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# Arrest by Police: Circumspection or Usurpation of Power

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ADYASHA MISHRA<sup>1</sup> AND ABINASH DAS<sup>2</sup>

## ABSTRACT

*The flagrant violation of arrest & detention guidelines in consonance with the whimsical actions of police personnel is almost as popular as are the fanciful ways adopted for arresting an individual even before a proper plausible case appears to be made out. What surfaces at later stages of the investigation and trial are instances of gross lapses and unreasonableness in curtailing of individual liberty thereby often accelerating public dismay at the functioning of the authorities. Usurpation of this power not only causes humiliation to the individual but also adds to the increasing number of petty disposals at the courts and acts lesser effective in cases of evasions and encountered arrests. In the midst of the ongoing pandemic, the numerous instances of frivolous cases of arrest registered against innocent migrants have been condemned and called out by the Apex court. In light of the alarming rise in such actions, the authors of the paper seek to address this legal premise and sensitize about the judicious use of the power so entrusted to the authorities.*

**Keywords:** Whimsical actions; evasions; encounter arrest; Public dismay; frivolous cases

## I. INTRODUCTION

*‘Presumption of innocence is an important concept in criminal law, however, that is defeated if such a power is given to an arresting authority.’*

Arrest is an all pervasive concept in criminal law whether in India or the world, that creates the instant impression of an apprehensive course of action which ultimately results in humiliation, curtails freedom and casts scars forever in the minds of innocent individuals. The mere concept of arrest strikes a fear in the minds of the common man and more so when it is arbitrary and without reasonable exercise of due diligence. The modern day legal scenario has seen numerous instances of undue exercise of power by authorities in detaining and thereby giving a rise to the alarming number cases of arbitrary action. To curb these excess action in the name

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<sup>1</sup> Author is a student at University Law College, Utkal University, India.

<sup>2</sup> Author is a LL.M. Student at P. G. Department of Law, Utkal University, India.

of unbridled power, several legislative amends and judicial precedents seem to have been incorporated in our legal structure, thus protecting the sanctity of the concepts of “Individual liberty” and reasonable action backed by legal sanction. The surmise of this gradually coming of age concept lies at the basic guarantee of individual freedom in the bottomless sphere of detention policy and its lack, thereby causing an irreparable dent on the sleeves of the custodial culture which paints both the departments with the tainted ink of excessiveness.

The need for caution in exercising the drastic power of arrest has been emphasised time and again by the courts but has not yielded the desired result. The attitude to arrest first and then proceed with the rest is despicable. In pith and core, the police officer before effecting an arrest must primarily put certain questions to himself, why arrest? Is it really essential for the alleged act? What purpose will it serve? What object will it achieve? The prima facie view is that when the legislature has imposed a duty upon an authority to record reasons for exercising of a power which has severe civil consequence on an individual, it would be deemed that such authority has the corresponding duty to exercise such coercive power of arrest with caution and circumspection. No arrest can be made in a routine manner without 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. The question whether the person is under arrest or not, depends not on the legality of arrest, but on whether he has been deprived of his personal liberty to go where he pleases to go of his own accord.

## **II. POWER OF POLICE TO ARREST AND THE PROCEDURE TO BE FOLLOWED**

S.46 of the CrPC details the manner in which an arrest is to be made. S.46(2) of the CrPC states that if the person being arrested forcibly resists the endeavour to arrest him, or attempts to evade arrest, the person empowered to arrest may use necessary means to effect the arrest. Whether the means were necessary depends on whether a reasonable man, having no intention to cause serious injury to the other, would employ the same means. S.46(3) of the CrPC states thus: ‘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.’ Reading and interpreting the sections together, it would mean that one may cause the death in case the person is merely accused of an offence that is punishable with death or life imprisonment while attempting to effect arrest using necessary means. This interpretation has been considered in cases such as *Harendra Kumar Deka v State of Assam* as well as *Extra Judicial Execution Victim Families Association v Union of India (‘EEVFA’)*. Section 46(3) of CrPC acts as a tacit approval for

encounters by the police thus acting as an impediment to access to justice.

It must be remembered that the CrPC is applicable to all persons accused of offences under the Indian Penal Code ('IPC') 1860. Such people form a class. However, reading S.46(2) and 46(3) together, within the broader class of those accused of offences under the IPC, there are two categories of accused contemplated:

- 1) Those who are accused of offences that are punishable with death or life imprisonment and;
- 2) Those who are not.

For the latter, the arresting authority cannot use means that involve causing death to effect arrest, while for the former, the arresting authority is allowed to do so. However, there is no real or substantial distinction between the two categories of accused that warrants the arresting authority to cause death for only one category of persons. If one of the objects of the CrPC is that an accused person must have a fair trial in accordance with the principles of natural justice, one fails to see how allowing the arresting authority the power to cause the death of some accused and not others has any connection with the object. In fact, it is entirely contrary to the object of the CrPC. In *Subramanian Swamy v Raju*, it was observed that there may be differences amongst the members included within a particular class. So long as the broad features of the categorization are identifiable and distinguishable and the categorization made is reasonably connected with the object targeted, Article 14 will not forbid such a course of action. However, in this case, neither are the broad features distinguishable and neither does the classification have any nexus with the object of the statute. Article 21 of the Constitution states thus: "No person shall be deprived of his life or personal liberty except according to procedure established by law". In *Maneka Gandhi v Union of India* it was held that the procedure to be established by law had to be fair, just and reasonable and could not be unfair or arbitrary. Further, in *Kartar Singh v State of Punjab*, it was held that in order for a procedure to be fair, just and reasonable, it had to conform to the principles of natural justice. One of the core principles of natural justice is *audi alteram partem*, or to hear the other side. It further includes two facets:

- 1) Notice of the charge against the said person and;
- 2) An opportunity to explain the said charge.

In *Nirmal Singh Kahlon v State of Punjab*, it was held that Article 21 contemplates the right of an accused to have a fair trial, through a fair procedure and fair investigation. However, by allowing the arresting authority to cause the death of a person accused of a particular offence

renders their rights under A.21 a dead letter as they are denied an opportunity to be heard by an independent adjudicatory authority. Access to justice in an egalitarian democracy must be understood to mean qualitative access to justice, which is imperative of an individual's access to courts or guaranteeing representation as enshrined under Article 21 of the Constitution. Denial of this right undermines public confidence in the justice delivery system and poses a threat to the rule of law.

### III. BENEFIT PROVIDED BY AMENDING SECTION AGAINST ARREST BY POLICE: THE REQUIRED ANTIDOTE

The police cannot arrest a person simply because they have the power to arrest the person who is said to have committed cognizable offence. 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 and the justification for the exercise of it is quite another. 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, as reiterated in the landmark judgment of '*Joginder Kumar vs. State of U.P.*'<sup>3</sup> The only way out from this quandary is to implement the benefit of section 41(1) CrPC which is available to the arrested person. It provides that an investigating officer shall not arrest the accuse of such offences in a routine manner and the arrest to be made, only after following the restrictions imposed under section 41(1)(b) CrPC. Section 41(1)(b) CrPC as inserted vide Act 5 of 2009 make it compulsory for the police to record the reasons for making arrest as well as for not making an arrest in respect of a cognizable offence for which the maximum sentence is upto seven years. Section 41(1)(b) CrPC states that –

*Any police officer may without an order from a magistrate and without a warrant, arrest any person – “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 which may extend to seven years whether with or without fine.”*

A case on point is '*C Muniappan and Ors v. State of Tamil Nadu*', where the Hon'ble Supreme Court held that the provisions of S. 195 CrPC are compulsory, so failure to comply

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<sup>3</sup> AIR [1994] 4 SCC 260; See also, RiniJohar vs. State of M.P. (2017) 1 SCC (Cri) 364: 'The investigating officer in no circumstance can flout the law with brazen proclivity and the constitutional courts are entitled to grant compensation against the breach committed by the erring officials.'

will vitiate the case and all other subsequent orders. Furthermore, it was held in this case that the Court cannot assume cognizance of the case without such complaint, and that in the absence of such complaint the trial and conviction will be void ab initio being without jurisdiction. The statutory power of the police to investigate under the Code is not in any way controlled or circumscribed by Section 195 CrPC. It forms the requisite opinion and follows the procedure laid down in Section 340 CrPC. Non-compliance with the provisions for arrest without warrant by arresting police makes him liable for contempt of court. In *D.K. Basu vs. State of West Bengal*, the Supreme Court has formulated certain procedures which are to be mandatorily followed by a police for making an arrest without any order from a magistrate and without a warrant. The procedures laid down in the said case have been given statutory recognition and codified in sections 41A, 41B, 41C and 41D. Evidently, the violation of the proposed provision in section 41A, 41B, 41C, and 41D would constitute an offence within the meaning of Section 166 IPC.<sup>4</sup> The apex court has also reiterated with stringency that – ‘failure to comply with the requirements shall render the concerned official liable for departmental action, and also render him liable to be punished for contempt of court to be instituted by the High Court of the country having jurisdiction over the matter.’

#### IV. CONCLUDING VIEWS- A CRITICAL NARRATIVE:

- **COVID-19 (A GLIMPSE OF THE HARDSHIP)**

In the present scenario of a pandemic gripping the entire world in its clutches, the legality of a number of apprehensions by police authorities, unquestioned detentions and unbridled power in the hands of officials seems to be misused. While migrants and the lower strata of the society seem to be reeling under the clutches of unemployment, an additional blow in the form of targeted arrests against the helpless provides a true account of the deplorable state of affairs with regard to unchecked power usurpation. Stranded in parts of the country, distraught with no money, food, sense of security, a lurking fear of contamination from a deadly virus and away from the comfort of homes, migrants have already been undergoing the worst of plights. Added to this misery is the hefty penalty of being arrested for defying lockdown orders as they travel hundreds of kilometres on foot, without an iota of criminal intent, for which they are reportedly under scrutiny. A careful redressal of this aspect might reveal astonishing cases of humiliating instances where a careful appraisal and thoughtful act before arrest could stop the mindless arresting before a proper case being made out against the person concerned. The

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<sup>4</sup> Section 166 IPC: ‘Public servant disobeying law, with intent to cause injury to any person shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both’

Honourable Supreme Court has in this regard recently issued guidelines for release of all such migrants and withdrawal of allegations and cases registered in this regard.

***”With great power comes great responsibility and with great responsibility comes greater accountability.”*** But scant regard has been paid to the humanitarian moralities instead the rigidities have been focussed upon and honouring of basic principles have gone for a toss. It’s time we regulate our forces with a greater accountability to the public spirit of vigilance and not ruthless imposition of misguided formalities. Streamlined and structured routine procedures prior to arrests need to be enforced with stringent legislative intent and judicial scrutiny to ensure its effective utility in the procedural functioning of the police department or arresting authority. A moral high ground and efficient utilisation of directive guidelines shall ensure the smooth functioning of the machinery.

If our standard procedures are more reasonable than the focus on their rigidity, lapses and irregularities found in majority of arrest can be well avoided, keeping aside the agony, shame and social stigma associated with arrests of innocent citizens. Legitimizing the cause and accordingly issuing warrants for arrest is the way to a well navigated legal structure and its harmonious operational ability in the present day society.

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