in the court.

Lastly, it is the duty of the police to in cases except with non-bailable offences, intimate the arrested person that he has a right to bail. Many a times, arrested persons are not aware of the availability of this right, thus, this mandatory duty⁸ shall ensure there is an increased trust

⁶ Vivek Raj & Avinash Kumar Sirohi, *Assessing the Impact of Justice Malimath Committee Report 2003 on Policies of India*, 2 LEGAL SPECTRUM J. 1 (2022).

⁷ *Nandini Satpathy v. P.L. Dani*, AIR 1978 SC 1025.

⁸ Anadi Tewari, *Constitution meant for every citizen; every individual must be made aware of rights, duties: CJI NV Ramana*, BarandBench, 31 Jul 2022, <https://www-barandbench-com.eu1.proxy.openathens.net/news/litigation/constitution-meant-every-citizen-every-individual-must-be-made-aware-rights-duties-cji-nv-ramana>.

between the police and the society. At the end of the day, bail is the rule and jail is the exception⁹.

Right to be produced before Magistrate without delay

The arrested person needs to be promptly produced before a judge or a magistrate without a delay. This right has been added to the bundle of rights to avoid a situation wherein an arrested person needs to mandatorily give information. Section 57 and 58 of BNSS state that if an arrest is made without a warrant, a police officer cannot detain a person in custody for a time period longer than 24 hours. This 24-hour period excludes the time taken for the journey to reach the magistrate.

This right is not a mere formality but a substantial protection given to the arrested persons. The same has also been enshrined as a Fundamental Right under Article 22 of the Indian Constitution. The 24-hour period can only be extended in case of a judicial custody.

However, given the two-fold protection of the constitutional and statutory provisions, there have been an n number of cases wherein the arrested person is not produced before the magistrate within 24 hours of arrest¹⁰. In *Poonam v. Sub-Inspector of Police*, the court had stated that in cases of violation of this right, the Magistrate if aware can call upon the police officer, undertake an investigation and pass necessary orders. Therefore, we can infer here that the Magistrate holds the power to keep the police and its actions in check.

Right available to a person under Preventive Detention

Article 22 of the Indian Constitution holds special safeguards for individuals under preventive detention. The aim of preventive detention basically, is to detain a person as a precautionary measure to avoid happening of something that is apprehended will happen if there is no preventive detention.

1. No detention beyond three months unless same is approved by an advisory board

⁹ Madhu Rani & Rana Parveen, *Right to Bail as a Constitutional Right*, 5 INT'L J.L. MGMT. & HUMAN. 352 (2022).

¹⁰ Areeb Uddin Ahmed, *[Lakhimpur Kheri case] Priyanka Gandhi not produced before magistrate after detention: Lawyers claim*, BarandBench, 05 Oct 2021, <https://www-barandbench-com.eu1.proxy.openathens.net/news/priyanka-gandhi-not-produced-before-magistrate-after-detention-lawyers-claim>.

2. The detaining authority must communicate grounds of detention as soon as possible to the detainee
3. The detainee shall be provided with an opportunity to make a representation at the earliest
4. No detention beyond the maximum period as prescribed by the law made by the Parliament

It is significant to highlight here that the Supreme Court commented how preventive detention laws were colonial in nature and had a high potential for abuse and misuse¹¹. According to the latest National Crime Bureau of 2022, the number of detainees can clearly be seen at a vast rise of 854 detainees in a mere period of 12 months.

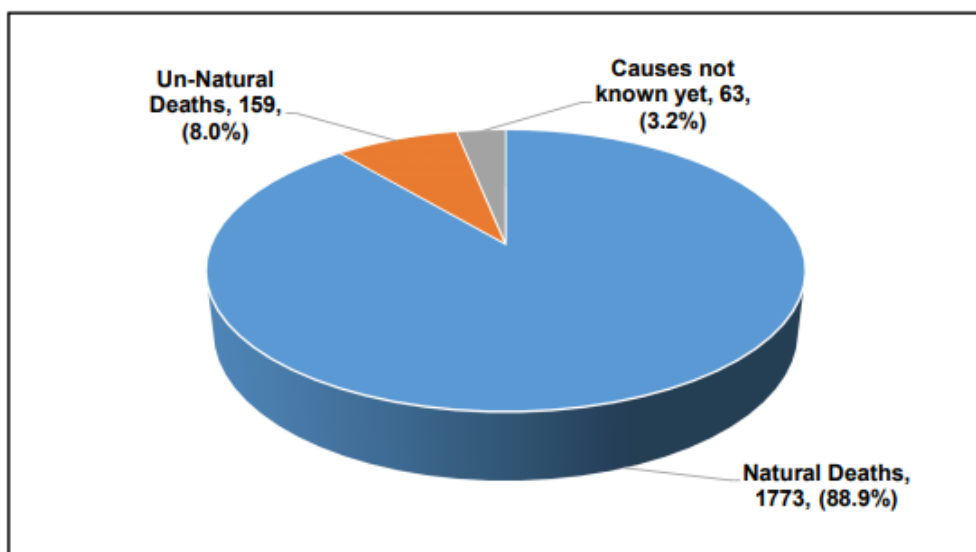
Prisoners – Types & Demography

Year	No. of Convicts	No. of Undertrial Prisoners	No of Detenues	No. of Other Inmates	Total No. of Prisoners
2020	1,12,589	3,71,848	3,590	484	4,88,511
2021	1,22,852	4,27,165	3,470	547	5,54,034
2022	1,33,415	4,34,302	4,324	1,179	5,73,220

- As per data provided by States/UTs.
- Figures are as on 31st December of each year

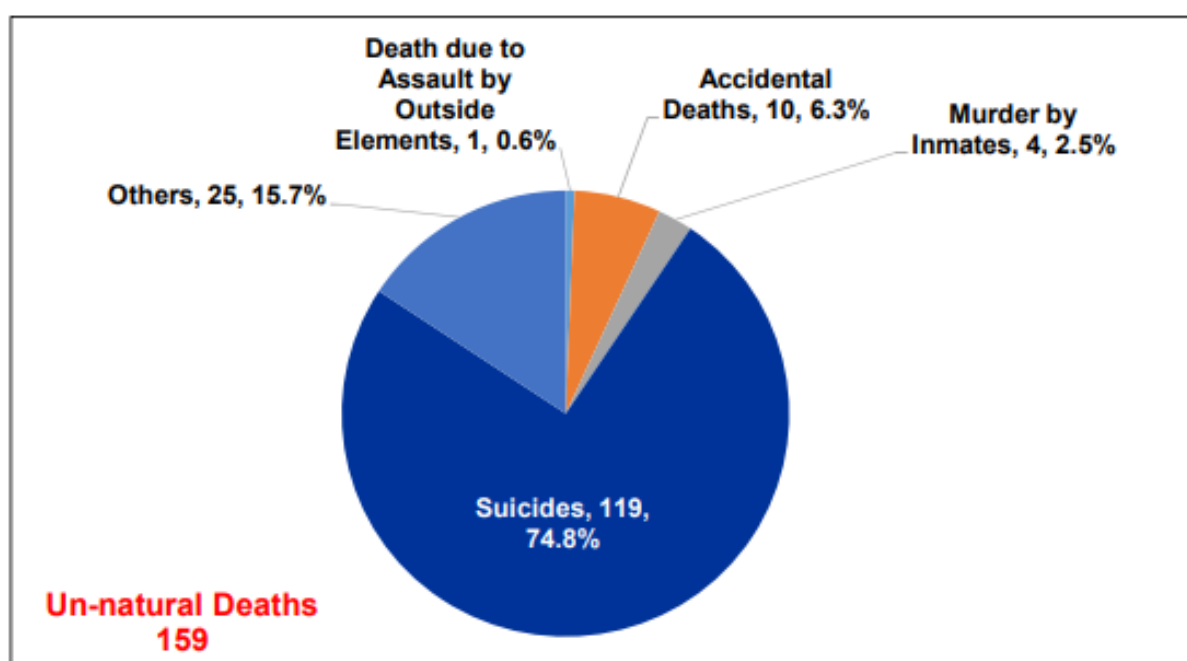
Further, looking at the data we have proof of how many deaths were recorded in the police custody. Most of the deaths even between 2001 and 2018 were labelled as suicides leaving only 26 policemen to be convicted for their inhuman behaviour.

¹¹ Aleena Maria Moncy, *Preventive Detention and Personal Liberty: A Critical Analysis*, 4 INDIAN J.L. & LEGAL RSCH. 1 (2022-2023).



- As per data provided by States/UTs.

Deaths of Prison Inmates due to Natural & Un-natural causes during 2022



- As per data provided by States/UTs.

Deaths of Prison Inmates due to Un-natural Causes during 2022

Most of the deaths were the result of alleged torture and foul play. The important part here is that majority of these people were arrested for committing comparatively petty crimes like gambling, sale of illegal liquor and so forth. Torture is the usual method police uses to extract confessions even though these hold no evidentiary value in courts. Majority of the targets are people belonging to lesser privileged backgrounds. Many a times, these individuals are not even aware of their rights available to arrested persons and keep rotting in the jails.

In the case of *Joginder Kumar v. State of Uttar Pradesh*¹², the police had unlawfully detained a young lawyer on the pretext of general queries. The detention had lasted for five days and thus, the court stated that a person cannot be arrested on mere allegations of committing an offence unless a proper investigation has taken place.

However, unfortunately, even today, the courts need to reiterate the same constitutional mandates having already laid down powerful precedents in this regard. In 2023, the nation celebrated the Azadi Ka Amrit Mahotsav, the state of Telangana saw certain police officers who were ignorant to the Fundamental Rights¹³. Simultaneously, for an act of 2021, a detention order was passed in 2022 and its implementation took place in 2023 raising valid concerns about the unexplained delay¹⁴, vitiating the same in law¹⁵.

LANDMARK JUDICIAL PRONOUNCEMENTS

This paper shall briefly touch upon two landmark judgements related to arrests by police and rights of arrested persons;

*ARNESH KUMAR V. STATE OF BIHAR*¹⁶

The two primary issues of this case were;

1. Unnecessary arrest by the police
2. Magistrate do not authorize detention casually and mechanically

The most important guideline from this case is the WIWW Test. The court held that before making an arrest, the police officer must ask himself the following questions;

1. W- why arrest?

¹² *Joginder Kumar v. State of Uttar Pradesh*, (1994) 4 SCC 260.

¹³ Abhimanyu Hazarika, *Put an end to pernicious trend of passing illegal preventive detention orders: Supreme Court to Telangana Police*, BarandBench, 04 Sep 2023, <https://www.barandbench-com.eu1.proxy.openathens.net/news/end-pernicious-trend-telangana-police-preventive-detention-order-supreme-court>.

¹⁴ Mohsin Dar, *Preventive detention orders passed after unexplained delay are unsustainable: Jammu and Kashmir High Court*, BarandBench, 22 Dec 2023, <https://www.barandbench-com.eu1.proxy.openathens.net/news/preventive-detention-orders-unexplained-delay-unsustainable-jammu-and-kashmir-high-court>.

¹⁵ *Rajinder Arora v. Union of India*, (2006) 4 SCC 696.

¹⁶ *Arnesh Kumar v. State of Bihar*, (2014) 8 SCC 273.

2. I- is the arrest actually required?
3. W- what purpose will arresting this person serve?
4. W- what objective will be achieved?

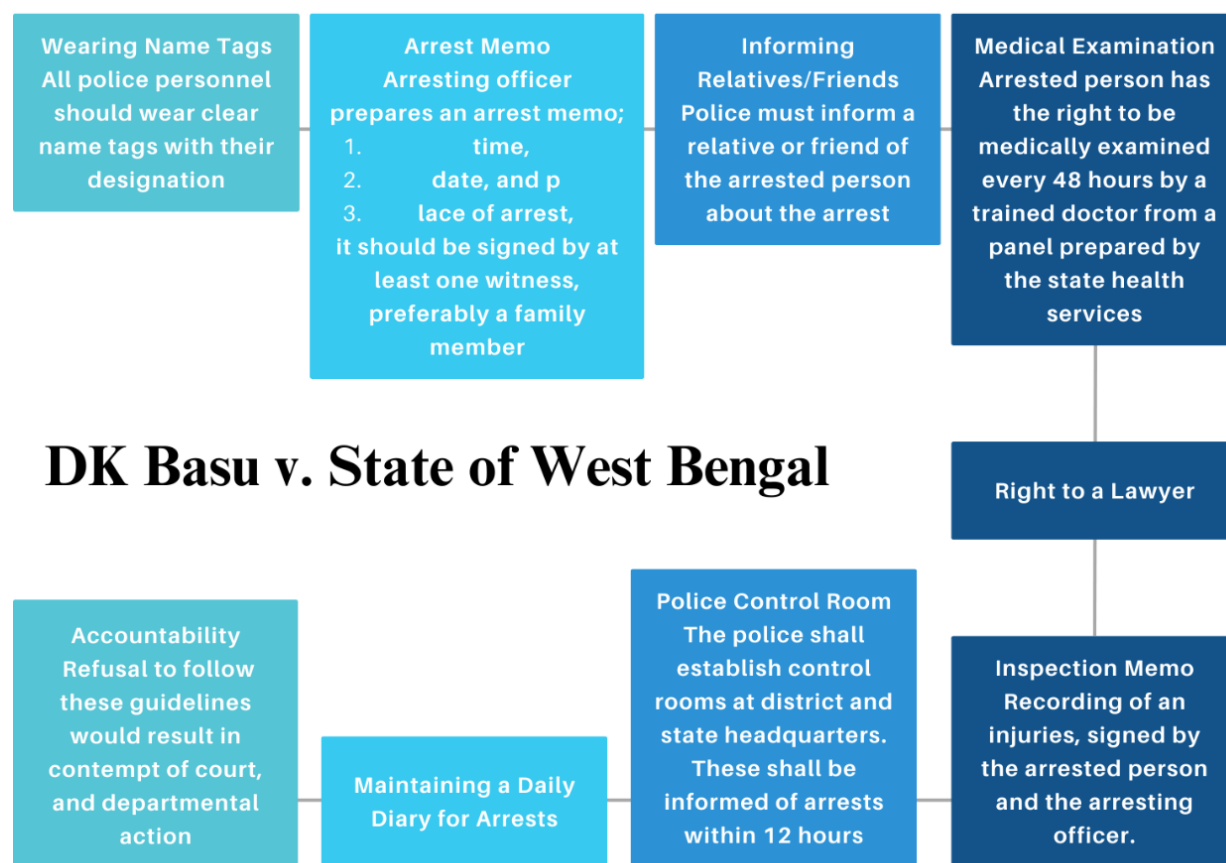
Besides the test, the case lays down the following guidelines;



DK BASU V. STATE OF WEST BENGAL¹⁷

In this landmark judgement, the Supreme Court laid down guidelines related to various aspects to safeguard rights of an arrested person and prevent custodial violence and abuse by the police.

¹⁷ DK Basu v. State of West Bengal, AIR 1997 SC 610.



RECOMMENDATIONS AND CONCLUSION

“Power tends to corrupt; absolute power corrupts absolutely.”

Several judgements have been passed by the Supreme Court to provide compensation to the wrongfully arrested persons. In a case¹⁸, the court provided compensation against the state and condemned the excessive use of powers by the police. The amount of compensation is not fixed but subject to facts and circumstances of each case¹⁹. In the 277th Law Commission Report, it was suggested that a chapter on compensation shall be inserted to the code as an official remedy. As per the contentions above, there is an urgent need to bring in strong procedural reforms to align the justice system to the established precedents. Secondly, it is mandatory for police to record reasons of arrest or of no-arrest²⁰, yet there is a huge lapse in the criminal justice system.

¹⁸ Delhi Judicial Service Association v. State of Gujarat, (1991) 3 SCR 936.

¹⁹ Sube Singh v. State of Haryana, (2006) 3 SCC 178.

²⁰ Hema Mishra v. State of Uttar Pradesh, (2014) 4 SCC 453.

To conclude, even though numerous guidelines have been passed on the misuse of powers, the police continue to harass citizens. There exists a segment of citizens who are ignorant of these rights and due to fear, refrain from taking an official action against the violations by the police.

Thus, lastly, awareness and educational initiatives shall never cease to exist. Educating the minds is the only way to achieve a large-scale progress in the transformative society of today.

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