CHAPTER IV

RIGHTS OF THE ACCUSED AND CONSTITUTIONAL PROTECTION IN CASE OF ARREST

It is aptly said that after war, crime is the greatest disintegrating force challenging human society. It is difficult to offer a clear and precise definition of crime. The concept of crime involves the idea of a public as opposed to a private wrong with the consequent intervention between the criminal and the injured party by an agency representing the community as a whole. Crime is thus an intentional commission of an act, deemed socially harmful or dangerous and the reason for making any given act a crime is the public injury that would result from its frequent perpetration. The society, therefore, takes steps for its prevention by arresting a person, committing him to trial and then prescribing specific punishments for each crime.\(^1\) Hence the first step is to arrest the person accused of an offence. Wharton describes arrest as the restraining of the liberty of a man's person in order to compel obedience to the order of a court of justice, or to prevent the commission of a crime or to ensure that a person charged or suspected of a crime may be forthcoming to answer it.\(^2\)

Measure to combat crime by arresting a person to protect and safeguard the members of society is one aspect and upholding the rights of an individual who is accused of an offence is another important aspect that cannot be ignored. Hence a vital problem facing the courts and legislatures is the protection of individual civil liberties without unduly restricting the efficient operation of law enforcement agencies. The increasing incidence of criminal offences together with current progress in developing instruments for observation and detention emphasize the importance of this problem. The basic issues are clear: Individual civil liberties must be safeguarded in accordance with constitutional

mandates. These safeguards, however, must not be so severe that they make law enforcement impossible or police ‘lawlessness’ inevitable.3

The criminal justice delivery system in India is a pyramid or hierarchal system made up of many overlapping layers starting with magisterial courts and finally ending with the summit court namely the Supreme Court of India. In a criminal proceeding from the stage of arrest till the trial of a criminal case culminates into finality, certain constitutional safeguards and legal protections as embodied in various provisions are given to any person arrested or detained or accused or an offence.4

The criminal justice system consists of three identifiable components each operating within its own sphere and communications. These three components can be categorized generally as (i) Police (ii) Courts and (iii) Corrections or punishments.5

The functionary of the criminal justice system who first comes in contact with the accused is the police. The role of the policeman starts at the stage where a reasonable suspicion is entertained against a person under section 41 of Code of Criminal Procedure or from a stage of receipt of any information in a cognizable offence under section 154 till the filing of the final report under section 173 of the Code. But whether it is palatable or not, much remains to be done to salvage the image of the police, to bridge the hiatus between the police and the people in a manner whereby both the police and the people appreciate their interdependence and their complementary roles in law enforcement.6

Police is the investigating agency and are the custodians of law and order and hence their authority is unfettered within the limits prescribed by law as it was held in State of Haryana v. Bhajanlal:7 “The investigation of an offence is the field exclusively reserved for the police officers whose powers in that field are unfettered so long as the power to

5 Ibid.
7 1992 Supp (1) SCC 335.
investigate into the cognizable offences is legitimately exercised in strict compliance with the provisions falling under Ch. XII of the Code..." The word "legitimately exercised" is of significance that means the rule of law must prevail. The right of the individual has to be kept in focus which may be clear from an incident reported by a newspaper: “Inside a small mosque in the San Diego suburb of La Mesa, near where a group of men have set aside their shoes for evening prayer, attorney Randall B. Hamud has left what amounts to both a business card and a sign of the times. The slips of paper instruct the reader in both English and Arabic, that "in case of law enforcement questioning you," respond as follows: "I exercise my right to have my attorney, Randy Hamud, present". This incident was a result of the round up of Muslims in the wake of September 11 terrorist attacks. Randall Bruce Hamud described it as shameful action of a "police state". This anecdote sums up the situation that a person at the time of arrest has quite a few liberties that he must exercise.

Article 21 of the Constitution of India, which forms the arc of all fundamental rights guaranteed under part III of the Constitution enshrines that no person shall be deprived of his or her personal liberty except according to the procedure established by law. That means, under the constitutional law of the land, the life and personal liberty of a person can only be deprived according to the procedure laid down by law. However, this constitutional provision, which has been engrafted in a negative grammatical form and thereby assigning wider scope for its interpretation in the protection of human rights, does not provide for the circumstances under which the right to life and personal liberty can be deprived and by whom it can be deprived. For this purpose a reference to other criminal laws is a sine qua non.

Chapter V of Cr.P.C. provides legal process for the arrest and detention of persons by the police. The circumstances in which police officers, magistrates and private citizens are

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8 Maureen Tracik & Rick Wartzman, "His crusade is for rights of arrested" Indian Express 16th October, 2002.
9 Dr. N. Maheshwara Swamy, "Compensation for the infringement of right to life and personal liberty vis-à-vis duty of the police to arrest and detain: A review of the views of Supreme Court" 1995 Cr.LJ at 38-39.
authorized to make arrest without warrant have been mentioned in sections 41-44. The manner in which the arrest can be affected by any such person is provided by section 46.

If there is an arrest warrant against a person then he knows by way of warrant why the arrest is warranted. Mostly problem arises in cases of arrest without warrant. It will be a mockery of human rights if a person is arrested and just thrown in the jail without being informed of the reasons for curtailing his personal liberty. The Criminal Procedure Code envisages certain rights in favour of the accused, which are discussed here.

A) Right to Know the Grounds of Arrest

Section 50(1) gives clear cut instructions to this effect and lays downs that “every police officer or other person arresting any person without warrant shall forthwith communicate to him full particulars of the offence for which he is arrested or other grounds for such arrest.” Secondly, when a subordinate officer is deputed by a senior police officer to arrest a person under section 55, such subordinate officer shall, before making the arrest, notify to the person to be arrested the substance of the written order given by the senior police officer specifying the offence or other cause for which the arrest is to be made. Non-compliance with this provision will render the arrest illegal.10

Section 75 of the Code provides for arrests made under an arrest warrant. It states: “the police officer or other person executing a warrant of arrest shall notify the substance thereof to the person to be arrested, and if so required, shall show him the warrant.” The failure on the part of the police officer or other person to notify the substance of the warrant would render the arrest unlawful.11

Further the right to know of the grounds of arrest has been specifically embodied in article 22(1) of the Constitution as well which states: “No person who is arrested shall be...

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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 to be defended by a legal practitioner of his own choice."

The police is not only required to communicate the grounds of arrest but has to communicate in a language which is understood by the arrested person as was held in Harikishan v. State of Maharashtra otherwise it would not amount to sufficient compliance with the constitutional requirements. In Tarapada De v. State of W.B., it was held by the Supreme Court that the words 'as soon as may be' in article 22(1) would mean as early as is reasonable in the circumstances of the case, however, the word "forthwith" in section 50(1) of the Code creates a stricter duty on the part of the police officer making the arrest and would mean 'immediately'.

Section 50 of Cr.P.C. stipulates that a police officer arresting a person is obliged to communicate to him full particulars of the offence for which he is being arrested. Section 51 likewise stipulates that the arrested person should be searched and the articles on his body should be taken in safe custody. The Allahabad High Court was presented with a question as to the consequences of not communicating the ground of arrest in Udayabhan Shukla v. State of Uttar Pradesh wherein, however, one of the grounds of arrest was already mentioned and that was held by the court to be sufficient.

These provisions of the Code regarding informing the person arrested the grounds of arrest contained in sections 50, 55 and 75 do not talk about the arrest made by a magistrate without a warrant. But this loophole in the Code is plugged by the provision of article 22(1) of the Constitution that binds even the Magistrate to disclose the grounds of arrest.

It has further been held that in order that the procedure attendant upon detentions should conform to the mandate of article 21 in the matter of fairness, justness and

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12 AIR 1962 SC 911, 914.
13 AIR 1951 SC 174. The case was under Art. 22(5).
reasonableness, it is imperative that immediately after a person is taken in custody in pursuance of an order of detention, the members of his household, preferably the parent, the child or the spouse, must be informed in writing of the passing of the order of detention and of the fact that the detenu has been taken in custody. Intimation must also be given as to the place of detention, including the place where the detenu is transferred from time to time. It is necessary to treat the detenu consistently with human dignity and civilized norms of behaviour.15

A very benign provision is incorporated in the Code for persons who may not know about their rights to be released on bail in case of bailable offences, by way of section 59(2) which states: "where a police officer arrests any person without warrant any person other than a person accused of a non-bailable offence, he shall inform the person arrested that he is entitled to be released on bail and that he may arrange for sureties on his behalf".

B. Right to be Taken Before a Magistrate Without Delay

Sections 56 and 76 of Cr.P.C. are important safeguards for the well being of a person arrested for an offence. Section 56 states: “A police officer making an arrest without warrant shall without unnecessary delay and subject to the provisions herein contained as to bail, take or send the person arrested before a Magistrate having jurisdiction in the case, or before the officer in charge of a police station.” Section 76 states: “The police officer or other person executing a warrant of arrest shall (subject to the provisions of section 71 as security) without unnecessary delay bring the person arrested before the court before which he is required by law to produce such person: Provided that such delay shall not, in any case, exceed 24 hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's court.” By virtue of these provisions the accused has to be produced before the judicial authority as early as possible and definitely within 24 hours. It has also been provided that the arrested person should not be confined in any place other than the police station.

It is an established rule of law that an arrested person is to be produced before a judicial officer within 24 hours of his arrest, and failure to do so would render the detention unlawful.  

a) Judicial scrutiny necessary to detain beyond 24 hours

The investigation mechanism envisaged by the Criminal Procedure Code requires the judicial officer to be placed in between the individuals and the police machinery. It is in the interest of society to maintain peace that the police interfere with the autonomy of the individual. And it is for the judicial officer to see that the societal interest and the individual's interest are properly balanced and it is for this reason that our Constitution and the Criminal Procedure Code require the police to present the arrested person before a magistrate within 24 hours of arrest.

Section 57 of Cr.P.C. and article 22(2) of the Constitution are on the same lines providing for judicial scrutiny of the person arrested and state in categorical terms that no person is to be detained beyond 24 hours without the authority of law. Section 57 of Cr.P.C. states: “No police officer shall detain in custody a person arrested without warrant for a longer period than under all the circumstances of the case is reasonable, and such period shall not, in the absence of a special order of a Magistrate under section 167, exceed twenty four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate’s court.” Art. 22(2) is analogous to this section and hence further strengthen this right when it states that: “Every person who is arrested and detained in custody shall be produced before the nearest Magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of Magistrate and no such person shall be detained in custody beyond the said period without the authority of the Magistrate.”

In case of arrest under a warrant the proviso to section 76 provides a similar rule in substance.

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17 K.N.Chandrasekharan Pillai, “Criminal Procedure” XXXVI ASIL 2000 at 162.
C. Right to Consult a Legal Practitioner

A person who is arrested cannot be denied the right to consult a legal practitioner of his choice according to the mandate of article 22(1). It has also been held in Hussainara Khatoon\textsuperscript{18} case that the state is under a constitutional mandate (implicit in article 21) to provide free legal aid to an indigent accused person, and this constitutional obligation to provide free legal aid does not arise only when the trial commences but also attaches when the accused is for the first time produced before the Magistrate, as also when he is remanded from time to time. The Supreme Court while emphasizing this right has held that non-compliance with this requirement and failure to inform the accused of this right would vitiate the trial.\textsuperscript{19} The right of an arrested person to consult his lawyer begins from the moment of arrest.\textsuperscript{20} The consultation with the lawyer may be in the presence of police officer but not within his hearing.\textsuperscript{21}

D. Right to be Examined by a Medical Practitioner

In Sheela Barse \textit{v.} State of Maharashtra,\textsuperscript{22} the Supreme Court held that the magistrate must inform the arrested accused person about his right to be medically examined in terms of section 54 of Cr.P.C.\textsuperscript{23} The Supreme Court has made it obligatory on the part of the magistrate to enquire from the arrested person whether he has any complaint of torture or maltreatment in police custody.

\textsuperscript{18} Hussainara Khatoon (IV) \textit{v.} Home Secretary, State of Bihar, 1980 SCC (Cri.) 40.
\textsuperscript{19} Suk Das \textit{v.} Union Territory of Arunachal Pradesh, (1986)2 SCC 401.
\textsuperscript{20} Llewlyn Evans, Re ILR 50 Bom. 741, Moti Bai \textit{v.} State, AIR 1954 Raj. 241.
\textsuperscript{21} Sundar Singh \textit{v.} Emperor, 32 Cri.LJ 339.
\textsuperscript{22} (1983) 2 SCC 96.
\textsuperscript{23} 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, 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.
In Bhim Singh’s case, the Supreme Court deprecated the manner of passing remand order by the judicial magistrate without physical production of the accused person. It has been seen that many judicial officers presiding over criminal courts take an indifferent attitude to complaints of physical torture of the accused persons during their production before the Court. The inhuman pressure of work, want of proper training, lack of sensitization and possibly the fear of being deprived of the security provided by the police are some of the reasons for apathy of the magistracy in protection of human rights of the accused person.

Section 54 of Cr.P.C. is counterpart of section 53 of Cr.P.C. As far as section 53 is concerned, it enables a police officer to compel an arrested person to undergo a medical examination with a view to facilitate investigation, whereas section 54 gives the accused the right to have himself medically examined to enable him to defend and protect himself properly. The arrested person is given the right to have his body examined by a medical officer when he is produced before a magistrate or at any time when he is under custody, with a view to enabling him to establish that the offence with which he is charged was not committed by him or that he was subject to physical injury. The accused person has to be informed about his right. This provision is important, as police is known for its high handedness and third degree tactics to make an accused person confess to crime.

There had been accusations against men in khaki for their alleged atrocities. And it was held in Arvinder Singh Bagga v. State of U.P., that torture does not merely mean physical torture, but it also means mental and psychological, calculated to create fright to make one submit to the demands of the police.

The National Human Rights Commission (NHRC) made an analysis of deaths of prisoners in jails and came to the conclusion that lives of many of the prisoners could

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27 Illegal arrest or torture, implicating innocent persons in false cases, harassment assault by danda, brutally beating by hand and lathi, handcuffing, parading in streets, jolting or shaking the body etc., are some of the judicially recognized modes of “police atrocities”.

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have been saved if proper medical examination had been carried out at the time of admission and followed up by periodical medical checkups.28

True, there are certain rights conferred on an accused to be enjoyed at certain stages under the Code of Criminal Procedure, such as section 50 whereby the person arrested is to be informed of the grounds of his arrest and to his right of bail and under section 57 dealing with person arrested not to be detained for more than 24 hours and under section 167 dealing with the procedure if the investigation cannot be completed in 24 hours – which are all in conformity with the ‘Right to Life’ and ‘Personal Liberty’ enshrined in article 21 of the Constitution and the valuable safeguards ingrained in article 22 of the Constitution for the protection of an arrestee or detenu in certain cases. But so long as the investigating agency proceeds with his action or investigation in strict compliance with the statutory provisions relating to arrest or investigation of a criminal according to the procedure established by law, no one can make any legitimate grievance to stifle or to impinge upon the proceedings of arrest or detention during investigation as the case may be, in accordance with the provisions of the Code of Criminal Procedure.29

E. Judicial Intervention

The informal/unlawful arrest syndrome has attracted considerable attention of the judiciary. The role of judiciary to merely interpret and declare the law was the concept of a bygone age. It is no more open to debate as it is fairly settled that the courts can so mould and lay down the law formulating principles and guidelines as to adapt and adjust to the changing conditions of the society, the ultimate objective being to dispense justice.30 The Supreme Court in case of Joginder Kumar v. State of U.P.31 observed: “No arrest can be made because it is lawful for the police officers to do so. The existence of the power of arrest is one thing. The justification for the exercise of it is quite another. No arrest should be made without reasonable satisfaction being reached after some

31 1994 (4) SCC 260.
investigation about the genuineness and bonafides of a complaint and a reasonable belief both as to the person’s complicity and even so as to the need to affect arrest.”

The Supreme Court has cast an obligation on the judicial magistrate to ascertain whether the entry in general diary discloses the name of a friend or relative of the arrested person. Unfortunately many judicial officers do not know what follow up action can be taken up in case of violation of the above guidelines of the apex court in Joginder Kumar’s case.32

Judiciary taking a serious view of the unlawful arrests developed a set of guidelines:33

1. An arrested person being held in custody is entitled, if he so requests, to have one friend, relative or other person who is known to him or likely to take an interest in his welfare being told as far as is practicable that he has been arrested and where he is being detained.
2. The police officer shall inform the arrested person when he is brought to the police station of this right.
3. Necessary entries concerning the arrest to be duly made in the police record. These protections from power must be held to flow from articles 21 and 21(1) and enforced strictly.

The Supreme Court further held that 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.

It was further directed that the above requirements shall be followed in all cases of arrest till legal provisions are made in this behalf. These requirements shall be in addition to the rights of the arrested persons found in the various Police Manuals.

The Supreme Court ended up by pointing out that these requirements are not exhaustive and further directed that the Director General of all states in India shall issue necessary

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32 A.P.Durai, “Human rights and the role of criminal courts” 1996 Cr.LJ at 41.
33 Supra note 29 at 262.
instructions requiring due observations of these requirements. Further it was directed that departmental instructions shall also be issued that police officer making arrest should also record in the case diary\textsuperscript{34} for reasons for making the arrest.\textsuperscript{35}

More concrete and specific guidelines concerning arrests have been made by the Supreme Court in the case of \textit{D.K.Basu v. State of West Bengal}\textsuperscript{36} and others which deserve a close attention:

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

2. 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 be countersigned by the arrestee and shall contain the time and date of arrest.

3. 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.

4. 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 a 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.

\textsuperscript{34} The restrictions on the use of case diary in a criminal case came to be advertised to by the Supreme Court in \textit{State of Kerala v. Babu} 1999 SCC (vi) 611 wherein the court also ruled that case diary is a document u/s. 91 that can be summoned \textit{dehors} section 172.

\textsuperscript{35} Keshav Dayal, “The Law of Arrests – Recent Supreme Court Guidelines” 1999 Cr.LJ at 143.

\textsuperscript{36} (1997) 1 SCC 416.
5. The Person arrested must be made aware of this right to have someone informed of the arrest or detention as soon as he is put under arrest or is detained.

6. 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.

7. 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.

8. 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 or approved doctors appointed by Director, Health Services of the concerned State or Union Territory. The Director, Health Services should prepare such a panel for all Tehsils and Districts as well.

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

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

11. 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.

Failure to comply with the requirements mentioned in the judgment shall, apart from rendering the concerned official liable for departmental action, also render him liable to be punished for contempt of court and the proceedings for contempt of court may be instituted in any High Court having territorial jurisdiction over the matter.
One of the important aspects of this case is that the Supreme Court further directed that the above mentioned requirements be sent to the Director General of Police and the Home Secretary of every State and it shall be their obligation to circulate them to every Police Station which shall notify them at a conspicuous place. In order to create awareness among the people, the Court directed that these requirements be broadcast on All India Radio besides being shown on the national network of Doordarshan. However, it is sad to note that all the States could not file affidavits in the Supreme Court about the due compliance of the above requirements.

The judiciary upheld the principle that transparency of action and accountability are perhaps the two possible safeguards, which the courts must insist upon. If the directions given above are followed scrupulously then no doubt the rule of law would prevail and it has been held by the Court that failure to comply with the requirements mentioned above, apart from rendering the concerned official liable for departmental action, also render him liable to be punished for contempt of court and the proceedings for contempt of Court.

Despite the Supreme Court’s ruling in *D.K.Basu* in effecting arrest the Punjab and Haryana High Court had an occasion to deal with the same issue in *Amrika Singh v. State of Punjab*. It has been specifically instructed that whenever any illegal detention is brought to the notice of the Sessions Judge by any person, he/she shall make a surprise visit to police lock up to find out whether any person is detained therein without being produced before the concerned Magistrate in contravention of section 57 of Cr.P.C. and the constitutional provisions as contained in article 22.

**F. Compensation for Infringement of Right of an Accused**

38 P.S. Jaswal, "Constitutional Law I" XXXIII ASIL at 185.
39 Supra note 36.
Article 9(5) of the International Convention on Civil and Political Rights, 1966, states that “any one who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.”

Though there is no express provision in the Constitution for the grant of compensation for the violation of right to life, nonetheless the Supreme Court has judicially evolved a right to compensation in cases of established unconstitutional deprivation of life or personal liberty.  

The Apex Court has recognized this right of compensation and Chandrachud C.J. very categorically stated in *Rudul Shah v. State of Bihar* that:

If civilization is not to perish in this country... it is necessary to educate ourselves into accepting that respect to the rights of individuals is the true bastion of democracy. One way for securing due compliance with the mandate of Art. 21 is to mulct its violators in the payment of monetary compensation. Art. 21 which guarantees the right to life and liberty will be denuded of its significant content if the power of this court were limited to passing orders to release from illegal detention.

He further added:

Administrative sclerosis leading to flagrant infringement of Fundamental Rights cannot be corrected by any other method open to the judiciary to adopt. The right to compensation is some

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42 *AIR 1983 SC 1086*.

palliative for the unlawful acts of instrumentalities which act in the
name of public interest and which present for their protection the
powers of the state as shield.

In Nilabati Bahera v. State of Orissa\textsuperscript{44} case the apex court while granting exemplary
damage to the tune of Rs. 1,50,000 to the petitioner and a further sum of Rs. 10,000 as
costs to the Supreme Court Legal Aid committee observed that the State should be
prepared to forge new tools and devise new remedies for the purpose of vindicating these
precious fundamental rights. This remedy in public law (i.e. under article 32) has to be
more readily available when invoked by the have-nots, who are not possessed of the
wherewithal for enforcement of their rights in private law, even though its exercise is to
be tempered by judicial restraint to avoid circumvention of private law remedies as more
appropriate. Similar views were also expressed by the Supreme Court in Union Carbide
Corporation v. Union of India,\textsuperscript{45} the Court further clarified in this case that:

\[ \text{T}he \ decision \ of \ the \ court \ in \ Kasturi \ Lal \ Ralia \ Ram \ Jain \ v. \ The \ State \ of \ U.P.\textsuperscript{46} \ upholding \ the \ state's \ plea \ of \ sovereign \ immunity \ for \ tortuous \ acts \ of \ its \ servants \ is \ confined \ only \ to \ the \ sphere \ of \ liability \ in \ tort. \ This \ power \ is \ distinct \ from \ the \ state's \ liability \ for \ contravention \ of \ fundamental \ rights \ to \ which \ the \ doctrine \ of \ sovereign \ immunity \ has \ no \ application \ in \ the \ constitutional \ scheme, \ and \ is \ no \ defence \ to \ the \ constitutional \ remedy \ under \ article \ 32 \ and \ 226 \ of \ the \ Constitution \ which \ enables \ award \ of \ compensation \ for \ contravention \ of \ fundamental \ rights, \ when \ the \ only \ practicable \ mode \ of \ enforcement \ of \ the \ rights \ can \ be \ the \ award \ of \ compensation. \]

\textsuperscript{44} (1993) 2 SCC 746.
\textsuperscript{45} (1991) 4 SCC 584.
\textsuperscript{46} AIR 1965 SC 1039.
There has been an attempt by the Supreme Court to review or rewrite the theoretical foundation of awarding compensation in cases involving police atrocities. In *State of A.P. v. Challa Ramakrishna Reddy*, the Supreme Court had a review of the doctrine of sovereign immunity and expressed disapproval of this moribund doctrine in the changed circumstances thus:

The maxim that the king can do no wrong or that the crown is not answerable in tort has no place in Indian jurisprudence where the power vests not in the crown but in the people who elect their representatives to run the government which has to act in accordance with the provisions of the constitution and would be answerable to the people for any violation thereof.

The court explained its rulings in the nineties under the public law and clarified that those decisions made no difference with the present one. The court reasoned:

These decisions, as for example, Nilabati Behera, 1993 SCC (Cri.) 527 Sawinder Singh Grower, in re 1994 SCC (Cri.) 1464 and D.K.Basu, (1997) 1 SCC 416 would indicate that so far as fundamental rights and human rights or human dignity are concerned the law has marched ahead like a Pegasus but the government attitude continues to be conservative and it tries to defend its action or the tortuous action of its officers by raising the plea of immunity for sovereign acts or acts of the state, which must fail.

In *Rabindra Nath Ghosal v. University of Calcutta* the Supreme Court laid down the guidelines in regard to the award of compensation in public law. The court held that the

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48 Id. at 723.
49 Id. at 727.
petitioner must show the infringement of some fundamental right under article 21 by an arbitrary or capricious action on the part of the public functionaries and he was a helpless victim of that act on the part of such authorities. Every minor infractions of public duty by every public officer would not justify the grant of compensation in a petition under articles 32 or 226 by applying the principles of public law proceedings.

Consequences of non-compliance with the provisions relating to arrest:

(i) A trial will not be void simply because the provisions relating to arrest have not been fully complied with. If the court has jurisdiction to try an offence, any illegality or irregularity in arrest will not oust the jurisdiction of the court to try the offence.52 The question whether the police officer making the arrest was acting within or beyond his powers in effecting the arrest, does not affect the question whether the accused person was guilty or not guilty of the offence with which he is charged.53

(ii) Though the illegality or irregularity in making an arrest would not vitiate the trial of the arrested person, it would be quite material if such person is prosecuted on a charge of resistance to or escape from lawful custody.54

(iii) If a private person attempts to make an illegal arrest, the person against whom such attempt is made has every right to protect himself and to exercise his right of private defense in accordance with the provisions contained in Ss. 96-106, IPC.55 If the person making an illegal arrest is a police officer or a public servant, then the right of private defence against such police officer or public servant will not be affected by the illegality of the arrest.

53 Subramania Chetty, Re, AIR 1941 Mad 181: 42 Cri LJ 320 (1); Nagarmal Jankiram, Re, AIR 1941 Nag 338, 339: 43 Cri LJ 89; Emperor v. Ravalu Kesigadu, ILR 26 Mad 124.
54 See Ss. 224, 225, 225-B of IPC; see also Jagannath v. Emperor, AIR 1932 All 227: 33 Cri LJ 887; Appaswamy Mudaliar v. King-Emperor, ILR 47 Mad 442; Kartik Chandra Maity v. Emperor, 33 Cri LJ 706.
be as wide as it is against a private person and would be subject to the restrictions contained in section 99 of the Indian Penal Code.

(iv) If a public servant having authority to make arrests, knowingly exercises that authority in contravention of law and effects an illegal arrest he can be prosecuted for an offence under section 220 of the Penal Code. Apart from this special provision, any person who illegally arrests another is punishable under section 342 IPC, for wrongful confinement.56

(v) If the arrest is illegal, it is a sort of false imprisonment and the person making such arrest exposes himself to a suit for damages in a civil court.57

It may be mentioned here that the provisions regarding arrest cannot be by-passed by alleging that there was no arrest but only informal detention. Informal detention or restraint of any kind by the police is not authorized by law.58 ‘It is intolerable that the police should pursue the investigation of crime, by defying all the provisions of the law for the protection of the liberty of the citizen under the colourable pretension that no actual arrest has been made when to all intents and purposes, person has been in their custody.”59

G. Position in Other Constitutions

The fourteenth amendment was passed in 1868, one of several “reconstruction” amendments designed to assure that the people who had formerly been slaves had full legal rights as U.S. citizens. According to the Fourteenth Amendment, no state has the right to “make or enforce any law” that deprives any person “of life, liberty or property, without the process of law…”

Criminal law is comprised of rules and statutes intended to dictate parameters of conduct that will prevent harm to society. Criminal law differs from criminal procedure. Criminal law is concerned with defining crimes and setting punishment, while criminal

57 Anwar Hussain v. Ajoy Kumar Mukherjee, AIR 1965 SC 1651.
58 Empress v. Madar, 1885 AWN 59; Queen-Empress v. Gobardhan, ILR 9 All 528, 566.
59 Queen v. Basooram Dass 19 WR 36.
procedure refers to the process by which those laws are enforced. By way of an example, substantive criminal law is used to determine whether someone has committed murder. Criminal procedure guides the prosecution of the murderer, from evidence gathering to trial and beyond. Criminal procedure encompasses constitutional protections such as the right to be free from unreasonable searches and seizures, the right to counsel, the right against self-incrimination.

a) Law in the U.S.
With the advancement of civilization a great emphasis is placed on the rights of the accused. The framers of the American Constitution had English common law as the ideal before them which had evolved over the preceding centuries to place limits on the power of the sovereign over his/her citizens. But a number of the framers were not satisfied with the guarantees of liberty embodied in the Constitution itself, and in 1791 Congress passed the first ten amendments to it, commonly known as the Bill of Rights. Modelled on the English Bill of Rights (1689), these guaranteed additional liberties, and a number of them addressed the rights of citizens accused of crime. The Bill of Rights Amendments addressing the rights of the accused are the Fifth, Sixth and Eighth as well as Fourth, which protects against unreasonable search and seizure.

The police can arrest a person without an arrest warrant only when the crime is committed in his presence or there is an apprehension that the person may flee or on a probable cause. What is probable cause depends on the facts of the case. It should be “a state of facts which would lead a man of ordinary care and prudence to believe or entertain an honest and strong suspicion, that the person is guilty of an offence.”60

The suspect is to be taken to a judicial officer without unnecessary delay. When the arrest is made on a warrant the arrested person must be brought forthwith before the officer issuing the warrant and when without warrant without unnecessary delay before the nearest and most accessible judicial officer with the statement of charge of arrest.

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For instance, the Supreme Court in *Boyd v. United States*\(^6^1\) held that: “[T]he seizure of a man’s private books and papers to be used in evidence against him [would not be] substantially different from compelling him to be a witness against himself.” In practical terms this means that the police cannot come to a person’s house and say, “we know you have committed a crime – now show us the evidence”; likewise it means that a person under arrest will not be compelled to sit down and write out a confession.

It was in *Miranda v. Arizona*\(^6^2\) that the Court established unequivocal protections that the accused was entitled to during interrogation while in custody at the station or otherwise deprived of his freedom of action in any significant way. *Miranda* established that the accused must be informed that he or she has the right to remain silent and that anything said can be used against the suspect in Court. Before the interrogation starts the suspect must also be informed of the right to consult with an attorney and to have legal counsel present during interrogation. It is a mandatory requirement that Miranda rights must be read each time an arrest takes place.\(^6^3\) **Miranda Warning** is as follows:

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The Constitution requires that I inform you of your rights: You have a right to remain silent.
If you talk to any police Officer, anything you say can and will be used against you in Court.
You have a right to consult with a lawyer before you are questioned, and may have him with you during questioning.
If you cannot afford a lawyer, one will be appointed for you, if you wish, before any questioning.
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\(^6^1\) 46 S.Ct. 442 (1926).
Any statement obtained in violation of the suspect's Miranda rights are inadmissible as evidence in court.

The sixth amendment directs that the accused must “be confronted with the witnesses against him” and “must have compulsory process for obtaining witnesses in his favour”. The first of these provisions, often called the right of confrontation is closely tied with another sixth amendment right, that of being informed of the accusation. The second of the provisions mentioned above means that the defense has the right to require that anyone who can testify in favour of the accused must appear in court. Allied with this is the idea that the defendant may present any evidence that he may use in aid of his case.

The Constitution provides for trial by jury by the eighth amendment and Article III. The biggest advantage is that the juries are selected by a process called *voir dire*, in which both the prosecution and the defense have an opportunity to question prospective jurors. One the basis of the prospective jurors answer, one side or the other may arrange to have that person stricken from the list.

The importance of eighth amendment with regard to the pre trial phase lies in its first six words: “Excessive bail shall not be required”. This is the only mention of bail in the Constitution, but it has long been understood to imply that the accused has a right to bail.

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64 See Brewster, Stanley Farrar, *Twelve Men in a Box* (1934).
If the court judges the accused to be dangerous, or deems him a particular risk for flight ("jumping bail"), it may refuse to release him, or it may set bail so high as to be prohibited. In some cases, the accused may be released on recognizance that is, the honor system.66

b) Law in England

According to Sir Stephen in ancient times, persons after their arrest were kept in confinement more or less secret till their trials and could not prepare for their defense as they had no information of the grounds of arrest and detention and more over of evidence against them.67 And during confinement they were tortured with third degree methods so as to obtain confessions so that the arrest may be justified. This was one of the major grievances of the public and hence an inclusion of this in the Magna Carta: "No free man shall be taken or imprisoned ... except by the legal judgment of his peers or by the law of land."

In England, whenever an arrest is made without a warrant, the arrested person has a right to be informed not only that he is being arrested but also to be informed of the reasons and ground of his arrest. The House of Lords in Christie v. Leachinsky68 went into the origin and development of this rule. Viscount Simon observed in his propositions that:

1. If a policeman arrests without warrant upon reasonable suspicion of felony, or of other crime of a sort, which does not require a warrant, he must in ordinary circumstances inform the person arrested of the true grounds of arrest. He is not entitled to keep the reasons to himself, or to give a reason that is not the true reason. In other words, a citizen is entitled to know on what charge or on suspicion of what crime he is seized.

2. ...

68 (1947) AC 583.
3. The requirement that the person arrested should be informed of the reason why he is seized naturally does not exist if the circumstances are such that he must know the general nature of the alleged offence for which he is detained.

As far as the right of representation by counsel is concerned, this right in England is not an ancient one despite its tremendous importance in administration of justice. The early English common law has recognized it only in connection with minor offences on the point of law. An accused was not allowed to be represented by a lawyer in cases of treason and other felonies. Probably, it was because at that time the trial under the common law was by examination of the accused and not by a jury and witnesses.\(^6^9\)

Blackstone and Bentham strongly opposed this practice and in 1856 the Parliament by enactment granted the right to retain a counsel in all English felony prosecutions:\(^7^0\) “All persons trial for felonies should be admitted, after the close of the case for prosecution, to make full answer and defense thereto by counsel learned in law, or by attorney in Courts where attorneys practiced as counsel.”

As of now the poor and indigent are provided Legal Aid under the Legal Aid and Advice Act of 1974.

As in India, in England as well a person has to be produced before the Magistrate:\(^7^1\) “We conceive it to be a principle inherent in the English law that no person shall be deprived of his liberty except by a Magistrate or Court. Admittedly there is power of arrest whether by the police or a member of the public, but this power of arrest is only with a view to the production of a prisoner before a magistrate.” Hence the police powers of arrest and limitations on the authority of arrest are similar to that of India.

\(^7^0\) 6 and 7 W. 4, C.114, S. 1 (1836).
\(^7^1\) Thomas Pelham Dale’s case (1881) 6 Q.B.D. 376 at 461.
H. Conclusion

Modern criminal jurisprudence has come a long way in protecting and safeguarding the interests of a person accused of an offence. Man is fallible and police more so because of its working under public pressure which expects police to produce quick results. The police often resorts to shortcut and illegal methods in the performance of their duties hence a check is must so that a person who is arrested cannot escape arrest but may demand that basic human rights are granted to him. In many cases the person arrested may not be the one guilty of the offence hence the safeguards become all the important. Even if the right person is arrested there are adverse circumstances and other behavioural patterns which may be responsible for the crime so he cannot be shunned by the society and made to believe that since you have committed a criminal act you will not be treated as a human being. The very fact that a man has committed crime ,only those rights which hamper the administration of justice can be curtailed, all others remain intact.

The Constitution has guaranteed a number of rights to a person before the actual trial commences so that human dignity is kept intact and the law enforcers may not take undue advantage of their power Before the Constitution, sections 60, 61 (56 and 57 of the New Code), CPC, 1898, respectively provided that a person arrested and detained by a police officer without or with warrant must be produced before the Magistrate without unnecessary delay. But such provisions could be taken away by the legislatures at their whim hence a need was felt, by the Constituent Assembly, to make these rights inviolable and hence they have been enshrined as fundamental rights in the Constitution of India. Disregard of these pre-trial rights vitiates the trial and so the law enforces adhere to them. The constitutional protection extends to court the pretrial and the trial enquiries and the procedure laid by law is followed not only in making arrest but that no piece of evidence incriminating the accused should be extorted from him. This is the outcome of the doctrine of presumption of innocence of the accused till contrary is proved.