1.1 Prelude

The criminal administration of justice is one of the important components of the State and involves all the three pillars of constitutional machinery executive, legislature and judiciary. This is the first wing which has the dual responsibility of protection as well as detection of crime in society. The criminal administration of justice in India assumes that the State as a prosecution using its investigating resources and employing competent prosecutors will try its best to prove the case while on the other hand accused will hire the equally competent services of a counsel to defend himself and challenge the accusations leveled against him. Moreover, the notion that a person is presumed innocent until proved guilty still looms large. It is no doubt true that wrongful acquittals are undesirable and shake the confidence of the people in the judicial system much worse; however is the wrongful conviction of an innocent person.\(^1\) To strike the balance between the needs of law enforcement on one hand and the protection of the citizens from the oppression and injustice at the hands of the law enforcement machinery on the other, is a perennial problem of Statecraft.\(^2\) The concept of fair trial is the characteristic of criminal jurisprudence in India. However there is not any exact definition of the term but many provisions enshrined in different fundamental laws shows the importance of the term in administration of criminal justice.

\(^1\) Kali Ram v. State of H.P. (1973) 2 SCC 808.
The criminal administration of justice in India provides prosecution by competent courts as the heinous crimes are tried by senior courts and experienced magistrates and petty offences are triable by less experienced counterparts. Criminal Procedure Code (hereinafter mentioned as Cr.P.C) in Section 479 has mentioned that any magistrate who tries a case must not be in any way connected to that case or in other sense should not have any interest in that case. Similarly there is a provision for open trial with certain exceptions where magistrate can opt for secret or camera trial. The trial is held in the presence of the accused person. There is provision of free legal aid to indigent accused.

Section 327. Court to be open.
(1) The place in which any criminal Court is held for the purpose of inquiring into or trying any offence shall be deemed to be an open Court to which the public generally may have access, so far as the same can conveniently contain them:
Provided that the presiding Judge or Magistrate may, if he thinks fit, order at any stage of any inquiry into, or trial of, any particular case, that the public generally, or any particular person, shall not have access to, or be or remain in, the room building used by the Court.

(2) Notwithstanding anything contained in sub-section (1), the inquiry into and trial of rape or an offence under section 376, section 376A, section 376B, section 376C or section 376D of the Indian Penal Code (45 of 1860) shall be conducted in camera:
Provided that the presiding Judge may, if he thinks fit, or on an application made by either of the parties, allow any particular person to have access to, or be or remain in, the room or building used by the Court.

(3) Where any proceedings are held under sub-section (2), it shall not be lawful for any person to print or publish any matter in relation to any such proceedings, except with the previous permission of the Court.

Section 273. Evidence to be taken in presence of accused.
Except as otherwise expressly provided, all evidence taken in the course of the trial or other proceeding shall be taken in the presence of the accused or, when his personal attendance is dispensed with, in the presence of his pleader.

Explanation— In this section "accused" "includes a person in relation to whom any proceeding under Chapter VIII has been commenced under this Code.

Section 304. Legal aid to accused at State expense in certain cases.
(1) Where, in a trial before the Court of Session, the accused is not represented by a pleader, and where it appears to the Court that the
The criminal administration of justice is set at motion by First Information Report (FIR) resultantly the investigation process. Arrest is an ingredient of effective investigation. The prosecution is under obligation to detect the crime by whatever means and faces blame for not making any breakthrough in investigation. The prosecution has to take harsh steps sometimes to detect the crime or any chain in criminal investigation. However our law does not provide for any defined force or torture upon criminals in custody, but it is presumed or notion resides in the minds of common people that there is always torture (remand) in custody for howsoever small duration it may be. Remand is sometimes used as synonymous for torture.

1.2 Definition of Arrest

The term arrest is not defined in the Code of Criminal Procedure but it means to take or keep in custody by authority of law. The elaboration of the term can be said to restraint and seizure of a person by someone (e.g., a police officer) acting under legal authority. Arrest is a form of State constraint applied to a person, during which the person is placed under detention, is imprisoned and is deprived of his right to move freely. Therefore, no doubt the accused has not sufficient means to engage a pleader, the Court shall assign a pleader for his defence at the expense of the State.

(2) The High Court may, with the previous approval of the State Government make rule providing for—
(a) the mode of selecting pleaders for defence under sub-section (2);
(b) the facilities to be allowed to such pleaders by the Courts;
(c) the fee payable to such pleaders by the Government, and generally, for carrying out the purposes of sub-section (1).

(3) The State Government may, by notification, direct that, as from such date as may be specified in the notification, the provisions of sub-sections (1) and (2) shall apply in relation to any class of trials before other Courts in the State as they apply in relation to trials before the Courts of Session.

arrest means deprivation of personal liberty but the Constitution of India which is supreme law of the country provides ample protection against arbitrary arrests.

The United Nations Programme on Crime Prevention and Criminal Justice, incorporates concept of arrest and arrest has been defined as "the act of depriving a person under governmental authority for the purpose of taking that person into detention and charging the person with a criminal offence".

Arrest consists of a seizure or touching of a person's body for the purpose of holding or detaining him to answer a criminal charge or preventing the commission of a criminal offence. Words may amount to an arrest depending on the circumstances of the case, i.e., words brought to the person's attention that are intended to communicate to him that he is under compulsion and he thereafter submits to it. The pronouncing of words of arrest is not an arrest unless the person sought to be arrested submits to the process and goes with the arresting officer. There are three modes of undertaking arrest: 1) Submission to the custody by word or action. 2) Touching the body of the person to be arrested 3) Confining the body of such person." Section 46 Cr.P.C. empowers

7 Section 46. Arrest how made
(1) In making an arrest the police officer or other person making the same shall actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by word or action
(2) If such person forcibly resists the endeavour to arrest him, or attempts to evade the arrest, such police officer or other person may use all means necessary to effect the arrest
(3) Nothing in this section gives a right to cause the death of a person who is not accused of an offence punishable with death or with imprisonment for life.
(4) Save in exceptional circumstances, no woman shall be arrested after sunset and before sunrise, and where such exceptional circumstances exist, the woman police officer shall, by making a written report, obtain the prior permission of the Judicial Magistrate of the first class within
the police force to use proportionate force to effect arrest if it is resisted by the person to be arrested. The extent of use of force goes up to causing death if the offence committed by accused is punishable by life imprisonment or death sentence.

Every compulsion or physical restrain is not arrest but when the restraint is total and deprivation of liberty is complete, that would amount to arrest. If a person suppresses or overpowers the voluntary action of another and detains him in a particular place or compels him to go in a specific direction, he is said to imprison that toiler person. If such detention or imprisonment is in pursuance of any legal authority or apparent legal authority, it would amount to arrest.

The most basic provision relating to arrest has been incorporated in the Article 21 of the Indian Constitution. It lays down that no person can be deprived of his/her right to liberty, except in accordance with procedure established by law.

An arrest may be made by a police officer or other persons empowered by law to do so. The police officer affecting the arrest can only do so strictly as per the provisions of Criminal Procedure Code. All necessary means may be employed to affect an arrest if a person resists attempts to arrest him. Resisting or obstructing the lawful arrest of a person is an offence whose local jurisdiction the offence is committed or the arrest is to be made.

Section 60 A. Arrest to be made strictly according the Code.-No arrest shall be made except in accordance with the provisions of this Code or any other law for the time being in force providing for arrest.
1.2.1 Arrest and Custody

An arrest serves the function of notifying the community that an individual has been accused of a crime and also may admonish and deter the arrested individual from committing other crimes. An arrest may occur by the consent of the person to be arrested. There is no arrest where there is no restraint and the restraint must be under real or pretended legal authority. However, the detention of a person need not be accompanied by formal words of arrest or a station house booking to constitute an arrest.

The test used to determine whether an arrest took place in a particular case is objective and it turns on whether a reasonable person under these circumstances would believe he or she was restrained or free to go. A reasonable person is one who is not guilty of criminal conduct, overly apprehensive or insensitive to the seriousness of the circumstances. Reasonableness is not determined in light of a defendant's subjective knowledge or fears. The subjective intent of the police is also normally irrelevant to a court's determination whether an arrest occurred, unless the officer makes that intent known. Thus, a defendant's presence at a police station by consent does not become an arrest solely by virtue of an officer's subjective view that the defendant is not free to leave. When an officer does seek an arrest warrant, the officer must present evidence to a neutral judge or magistrate sufficient to establish probable cause that a crime has been committed. The evidence upon which a warrant is based need not be ultimately admissible at trial but it cannot be based on knowingly or intentionally false statements or statements made in reckless disregard of the truth. An investigatory detention that lasts for too long automatically turns into a de facto arrest.
In every arrest, there is custody but not vice versa and that both the words custody and arrest are not synonymous terms. Custody may amount to an arrest in certain circumstances but not under all circumstances. If these two terms are interpreted as synonymous, it is nothing but an ultra legalist interpretation which if under all circumstances accepted and adopted, would lead to a startling anomaly resulting in serious consequences.\(^9\) The meaning of the expression "custody" was succinctly stated by the Orissa High Court in the decision reported as *Paramhansa Jadab v State*,\(^{10}\) stating that "It is now well settled that "police custody" for the purpose of Section 26 of the Evidence Act does not commence only when the accused is formally arrested but would commence from the moment when his movements are restricted and he is kept in some sort of direct or indirect police surveillance." The "police custody" commences as soon as the movements of the accused get "restricted" whereas the formal arrest can take place only after the stage when there are sufficient evidence to make grounds of arrest and moreover, there is justification to make such arrest.

1.2.2 Who can Arrest

Arrest can be made either upon warrant of arrest or without warrant. Arrest can be affected by Police officers, Individuals and Magistrates.\(^{11}\) The Code of Criminal Procedure has made it very clear in its texts. Generally it is presumed that only the prosecuting/ investigating agencies have the power to arrest but there are provisions in the Code where by even the persons other

---

\(^{9}\) *Directorate of Enforcement v. Deepak Mahaja*, (1994) 3 SCC 440

\(^{10}\) AIR 1964 Orissa 144

\(^{11}\) Sections 41, 42, 43 and 44 of Criminal Procedure Code illustrate the procedure for arrests by different classes of persons.
than prosecuting/ investigating agencies may be authorised to arrest certain criminals. Even the magistrate can affect the arrest by following the procedure. The police officer referred to in Section 41 must be an officer who is a member of the police force enrolled under the Indian Police Act, 1861. Section 41 is a depository of general powers of the police officer to arrest but this power is subject to certain other provisions contained in the Code as well as certain Special statutes to which the Code is made applicable. The powers of the police to arrest a person without a warrant are only confined to such persons who are accused or concerned with the offences or are suspects thereof. The law now also recognises the redressal against arbitrary arrest and detention by providing remedy in the form of complaint against any wrongful act by the police to Superintendent of Police of that district and other senior police officers; court; and State Human Rights Commission/ National Human Rights Commission.

1.2.3 Who can be arrested?

The Criminal Procedure Code mentions that the following persons can be arrested by police officials without warrant\(^\text{12}\);

1) who commits, in the presence of a police officer, a cognizable offence,

2) against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists that he has committed a cognizable offence punishable with imprisonment for a term which may be less than seven years or

\(^{12}\) Section 41 Criminal Procedure Code
which may extend to seven years whether with or without fine, if the following conditions are satisfied, namely:—

(i) the police officer has reason to believe on the basis of such complaint, information, or suspicion that such person has committed the said offence;

(ii) the police officer is satisfied that such arrest is necessary—

(a) to prevent such person from committing any further offence; or

(b) for proper investigation of the offence; or

(c) to prevent such person from causing the evidence of the offence to disappear or tampering with such evidence in any manner; or

(d) to prevent such person from making any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to the police officer; or

(e) as unless such person is arrested, his presence in the Court whenever required cannot be ensured and the police officer shall record while making such arrest, his reasons in writing.

Provided that a police officer shall, in all cases where arrest of a person is not required under the provisions of this sub-section, record the reasons in writing for not making the arrest.

3) against whom a credible information has been received that he has committed cognizable offence punishable with imprisonment for a term which may extend to more than seven
years whether with or without fine or with death sentence and the police officer has reason to believe on the basis of that information that such person has committed the said offence.

4) who has been proclaimed as an offender either under this Code or by order of the State Government; or

5) in whose possession anything is found which may reasonably be suspected to be stolen property and who may reasonably be suspected of having committed an offence with reference to such thing; or

6) who obstructs a police officer while in the execution of his duty, or who has escaped, or attempts to escape, from lawful custody; or

7) who is reasonable suspected of being a deserter from any of the Armed Forces of the Union; or

8) who has been concerned in, or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists, of his having been concerned in, any act committed at any place out of India which, if committed in India, would have been punishable as an offence, and for which he is, under any law relating to extradition, or otherwise, liable to be apprehended or detained in custody in India; or

8) who, being a released convict, commits a breach of any rule made under sub-section (5) of section 365; or

9) for whose arrest any requisition, whether written or oral, has been received from another police officer, provided that the requisition specifies the person to be arrested and the offence or other cause for which the arrest is to be made and it appears there
from that the person might lawfully be arrested without a warrant by the officer who issued the requisition

1.2.4 Handcuffing of Accused

The arrest implies custody subject to compliance of Section 49 Cr.P.C.\(^\text{13}\) whereby the restraint is limited to prevent the accused from escape. The general rule is that a police officer shall not put handcuffs on the accused while arresting him. Handcuffing is only justified under exceptional circumstances or if there are sufficient reasons to believe that accused may attempt to escape from custody. This notion is based on the principles that if police officer is authorised to handcuff in all the cases of arrest, it would amount to be given the blanket powers to oppress the accused person. As a rule handcuffing or other fetters shall not be forced on prisoners, convicts or under-trials while lodged in a Jail anywhere in the country or while transporting or in transit from one Jail to another or from Jail to Court or back. Police and the Jail authorities, on their own, shall have no authority to direct the handcuffing of any inmate of the Jail in the country or during transport from one Jail to another or from Jail to Court or back. In Sunil Batra v Delhi Administration,\(^\text{14}\) the Supreme Court of India ruled that fetters should be shunned as violative of human dignity and that the indiscriminative use of handcuffs is illegal.

The prisoner should be produced before the Magistrate concerned and a prayer for permission to handcuff the prisoner be made before the said Magistrate, where the Police or the Jail authorities have well grounded basis for drawing a strong inference that a

\(\text{13 Section 49. No unnecessary restraint. The person arrested shall not be subjected to more restraint than is necessary to prevent his escape.}\)

\(\text{14 (1978) 4 SCC 494}\)
particular prisoner is likely to jump Jail or break out of the custody. In rare cases of concrete proof regarding proneness of the prisoner to violence, his tendency to escape, he being too dangerous, desperate and finding no other practical way of forbidding escape is available, the Magistrate may grant permission to handcuff the prisoner.

In all the cases of arrest where the arrestee is produced by police before the Magistrate and remand judicial or non-judicial is given by the Magistrate, the person concerned shall not be handcuffed unless special orders in that respect is obtained from the Magistrate at the time of the grant of the remand. When the Police arrests a person in execution of an arrest warrant obtained from a Magistrate, the person arrested shall not be handcuffed unless the police has also obtained orders from the Magistrate for the handcuffing of the person to be so arrested.

In cases of arrest without warrant by police, the Police Officer concerned may if he is satisfied, on the basis of the guidelines given by the Supreme Court in para above, that it is necessary to handcuff such person, he may do so till the time he is taken to the Police Station and thereafter his production before the Magistrate. But these kinds of examples of human rights violations continue to happen every now and then. This is exactly what happened in the case, Sunil Gupta v State of Maharashtra. Handcuffing the petitioners who are educated and not likely to flee from jail was considered unjust and unreasonable by the Supreme Court. In this case, the Supreme Court directed the government to ensure that appropriate action is taken against the 'escorting party,' namely

15 (1990) 3 SCC 119
the cops, for handcuffing the petitioners in violation of the law laid down by the Supreme Court.

There are many cases relating to human rights violations of arrested persons in India. In a landmark case, *Citizens for Democracy v State of Assam*, it was held that when a person is arrested based on a warrant of arrest that is issued by a Magistrate, the police shall not handcuff the said person unless the Magistrate has ordered handcuffing. It was also held that when the police arrest a person without a warrant, the person maybe handcuffed in consonance with the Supreme Court guidelines. However, once he is produced before the Magistrate, he cannot be chained or handcuffed without the orders of the Magistrate. The court further held that handcuffing and chaining in public, "degrades and puts to shame finer sensibilities and is a slur on our culture." It was further observed that handcuffing should be shunned as violative of human dignity.

**1.2.5 Interrogation**

When a person thinks of arrest, the picture that most often springs to one's mind as fostered by pictures and televisions drama is that police officer implementing all means of oppression. The police remand has also the same picture in minds of common people. In fact law does not allow this and it is only the interrogation which is required to get breakthrough in investigation. The suspect has a right to counsel during interrogation and should be allowed to meet his counsel; but the counsel need not be present throughout

16 (1995) 3 SCC 743
17 Section 41D. Right of arrested person to meet an advocate of his choice during interrogation.- When any person is arrested and interrogated by the police, he shall be entitled to meet an advocate of his choice during interrogation, though not throughout interrogation.
the interrogation; where necessary, he is entitled to free legal aid and enjoys the right to remain silent. A woman or a child below 16 years of age cannot be taken to a police station for interrogation. This should apply equally to those who have serious physical or mental problems. Though this does not apply to the suspect/accused, it may be necessary to introduce this change.

If tortured, an accused should have the freedom to apprise the Magistrate of the incident, when produced before him. In such cases, the magistrate can remand him to judicial custody. This should be true of any violence or sexual offence perpetrated against an accused person in custody. In all such cases, there must be a detailed enquiry. The Criminal Procedure Code had provision for medical examination of the arrested person at his behest under Section 5418, which has been further strengthened by substitution of new Section by Act 5 of 2009, Section 8, for Section 54, making medical examination mandatory after arrest. The medical officer or a registered medical practitioner so examining the arrested person shall prepare the record of such examination, mentioning therein in any injuries or marks of violence upon the person of the arrested person, and approximate time when such injuries or marks have been inflicted. Moreover, the medical officer or registered medical practitioner is under

18 Section 54. Examination of arrested person by medical practitioner at the request of the arrested person
When a person who is arrested, whether on a charge or otherwise, alleges, at the time when he is produced before a Magistrate or at any time during the period of his detention in custody that the examination of his body will afford evidence which will disprove the commission by him of any offence or which will establish the commission by any other person of any offence against his body, the Magistrate shall, if requested by the arrested person so to do direct the examination of the body of such person by a registered medical practitioner unless the Magistrate considers that the request is made for the purpose of vexation or delay or for defeating the ends of justice
obligation to supply a copy of the medical report to the arrested person or any other person nominated by such arrested person. Therefore, torture during interrogation may put the police officials in trouble as the medical examination will furnish evidence to this effect and arrestee can sue them for violation of human rights.

1.2.6 Right to Legal Aid and Advice

Every poor accused is entitled to be provided with free legal aid. This right begins from the time of his arrest only. If he is not aware of this right it is the duty of the Magistrate to inform him about this right when he is first produced in court. The Supreme Court took a very strong view in the case of Khatri & Others v. State of Bihar and others against the judges deciding cases without legal defence of some blind accused persons and saying that the accused persons did not ask for legal representation and vehemently held that

"There is so much lack of legal awareness that it has always been recognised as one of the principal items of the programme of the legal aid movement in this country to promote legal literacy. It would make a

19 Section 304. Legal aid to accused at State expense in certain cases. (1) Where, in a trial before the Court of Session, the accused is not represented by a pleader, and where it appears to the Court that the accused has not sufficient means to engage a pleader, the Court shall assign a pleader for his defence at the expense of the State. (2) The High Court may, with the previous approval of the State Government make rule providing for— (a) the mode of selecting pleaders for defence under sub-section (2); (b) the facilities to be allowed to such pleaders by the Courts; (c) the fee payable to such pleaders by the Government, and generally, for carrying out the purposes of sub section (1). (3) The State Government may, by notification, direct that, as from such date as may be specified in the notification, the provisions of sub-sections (1) and (2) shall apply in relation to any class of trials before other Courts in the State as they apply in relation to trials before the Courts of Session.

20 1981(1) SCC 627
mockery of legal aid if it were to be left to a poor ignorant and illiterate accused to ask for free legal services. Legal aid would become merely a paper promise and it would fail of its purpose. The Magistrate or the Sessions Judge before whom the accused appears must be held to be under an obligation to inform the accused that if he is unable to engage the services of a lawyer on account of poverty or indigence, he is entitled to obtain free legal services at the cost of the State. Unfortunately, the Judicial Magistrates failed to discharge this obligation in the case of the blinded prisoners and they merely stated that no legal representation was asked for by the blinded prisoners and hence none was provided. We would, therefore, direct the Magistrates and Sessions Judges in the country to inform every accused who appears before them and who is not represented by a lawyer on account of his poverty or indigence that he is entitled to free legal services at the cost of the State. Unless he is not willing to take advantage of the free legal services provided by the State, he must be provided legal representation at the cost of the State. We would also direct the State of Bihar and require every other State in the country to make provision for grant of free legal services to an accused who is unable to engage a lawyer on account of reasons such as poverty, indigence or incommunicado situation. The only qualification would be that the offence charged against the accused is such that, on
conviction, it would result in a sentence of imprisonment and is of such a nature that the circumstances of the case and the needs of social justice require that he should be given free legal representation. There may be cases involving offences such as economic offences or offences against law prohibiting prostitution or child abuse and the like, where social justice may require that free legal services need not be provided by the State.”

It is the duty of the police to immediately inform the nearest legal aid committee about the arrest of an accused seeking legal aid. In *Sheela Barse v. State of Maharashtra*\(^{21}\) the Supreme Court ordered that whenever a person is arrested by the police and taken to the police lock up, the police will immediately give intimation of the fact of such arrest to the nearest Legal Aid Committee and such Legal Aid Committee will take immediate steps for the purpose of providing legal assistance to the arrested person at State cost provided he is willing to accept such legal assistance. The State Government will provide necessary funds to the concerned Legal Aid Committee for carrying out this direction.

1.3 The Objective of Arrest

The term arrest is an important term in administration or application of criminal jurisprudence. The criminal jurisprudence mentions that the trial must be held in the presence of the accused person and Section 204 of Criminal Procedure Code deals with the

---

\(^{21}\) AIR 1983 SC 378
process of ensuring the presence of the accused persons. The arrest is the first step to procure the presence of the accused person. The exception works by surety provisions viz. personal bond or surety bond to appear before the court when and where required appearing. In other sense the arrest can also work as deterrent also to prevent further commission of crime in certain cases. The main objectives of arrest is to make investigation meaningful, presence of accused in trial, prevention of further crime and public safety and peace. Arrest is imminent to discharge duties and enforce criminal laws and the law of arrest should not be seen always from the violation of human rights point of view. However power of arrest has been considered to be the chief cause of corruption among police officers but its judicious exercise is desirable to meet the ends of administration of justice. A person, who is suspected of committing such a crime, for which a punishment can be imposed, including detention, imprisonment for a certain period of time or life imprisonment can be arrested by competent authorities. A person, who has violated the conditions of the precautionary measure applied, can also be arrested.

The arrested person is subject to be released based on the decision made by the officer in charge of the case, if the suspicion that a person committed an offence prohibited by the criminal law was

22 Section 204 Issue of process –
(1) If in the opinion of a Magistrate taking cognizance of an offence there is sufficient ground for proceeding, and the case appears to be—
(a) a summons-case, he shall issue his summons for the attendance of the accused, or
(b) a warrant-case, he may issue a warrant, or, if he thinks fit, a summons, for causing the accused to be brought or to appear at a certain time before such Magistrate or (if he has no jurisdiction himself) some other Magistrate having jurisdiction
(2) No summons or warrant shall be issued against the accused under subsection (1) until a list of the prosecution witnesses has been filed.
not proved; there is no procedural need to keep the person in custody\textsuperscript{23}. If the maximum time for arrest imposed by the law has run out and the Court has not made a decision to detain the defendant; If there are no grounds to keep the person under custody the pre-investigation body, the investigator and the prosecutor shall in no time release him, otherwise this will be viewed as unlawful deprivation of liberty. The person who has been released cannot be arrested again with the same suspicion.

\textbf{1.4 Balancing of societal interests and protection of rights of the accused}

We are not unaware that crime rate is going up in our country for various reasons which need not be recounted here. Terrorism, drugs and organized crime have become so acute that special measures have become necessary to fight them not only at the national level but also at the international level. We also take note of the fact that quite a number of policemen risk their lives in discharge of their duties and that they are specially targeted by the criminal and terrorist gangs. We recognize that in certain situations e.g., like the one obtaining in Kashmir today, a literal compliance with several legal and constitutional safeguards may not be practicable but we must also take note of and provide for the generality of the situation all over the country and not be deflected by certain specific, temporary situations. We must also take note of the fact that very often it is the poor who suffer most

\textsuperscript{23} \textbf{Section 169. Release of accused when evidence deficient} –

If, upon an investigation under this Chapter, it appears to the officer in charge of the police station that there is not sufficient, evidence or reasonable ground of suspicion to justify the forwarding of the accused to a Magistrate, such officer shall, if such person is in custody, release him on his executing a bond, with or without sureties, as such officer may direct, to appear, if and when so required, before a Magistrate empowered to take cognizance of the offence on a police report, and to try the accused or commit him for trial
at the hands of Police. Their poverty itself makes them suspects. This was said, though from a different angle, by George Bernard Shaw. He said “poverty is crime”. But nowadays, even middle classes and other well-to-do people, who do not have access to political power-wielders, also are becoming targets of Police excesses. We recognize that ensuring a balance between societal interest in peace and protection of the rights of the accused is a difficult one but it has to be done. We also recognize the fundamental significance of the Human Rights, which are implicit in Part III of our Constitution and of the necessity to preserve, protect and promote the Rule of Law which constitutes the bedrock of our constitutional system.

This court in *Smt. Nandini Satpathy v. P.L. Dan*24 quoting Lewis Mayers, stated: “To strike the 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.” The pendulum over the years has swung to the right.

In D. K. Basu case the Supreme Court of India gave directions aimed at ensuring authorised arrest, to bar illegal detention, to devise procedural mechanisms where an account of arrest is found in the case files of the Investigating officers, duly signed by witnesses and countersigned by the arrestees themselves and having parallel record in the daily diary so that there is left no space for illegal detention and its cover up pursuits. It further aims at ensuring the communication of arrest to the relatives/friends, so that every accused is represented and gets fair opportunity to

---

24 AIR 1978 SC 1025 at 1032
defend himself at every stage of criminal proceedings and finally it aims to secure to the arrestee a milieu wherein his fundamental rights under Article 21 are not violated and he doesn't fell prey to custodial violence and atrocious behaviour of police.

Besides D. K. Basu, the Supreme Court of India has dealt at length with the provisions relating to power of arrest and its exercise in the light of constitutional guarantees in Joginder Kumar v. State of U.P. and has evolved the new jurisprudence of arrest by adding new vistas to the concept of personal liberty and rationalizing the practice of arrest. The Supreme Court has evolved the new jurisprudence of arrest in this case by stating that “No arrest can be made because it is lawful for the Police Officer to do so. The existence of the power to arrest is one thing. The justification for the exercise of it is quite another. The Police Officer must be able to justify the arrest apart from his power to do so. Arrest and detention in police lock-up of a person can cause incalculable harm to the reputation and self-esteem of a person. No arrest can be made in a routine manner on a mere allegation of commission of an offence made against a person. It would be prudent for a Police Officer in the interest of protection of the constitutional rights of a citizen and perhaps in his own interest that no arrest should be made without a reasonable satisfaction reached after some investigation as to the genuineness and bona fides of a complaint and a reasonable belief both as to the person’s complicity and even so as to the need to effect arrest. Denying a person of his liberty is a serious matter. The recommendations of the Police Commission merely reflect the constitutional concomitants of the fundamental right to personal liberty and

25 AIR 1994 SC 1349
freedom. A person is not liable to arrest merely on the suspicion of complicity in an offence. There must be some reasonable justification in the opinion of the officer affecting the arrest that such arrest is necessary and justified. Except in heinous offences, an arrest must be avoided if a police officer issues notice to person to attend the Station House and not to leave Station without permission would do."

1.5 Review of Literature

*The Constitution and Criminal Justice Administration* and *Police and People Role and Responsibilities* by Dalbir Bharti; *Crime and Punishment in ancient India*, by S. Das; *Facets of Crime in India*, by S. Venugopal Rao, *The Outcry of Police Brutality*, by S.K.Ghosh, have presented a picture of police administration evolved through ages in systematic manner but none of these works however enlighten us on rights of arrested persons in ancient times. Kamal Kishore Mishra's, *Police Administration in Ancient India*, and Aparna Srivastava, *Role of Police in Changing Society*, has in their work given illustrious pictures of police administration in ancient and modern era respectively.

Pramathanath Banerjea in his *Public Administration in Ancient India*, has no doubt elaborated each and every aspect of administration such as state, administration of justice, executive and legislatives etc. and his work gives many things to gather from prevailing situations during different stages.

Similarly, other works done by foreign authors has also shown more interest on the development of political, social and judicial systems. Almost one aspect i.e. of Dharma as a source of law and
rights evolving as respect for its compliance seems to be the theme behind development of theory of rights whether it be the work of Robert Lingat, *The Classical Law of India*, A.L. Basham, *The Wonder That Was India*. Works by J.D. Mayne: *A Treatise on Hindu Law and usage* and Jullius Jolly, *The Minor Law Books (Trans.) Part I, Narada. Brihaspati*, R.K. Mukherjee, *Ancient India Education* gives us very bright pictures of ancient laws. These works, compiling and quoting all ancient writers has concentrated throughout around the concept of state, society and law. The rights of arrested persons or even laws regarding arrest has not been touched by any of the these however inference can be drawn from the literature made available under these compilations.

The concept of human rights in ancient India has been highlighted by many authors in their work. Paras Diwan-Peeyushi Diwan: *Human Rights and the Law. Universal and Indian*, Ashish Kumar Das and Prasant Kumar Mohanty, *Human Rights in India*, Jaishree Jaiswal, *Human Rights of Accused and Juveniles: Delinquent In Conflict With Law* - do trace the origin of humanistic approach towards individuals in ancient times. Whereas, the rights as has now been inserted in the Constitution, also see its journey through ancient and middle age but it was the British period which has the most impact on the laws as we find now because most of the codified laws are still in existence which were passed during British regime. Satya Prakash Dash, *Constitutional and Political Dynamics of India*, V. D. Kulshreshtha, *Landmarks in Indian Legal and Constitutional History*, Dr. Mrinmaya Choudhuri, *Languishing For Justice, Being A Critical Survey Of The Criminal Justice System*, Devi Dayal Aggarwal, *Jurisprudence in India: Through the ages*.

All this literature does have stray references of rights which can be gathered from prevailing law and order systems but these lack scientific treatment in the context of rights of arrested persons in ancient India. Thus this inadequacy in the existing literature necessitates the urgency of empirical investigation of the entire issue of human rights of arrested persons.

**1.6 Statement of the Problem**

The rule of law prevents crime detection. This is the finding of people who directly deal with crime and its prevention. But does this reflect the backwardness or inefficiency of the methods employed to uncover crime, the honest officers of our police who admit torture as a common means of investigation of crimes, is a question they prefer to avoid answering. Yet they insist that if police goes strictly by the rules, few crimes could be solved. A realistic approach should be made in this direction. The law of arrest is one of balancing individual rights, liberties and privileges, on the one hand and individual duties, obligations and responsibilities on the other; of weighing and balancing the rights, liberties and privileges of the single individual and those of individuals collectively; of simply deciding what is wanted and where to put the weight and the emphasis; of deciding which comes first – the criminal or society, the law violator or the law abider; of meeting the challenge which Mr. Justice Cardozo so forthrightly met when he wrestled with a similar task of balancing individual rights against society’s rights and wisely held that the
exclusion rule was bad law, that society came first, and that the criminal should not go free because the constable blundered.

The quality of a nation's civilisation can be largely measured by the methods it uses in the enforcement of criminal law. Allegations of extra-legal methods that police employs to crack open hardened criminals and bust crimes are common but the victims, mostly innocent, are categorized and dismissed as "unfortunate" cases. Their misfortune starts the moment they are "picked up" by police as a suspect and are tortured to confess a crime they have not committed. During the physical remand the police torture the suspect in open violation of human rights as they have no modern technique or facilities to investigate or interrogate the criminals, suspect and the accused. All that is demanded of them is to produce a person who admits the crime.

The overarching aim of the Criminal Justice System is to find out the truth. The person, who is most likely to know the truth of an offence which has been committed, is the offender himself. It must be emphasized that the suspect/accused like the other players in the Criminal Justice System can also contribute to the search for truth. It is true that except where there has been a voluntary confession, the suspect/accused is unlikely to incriminate himself; to which in a democracy, he is legally entitled to under the rights guaranteed to him by the Constitution. The rights of the accused include the obligation on the part of the State to follow the due processes of law, a quick and impartial trial, restraint from torture and forced testimony, access to legal aid etc. Accused has a right not to be convicted for any offence for the commission of an act

26 Malimath Committee Report at 49
which was not an offence at the time of the commission of the act or to be subjected to a penalty greater than the one prescribed at the time of commission of the act.\textsuperscript{27}

The rights of the accused under the Constitution of India and laid down by the Supreme Court in \textit{Joginder Kumar v. State of Uttar Pradesh}\textsuperscript{28} and \textit{D.K. Basu v. State of West Bengal}\textsuperscript{29} can be summerised as follows:

\textbf{Constitutional Position}

1. Accused has right against double jeopardy. [Art 20 (2)].

2. Accused has right not to be compelled to be a witness against himself. [Art 20 (3)].

3. No accused shall be deprived of his life or personal liberty except in accordance with procedure established law which is just, fair and reasonable. [Art 21].

4. Accused has right to fair and speedy trial. [Art 21].

5. Accused has right to assistance of a Counsel. [Art 22 (1)].

6. Right to be produced before the Magistrate within 24 hours of arrest excluding the time for travel. [Art 22 (2)].

7. Right not to be detained in custody beyond 24 hours after arrest excluding the time for travel without the order of the Magistrate. Art 22 (2)].

\begin{footnotesize}
\textsuperscript{27} Article 20(1) of Constitution of India  
\textsuperscript{28} AIR 1994 SC 1349  
\textsuperscript{29} AIR 1997 SC 610
\end{footnotesize}
Rights of Arrestee issued as instructions in Joginder Kumar case

8. An arrested person being held in custody is entitled, if he desires, to have one friend, relative or other person, who is known to him or likely to take an interest in his welfare, told as far as practicable that he has been arrested and where he is being detained.

9. The police officer shall inform the arrested person when he is brought to the police station of this right.

10. The entry shall be required to be made in the diary as to who was informed of the arrest.

It shall be the duty of the Magistrate, before whom the arrested person is produced, to satisfy himself that these requirements have been complied with.

Obligation of Police Officers after arrest as per D K Basu case

11. The police personnel carrying out the arrest and handling the interrogation of the arrestee should bear accurate, visible and clear identification and name tag with their designations. The particulars of all such police personnel who handle interrogation of the arrestee must be recorded in a register.

12. That the Police Officer carrying out the arrest of the arrestee shall prepare a memo of arrest at the time of arrest and such memo shall be attested by at least one witness, who may be either a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. It shall
also be countersigned by the arrestee and shall contain the
time and date of arrest.

13. A person who has been arrested or detained and is being
held in custody in a police station or interrogation centre or
other lock-up, shall be entitled to have one friend or relative
or other person known to him or having interest in his
welfare being informed, as soon as practicable, that he has
been arrested and is being detained at the particular place,
unless the attesting witness of the memo of arrest is himself
such a friend or a relative of the arrestee.

14. The time, place of arrest and venue of custody of an arrestee
must be notified by the police where the next friend or
relative of the arrestee lives outside the district or town
through the Legal Aid Organization in the District and the
police station of the area concerned telegraphically within a
period of 8 to 12 hours after the arrest.

15. The person arrested must be made aware of this right to
have someone informed of his arrest or detention as soon as
he is put under arrest or is detained.

16. An entry must be made in the diary at the place of detention
regarding the arrest of the person which shall also disclose
the name of the next friend of the person who has been
informed of the arrest and the names and particulars of the
police officials in whose custody the arrestee is.

17. The arrestee should, where he so requests, be also examined
at the time of his arrest and major and minor injuries, if any
present on his/her body, must be recorded at that time. The
“Inspection Memo” must be signed both by the arrestee and the police officer affecting the arrest and its copy provided to the arrestee.

18. The arrestee should be subjected to medical examination by a trained doctor every 48 hours of his detention in custody by a doctor on the panel of approved doctors appointed by Director, Health Services of the concerned State of Union Territory. Director, Health Services should prepare such a panel for all Tehsils and Districts as well.

19. Copies of all the documents including the memo of arrest, referred to above, should be sent to the Illaqa Magistrate for his record.

20. The arrestee may be permitted to meet his lawyer during interrogation, though not throughout the interrogation.

21. A police control room should be provided at all district and state headquarters, where information regarding the arrest and the place of custody of the arrestee shall be communicated by the officer causing the arrest, within 12 hours of effecting the arrest and at the police control room it should be displayed on a conspicuous notice board.

**Duty of the Magistrate When the Accused is produced**

When the arrested person is produced before the Magistrate, he has a duty to enquire with the accused as to when he was arrested and the treatment meted out to him including subjecting him to third degree methods, and about the injuries if any on his body.
The time has come when certain trends need to be changed. The popular notion that arrested persons lose all rights including fundamental rights, the moment they are arrested has to be discarded. In remote areas even mandated procedures are not followed since there is no one to review the situation there. This calls for immediate remedial action. The police however, allow the arrested person one telephone call immediately after arrest as a matter of routine but now corresponding to the communication of arrest a provision has been incorporated in Section 41B(c)\textsuperscript{30} of Criminal Procedure Code.

Considering that in some circumstances arrest can be a compelling need, adequate safeguards have to be provided as a matter of policy to ensure that the rights of arrested persons are not violated in any circumstances. The law in this area has evolved over a long period of time. Initially the law consisted of provisions in the Criminal Procedure Code, which as we shall see later are hardly effective for the purpose they were incorporated.

1.7 Objectives of the Study

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 recognizes the power of the State to arrest any person as a part of its primary role of maintaining law and order. The Constitution requires a just, fair and reasonable procedure established by law under which alone such deprivation of liberty is permissible. Although Article 22(1) of the Constitution provides that every person placed under arrest shall be informed as soon as may be

\textsuperscript{30} Inserted by Act 5 of 2009, Section 6 (w.e.f. 1-11-2010)
the ground of arrest and shall not be denied the right to consult and be defended by a lawyer of his choice and Section 50 of the Code of Criminal Procedure, 1973 (Cr. P.C) requires a police officer arresting any person to “forthwith communicate to him full particulars of the offence for which he is arrested or other grounds for such arrest.” However, large numbers of complaints pertaining to Human Rights violations are in the area of abuse of police powers, particularly those of arrest and detention. It has, therefore, become necessary to conduct a study with a view to narrowing the gap between law and practice and to ascertain the degree of compliance being done while enforcing the provisions of law relating to arrest, even while at the same time not unduly curtailing the power of the police to effectively maintain and enforce law and order and proper investigation. The compliance as to the enforcement of established provisions of law relating to arrest and arrested persons can be broadly studied in three stages i.e. firstly at the time of pre-arrest, secondly at the time of arrest and thirdly at the time of post-arrest. The various legal provisions involved in the process of arrest and human rights of arrestees, in these three stages can be discussed and explained in the following manner:

- By examining the implementation of existing laws relating to arrest.
- To evaluate the treatment towards arrested persons under trials/convicts.
- By examining how much aware are the arrested persons regarding their rights.
By discussing the provision for protection of arrested persons from torture under different international conventions and adoption in Indian laws.

By examining the behaviour of police authorities towards arrested persons and the knowledge the officers regarding precautions to be taken while arresting or after taking into custody.

To evaluate the extent to which the directions or safeguards have been properly executed in practice.

To suggest the mechanism to make improvement in existing laws to overcome shortcomings.

1.8 Hypotheses

The work mainly proceeds with the hypotheses that:

I. The existing laws for protection of Human Rights of Arrested Persons in India are being implemented in letter and spirit by the law enforcing agencies.

II. These laws are adequately protecting the human rights of arreestees.

1.9 Methodology

The study is doctrinal as well as non-doctrinal in nature. The first part of the study focuses on the concepts explaining the purpose, utility and the present law for the purpose of protecting the human rights of the arrested persons. First part being the doctrinal study, the emphasis has been on books, journals, magazines, national and international enactments and case laws to develop theory. The
second part of the study is based on non-doctrinal research pointing out the deficiencies, if any, in the working of present system. For this purpose questionnaire –cum-schedule was prepared and administered to the respondents i.e. arrested persons and investigating agencies. However, verification with respect to the communication of arrest was made from the person so informed. In case of illiterate respondents, interviews were conducted. A few case studies has been made in detail to find out whether the mandate of law on the subject is being implemented in true spirit and what more can be done to enforce these provisions in a better way.

1.10 Universe of the Study and Sampling

The study has been carried out in the State of Himachal Pradesh. The research has been carried out on the basis of deliberate/purposive sampling. For the purpose of this study, the sample consist of three districts of the State of Himachal Pradesh, namely, Shimla, Solan and Kinnaur. The sample is fairly representative on the grounds that:

Shimla is the capital of the State and a cosmopolitan city. It represents more or less the whole of the State of Himachal Pradesh.

Solan is the highest industrialized district, bordering three States and having multiple complexities so far as crime and enforcement of law and order is concerned.

District Kinnaur is one of the two tribal districts of the State, representing majority of the tribal population. At the second stage of sampling the arrestees were chosen from amongst the under
trials of cases registered in these three district till 31.12.2008 who are in judicial lockups/prisons, because it was not practicable to find out other arrestees who have been acquitted or the relative entries with respect to whom were not available in the Daily Dairies. Arrestees alleged of committing all types of crimes were chosen and accordingly other respondents i.e. relatives informed about his arrest and investigating officers etc. all concerned in this process were interviewed or sent questionnaires as per requirement.

1.11 Scheme of Study

The present study is divided into six chapters. The framework of the chapters is as follows:

Chapter I. Introduction

In this Chapter introduction to the present study has been made. Since the study is related to the rights of arrested persons, the chapter elaborates the term arrest in wide aspect i.e. definition, power and consequences etc. The chapter also draws outline of the perusal of the problem, objective and scope of the study, review of literature, methodology adopted for the present study and scheme of the chapters.

Chapter II - Rights of Arrested Persons in Historical Perspective

In this chapter attempt has been made to highlight the provisions during ancient times to protect the inhuman treatment towards arrested persons. Elaborative study has been done to understand the administration of justice, concept of police; concept of crime and criminals through ages viz. Ancient time, Mughal period and
British period till present laws. The evolution of human rights laws in favour of arrested persons at international level has distinctly been elaborated under different covenants and conventions in this chapter.

**Chapter – III Status of Rights of Arrested Persons in India**

In this Chapter the existing laws which protect the violation of rights or inhuman behaviour towards an arrested persons/accused have been discussed. The constitutional and legal rights of the arrested person have been discussed in detail to establish the present status of rights of arrested persons. The judicial position with respect to the rights of arrested persons has also been discussed in detail in this chapter.

**Chapter IV - Torture: An Antithesis of Human Rights and an Offence to Human Dignity**

This chapter deals with the concept of torture and besides defining the torture the mechanism and regulations against torture in national and international perspective have been discussed in detail. The domestic and international responses of the courts against the use of torture have also been discussed in detail.

**Chapter V - Position of Human Rights of Arrested Persons in Himachal Pradesh: An Empirical Study**

In this chapter analysis has been made of the position of human rights of arrested person in the State of Himachal Pradesh on the basis of primary data collected through distribution of questionnaires.
Chapter VI - Conclusions and Suggestions

In this chapter the conclusions have been drawn after going through the entire study and some suggestions has been made in reference to the findings of the study.