

The Status of the Rights of Accused under Different Indian Laws

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Abstract: An accused is a person against whom an accusation has been made for alleged commission of crime or for his alleged involvement in the commission of crime, which invites Punishment under penal laws of the country the accused also have got certain rights privileges and protections, which are laid down in criminal procedure code, 1973, Indian Evidence Act, 1872, and in the constitution of India 1950. A person accused of an offence is put under the peril of his life and liberty. Therefore it becomes necessary that certain safeguards should be provided to him. These protections are almost common to all civilized legal system of the world including that of India. Many procedural rights and privileges are laid down under the Indian evidence 1872, criminal procedure code, 1973, which are available to the accused. Some of them have been guaranteed and made available by The Indian Constitution too. These rights have been inherited in India from common law. Basically It is seen in every morning through the newspaper that in police custody. There is a violation of the rights of accused by the Police personals although there are various provisions in different laws (i.e. The criminal procedure Code 1973, The Indian Evidence Act 1872, etc) But still there is violation of their rights. The judiciary has given the guidelines in regard to the accused that how they will be treated but it is seen in day to day life that how the accused are treated for example we can see the recent incident of Ch. Charan Singh District Jail Meerut that how the police behaved with inmate prisoners. Cognizable offence without going to magistrate, so Court should be vigilant to see that these powers are not abused for lightly used for personal benefits. No arrest can be made on mere suspicion or information. Even private person cannot follow and arrest a person on the statement of another person, however impeachable it is. Though the Code of Criminal procedure, 1973 is mainly procedural, yet it deals with three distinct but closely related subjects, the Constitution and powers of Courts, the conduct of criminal proceedings and the prevention of crimes by interference beforehand.

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1. Introduction:

It is evident on record (i.e in Veda, Upnishad, Shrutis etc) that the concept of equal rights of men and women, impartial treatment of Human being in society and humanitarian consideration of accused etc. were age old concepts in India which are prevailing since "vedic age" the developments of human rights starting from Magna Carta- 1215 AD to universal declaration of Human Rights 1948 have further enriched the concept. "Today in India Human Rights Like fundamental Rights are paramount sacrosanct, eternal and transcendental in nature and ought to be treated as inalienable and inviolable for preserving. The dignity of the people. In India courts are regarded as custodian of Human Rights and Common men always looks upon the trial court as his protector.¹

In the modern times, every matured legal system of the world accords certain basic protections to accused person- who may be deprived of their personal liberty by way of legal confinement for the commission of an offence and a right to be presumed innocent is a cardinal principle of human rights jurisprudence. Every person who is alleged formally to commit an offence-commonly known as 'accused' has a 'right to be presumed innocent' until the charges leveled against him are finally proved and he is convicted by a competent court in accordance with the prescribed procedure of law. This right arises as soon as the formal accusation is levied upon an accused and continues throughout the continuance of the criminal proceeding until the court declares him

¹ Tripathy Dr. Prabateh, "Realistic approach to Human Rights with Special Reference to Rights of

Accused v. Victim – An Analysis". 2003 Cri L.J. Journal/s III

to be guilty and punishes him.² The duty of the police when they arrest without warrant is, no doubt, to be quick to see the possibility of crime, but equally they ought to be anxious to avoid mistaking the innocent for the guilty.

2. Rights of the Accused Under Different Laws in India

In this chapter we are concerned with those provisions of the Code which entitle an accused of certain rights during the course of any investigation, enquiry or trial of an offence with which he is charged. For convenience we have categorised those rights under certain heads, which are as under:

(i) Protection against arbitrary or illegal arrest: The provisions in this regard are discussed as follows:

(a) When police may arrest without warrant: Under section 41 very wide powers are conferred on the police in order that they may act swiftly for the prevention or detection of cognizable offences without the formality and delay of having to go to a Magistrate for order of arrest. Courts should, therefore, be particularly vigilant to see that the powers are not in any way abused or lightly used for the satisfaction of private feelings or of designing complainants. Therefore, the arrest and detention of persons without warrant are not matters of caprice but are governed by rules and principles clearly laid down by law.³ To arrest persons without justification is one of the most serious encroachments upon the liberty of a subject.⁴ Where there is no danger of the person who has *ex-hypothesis* aroused their suspicion, that he probably is an "offender" attempting to escape. They should make all presently possible enquiries from persons present or immediately accessible who are likely to be able to answer their enquiries forthwith. The police should act on the assumption that their *prima facie* suspicion may be ill founded.⁵ When a constable has taken into custody a person reasonably suspected of committing a crime, it is his duty to act reasonably. Whether he acted reasonably is a question to be decided

judiciously.⁶ There can be no legal arrest if there is no information or reasonable suspicion that the person had been involved in a cognizable offence.⁷ No definition is possible of what is reasonable complaint or reasonable suspicion as it depends so much on the special fact of each case,⁸ but it must at least be founded on some definite facts tending to throw suspicion on the person arrested and not on mere vague surmise or information. Still less have the police any power to arrest persons, as they sometimes appear to do merely on the chance of something being hereafter proved against them.⁹ This case has been approved in several decisions.¹⁰ Reasonable means a *bona fide* belief that an offence had been committed or is about to be committed.¹¹ Mere suspicion is not enough.¹² The burden is on the police officer to satisfy the court before which the arrest is challenged that he had reasonable grounds of suspicion.¹³

(b) Arrest on refusal to give name and residence: Under section 42, arrest of a person - (1) who commits a non cognizable offence in the presence of a police officer, or (2) is accused before him of having committed such an offence is permissible only, if he refuses to give name and address¹⁴ and as soon as they are ascertained he is to be released on execution of a bond for appearance. If name and residence cannot be ascertained he must not be kept under arrest beyond 24 hours, but should be taken to a Magistrate. If his name and address were previously known to the police officer, he cannot be arrested or detained.¹⁵

(c) Arrest by private person and procedure on such arrest: Section 43 is based on the principle that every citizen has the duty 'to help, keep the peace and so has the right to make over or cause to be made over to the authorities any offender who breaks the law. It empowers a private person to arrest or cause

² Jaiswal Dr. Jaishree "Presumption of Innocence- A cardinal principle of human right law of an accused, 'Indian Bar Review, Volume XXXVi. (1 to 4) 2009. P.15.

³ Avinash Madhukar Mukhedkar v. State of Maharashtra, 1983 Cr. L.J. 1833 (Bom)

⁴ Ramprit, AIR 1926 Punj 560.

⁵ Dumbnell v. Roberts, 1944 (1) All ER 326 CA.

⁶ Dallison v. Caffery, 1964(2) All ER 610.

⁷ Raju Mia, 44 CWN 502.

⁸ Behary, 71 WR Cr 3.

⁹ Markby. J in Behary, 71 WR Cr.3.

¹⁰ Charu Ch, 20 CWN 1233; Bhawoo, 12 B 377(388); Saindino, A 1934 S 197; Tribhuwan, AIR 1949 Ori 74; Roshan, AIR 1950 MB 83.

¹¹ Muhammed, AIR 1943 Mad 218.

¹² State v. Maheshwar, AIR 1955 NUC (Or) 439.

¹³ Emperor v. Vimlabai Deshpande, AIR 1946 PC 123; 73 Ind App 144: Cr LJ 831 (Shearer v. Shields, 1914 AC 808 (Scot) (relied on).

¹⁴ Goalab, 5 Bom LR 597.

¹⁵ Gopal (1922) 46 Mad 605 (FB).

to be arrested - (1) a proclaimed offender, or (2) any person who in his presence commits a non bailable and cognizable offence, but not after the completion of such offence. After the offence has already been committed, it is a matter for the police and a private person should then inform them. After arrest, he must without unnecessary delay either take the person or cause him to be taken to the nearest police station. Akin to the right in section 43 is the right of private defence (sections 96 & 97, IPC which every citizen has of protecting the body or property of himself or any other person extending to causing death for saving life or property in proper cases.

The rule of English Common law that a private person may arrest any person reasonably apprehended to commit a breach of the peace does not apply in this country. Sections 96, 97, 102 and 105 of IPC define the limits within which restraint can be placed on another citizen.¹⁶

No arrest can be made on mere suspicion or information.³ Private citizen cannot follow and arrest a person on the statement of another person, however unimpeachable, that the former committed a non-bailable and cognizable offence.¹⁷

(d) Arrest how made: Section 46 envisages three modes of arrest (a) submission to custody, (b) touching the body physically, or (c) confining the body. Arrest is restraint on personal liberty. Unless there is submission to custody, by words or by conduct, arrest must be made by actual contact.¹⁸ Under this provision 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.¹⁹ If such person forcibly resists the endeavour to arrest him, or attempt to evade the arrest, such police officer or other person may use all means necessary to effect the arrest.²⁰ But if force is required, no force should be employed in effecting arrest than is justly necessary. Whether violence is justifiable depends on whether the means employed were such as an ordinarily prudent man could make use of, who had no intention of doing any serious injury.²¹ All means necessarily includes help from other persons and it also applies to arrest by private

citizens²². However, this section does not give a right to cause the death of a person, who is not accused of an offence punishable with death or with imprisonment for life.²³ Accordingly, police officer in attempting to re-arrest escaped thief has no right to shoot.²⁴

(e) Search of place entered by person sought to be arrested: Section 47 provides that if any person acting under a warrant of arrest, or any police officer having authority to arrest, has reason to believe that the person to be arrested has entered into, or is within, any place, any person residing in, or being in charge of, such place shall, on demand of such person acting as aforesaid or such police officer, allow him free ingress thereto, and afford all reasonable facilities for a search therein.²⁵ The provision is not intended to restrict the powers of police to enter the place to be searched, on the contrary it is a provision for compelling house holders to; afford the police facilities in carrying out their duties. It further provides that if difficulties are placed, force may be used to obtain ingress.²⁶ The force means in order to effect entrance into such place the police officer may break open any outer or inner door or window of any house or place, whether that of the person to be arrested or of any other person, if after notification of his authority and purpose, and demand of admittance duly made, he cannot otherwise obtain admittance.²⁷ But if such place is an apartment in the actual occupancy of a *female* (not being the persons to be arrested) who, according to custom, does not appear in public, such person or police officer shall, before entering such apartment, give notice to such *female* that she is at liberty to withdraw, and shall afford her every reasonable facility for withdrawing, and may then break open the apartment and enter it.²⁸ Therefore, entry of police into *Muth* for arrest and search by breaking open back-doors though the main gate remained open and without demanding the head of *Muth* to allow them to enter, is illegal.²⁹

¹⁶ *Gokul*, 26 Cr LJ 1462.

¹⁷ *Kartar*, AIR 1956 Punj 122.

¹⁸ *Thaneil Victor v. State*, 1991 Cr LJ 2416 (Mad).

¹⁹ Section 46(1).

²⁰ Section 46(2)

²¹ *Protab*, 1 WR 9.

²² *Sheo Balak Dusadh v. Emperor*, AIR 1948 All 103; *Nazir*, AIR 1951 All 3 FB; *Kalavennu*, AIR 1956 AP 156; *Gouri*, 56 C615: AIR 1925 Lah 684.

²³ Section 46(3)

²⁴ *Dakti*, AIR 1955 All 379.

²⁵ Section 47(1)

²⁶ *Ramesh*, 41 C 350 (376).

²⁷ Section 46(2).

²⁸ Proviso to section 46(2).

²⁹ *Pagla Babu v. State*, AIR 1957 Ori 130.

(f) No unnecessary restraint: According to section 49, there should be no more restraint than is justly necessary to prevent escape, *i.e.*, reasonable force may be used for the purpose, if necessary; but before keeping a person under any form of restraint there must be an arrest. Restraint or detention without arrest is illegal.

(g) Person arrested to be informed of grounds of arrest and of the right to bail: Section 50 provides that any person arrested without warrant shall immediately be informed of the grounds of his arrest, and if the arrest is made in a bailable case the person shall be informed of his right to be released on bail. A similar provision in case of arrest with warrant is provided in section 75. Arrest without compliance of this provision will be illegal and will make the officer or person making such illegal arrest liable to all such remedies as are available in case of an illegal arrest. Section 50 is mandatory. If particulars of offence are not communicated to an arrested person, his arrest and detention are illegal. If he alleges by affidavit that he was not communicated with full particulars of the offence, the police officer's diary can be perused to verify his claim of oral communication of such particulars.³⁰ When the provisions of section 50 have not been complied with, the non-consideration of such non-conformance by the court when considering the question of bail operates to the prejudice of the arrested person and the order is liable to be set aside on this ground.³¹ This provision carries out the mandate of Article 22(1) of the Constitution of India.³² The grounds can be communicated even impliedly by conduct.³³

(h) Search of arrested person: Section 51 is the only provision which allows a police officer to make a personal search of arrested persons, but it comes into operation after arrest (with or without warrant) and not before. No search witness is legally necessary. If there is any and such witness is found unreliable, the evidence of the police officer can be looked to. Search by the police of the person of the accused does not contravene Article 20(3) of Constitution. Search should be made in the presence of respectable and independent witnesses. But this provision under section 51, as has been held, does not permit medical examination of the accused without

his consent. Forcible examination of the body of an arrested person without his consent, through a doctor for procuring evidence against him is not permissible and amounts to assault. Examination of accused by doctor not for benefit of health but by way of second search is not permitted in law without his consent.³⁴ The consent need not be in writing. It has, however, been held that an accused person can be taken to a doctor for the examination of injuries on his body to ascertain whether he could not have participated in an occurrence.) So, if an arrested person under intoxication is taken to a doctor who records his physical features and other symptoms, it is not hit by Article 20(3) of the Constitution of India.³⁵ On the other hand, it has been held in yet another case that the police have no legal right to take an accused by force to a doctor to examine whether he was intoxicated and he cannot be convicted under section 353, IPC for assault and escape as he had the right of private defence. Examination of the body of the accused often reveals valuable evidence. It may however, be noticed that, therefore, the lacuna in the matter has now been removed by insertion of new provision in a separate sections specifically authorising medical examination of an accused person.

With regard to provision of this section the reference may be made to Article 20(3) of the Constitution of India which is a guarantee to the accused against testimonial compulsion. But any incriminating object *e.g.*, a stolen article or document or other form of evidence can be seized from the person of the accused, or if he happens to swallow a stolen property he can be taken to a doctor with a view to have X-rayed or the article extracted. Similarly, a police officer may seize a blood stained cloth worn by a person charged with murder. Incriminating documents, things, etc., which are in the possession of the accused may also be seized by issue of a search warrant, though the court cannot direct him to produce them.³⁶ The principle appears to be that though an accused cannot be compelled to produce any evidence against himself, it can be seized under process of law from the custody or person of the accused by the issue of a search warrant. The constitutional protection in Article 20(3) prohibits compulsion or force. In obtaining oral or written

³⁰ Ajit Kumar Sarmah v. State of Assam, 1976 Cr LJ 1303 (Gau).

³¹ Govind, a Pd. 79 CWN 474.

³² Govind Prasad v. State of West Bengal, 1975 Cr LJ 1249 (Cal).

³³ Pranab Chatterjee v. State of Bihar, (1970) 3 SCC 926; 1971 SCC (Cri) 17; 1971 CAR 114.

³⁴ Bhandar, 35 CWN1212: AIR 1931 Cal 601.

³⁵ Palani Goundan, AIR 1957 Mad. 546.

³⁶ Sharma M.P. v. Satish Chandra AIR 1954 SC 300.

testimony. An accused has the right to decline to produce any such incriminatory document. Relying on *Sharma's* case it was held in many cases¹ that the issue of a compulsory process for the production of any document which is reasonably likely to support the prosecution case infringed Article 20(3). But these observations in *Sharma's* case were declared subsequently by the Supreme Court as obiter³⁷ and consequently now law on the subject is as under:

1. An accused person cannot be said to have been compelled to be a witness against himself simply because he made a statement while in police custody without anything more. In other words, the mere fact of being in police custody at the time when the statement in question was made would not, by itself, as a proposition of law, lend itself to the inference that the accused was compelled to make the statement, though that fact, in conjunction with other circumstances disclosed in evidence in a particular case, would be a relevant consideration in an enquiry whether or not the accused person had been compelled to make the impugned statement.
2. The mere questioning of an accused by a police officer, resulting in a voluntary statement which may ultimately turn out to be incriminatory, is not "compulsion".
3. Giving thumb impression or impression of foot or palm or finger or specimen writing or showing parts of the body by way of identification is not included in the expression "to be a witness" in Article 20(3).
4. To be a witness" in the ordinary grammatical sense means giving oral testimony. Case law has gone beyond this strict literal interpretation which bears a wider meaning, namely, bearing testimony in court or out of court by a person accused of an offence orally or in writing. To be a witness" in this sense may be equivalent to "furnishing evidence" (as held in *Sharma's* case) but not in the larger sense so far as to include giving finger impression etc.
5. "To be a witness" means imparting personal knowledge of relevant facts by oral evidence or statement writing but process for production of other evidence whether documentary or material (nor imparting personal knowledge of facts) in

the possession of the accused does not come within the prohibition of Article 20(3).

In view of the decision of the Supreme Court in *Kilthikalu* which has the effect of confining the privilege under Article 20(3) to testimony, oral or written, that privilege has also the least chance of attaching to non-testimonial physical evidence provided for in section 53 as stated above.

3. Right to Know the Ground of Arrest

In every case of arrest with or without a warrant the person arresting shall communicate to the arrested person without delay the grounds of his arrest and if the arrest is made in bailable offence, the person shall be informed of his right to be released on bail. It is mandatory.

Arrest without compliance of this provision will be. If particulars of offence are not communicated to an arrested person. Then his arrest and definition are illegal. Once this duty is cast on the arresting officer, he must make proper record of what he does in pursuance of the requirement of law.³⁸ Every police officer arresting without a warrant any person other than a person accused of a non-bailable offence is required to inform the person arrested that he is entitled to be released" on bail, and that he may arrange for sureties on his behalf (Section 50(2) Cr. P.C.). Timely information of the grounds of arrest serves the arrested person in many ways. It also enables him to apply for bail, or to make other expeditious arrangements for his defence Section 50(1) carries out the mandate of Article 22(1) of constitution Section 55 of Cr. P.C., underlines the procedure when police officer deposes subordinate arrest without warrant. A verbal order is sufficient if arrest is to be made in the presence of the police officer giving the order, otherwise a written order from him is essential for legal arrest. Arrest without written order is illegal.

3.1. Right of being produced before a magistrate:

That is 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' or court having jurisdiction in the case.

In case of every arrest, the person making the arrest is required to produce the arrested person before the magistrate within 24 hours, exclusive of the time necessary for the journey from the place of arrest to

³⁷ Mohammad Dastgir v. State of Madras AIR 1960 SC 756.

³⁸ Vikram v. State 1996. Cr.L.J. 1249 Calcutta.

the magistrate's court. (Section 57 of Cr.P.C.). It is constitutional and legal requirement and must be strictly observed, (*Khatris case*)³⁹

Detention in custody cannot exceed 24 hours. Journey time to Magistrate's court may be excluded but the period must be reasonable (Sec. 76 of Cr. PC.). Though a limit of 24 hours is allowed, there is no absolute right to keep in custody till that period and in no case, can a police officer detail for a minute Longer if he can send the accused to a magistrate at once, except upon some reasonable ground. The practice is well settled that even on holidays an arrested person is to be produced before the magistrate (Section 167 Cr. PC.) allows it only in special cases mentioned therein i.e. when investigation cannot be completed within 24 hours and it should be for reasons to be stated in writing and not as a matter of course, whenever the police ask for it. The right has also been incorporated in the constitution under Article 22(2). This right has been created with a view to prevent arrest and detention for the purpose of extracting confession or as a means of compelling people to give information and to prevent police stations being used as though, they were) prisons a purpose for which they are unsuitable and not meant.⁴⁰

3.2. Right to be examined by medical practitioner:

Section 54 of Cr.P.C. Lays down for examination of arrested person by medical practitioner at the request of the arrested person. The accused must be informed of his right. (*Sheela Barse v. State of Maharashtra*).⁴¹ If any arrested person 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, then the magistrate on the request of the arrested person, is required to direct the examination of his body by a registered medical practitioner. However, the magistrate need not give such a direction if he considers that the request for

examination has been made by the arrested person for the purpose of vexation or delay for defeating the ends of justice.

It also enables the person concerned to establish that the offence charged was not committed by him (for example in rape cases) or that he had been subjected to physical injury while in custody.

3.3. Right to Consult Counsel:

Any person accused of an offence before a criminal court or against whom proceedings are instituted under code of criminal procedure, may of right be defended by the lawyer of his choice. The right begins from the moment of arrest. The consultation with the lawyer may be in the presence of the police officer but not within his hearing. The right to consult and to the defended by a legal practitioner of accused's choice is now Recognized in Article 22(1) of Constitution.

Section 304 of Cr. PC. 1973, provides for legal aid to the accused at state expense in certain cases, when he is unable to hire 'a lawyer to defend him. The right to free legal service is reasonable, fair just and implicit In Article 21 of Constitution (*Maneka Gandhi v. Union of India*) In *Janardan Reddy v. State of Hyderabad*,⁴² "the Supreme Court observed that a court of appeal or revision is not powerless to interfere, if it is found that the accused was so handicapped for want of legal aid that the proceedings against him may be said to amount negation of a fair trial. Therefore Criminal Procedure code has also made a provision to provide a lawyer to the indigent accused person in a trial before a court of session.

In *Hussainara Khatoon v. State of Bihar*.⁴³ The Supreme Court after referring the constitutional directive contained in Article 39(A) regarding equal justice and free legal aid has explicitly observed that the right to free legal service is clearly an essential ingredient of reasonable, just and fair procedure for a person accused of an offence and it must be held implicit in the guarantee of Article 21. This is a constitutional right of every accused person who is unable to engage a lawyer and secure legal services on account of reasons such as poverty, indigence or in communication situation and the state is under a mandate to provide a lawyer free of cost to him.

³⁹ AIR 1981 Cr. L.J. 470. SC

⁴⁰ Varshney Anup. 'Rights of Accused' The Indian Journal of Criminology and Criminalistics, Volume XXVIII, Issue No. 3 Sept. to Dec. 2007. p34.

⁴¹ 1975 Cr.L.J. 1249 Calcutta.

⁴² AIR 1951.SC 217.

⁴³ (1980)1. SCC 98.

4. Statements to police not to be signed - use of statements in evidence:

The words of Section 162 Cr. P.C. are wide enough to include a confession made to a police officer in the course of an investigation. The statements if reduced in writing then it shall not be signed by the maker of the statement. The prohibition extends to all statements (confessional or otherwise) during a police investigation made by any person whether accused or not (in police custody or not), whether reduced to writing or not, subject to the proviso. In view of the ban in the section, no witness can be asked, what he said to the police during the investigation, nor may a police officer be asked what a witness said to him, no may any be stander be questioned as to what he heard another person say to the police during the investigation. Statements of accused before the police cannot be used as substantive evidence.

Section 162 Cr. P.C. imposes a complete ban on the use of statements recorded by the police officer under section 161 of Cr. P.C. for the purpose of corroboration or as substantive evidence. Such a statement can be used by the accused and with the permission of the court by the prosecution only for the purpose of contradicting the witnesses who has made such a statement in the manner provided by section 145 of Indian Evidence Act. 1872.⁴⁴

Section 162 does not refer to every statement recorded by the police but only to statement in the course of an investigation under chapter 12 into cognizable and non-cognizable offences, The ban does not apply to any statement to the police before starting investigation.

4.1. Examination of Accused by Medical Practitioner at the Request of Police Officer

Examination of accused by medical practitioner at the request of police officer: Section 53 authorises an examination of the arrested person by a registered medical practitioner at the request of a police officer, if from the nature of the alleged offence or from the circumstances under which it was alleged to have been committed, there is reasonable ground for believing that such an examination will afford evidence. A specific legal provision in this regard has been considered necessary because under the existing general provision relating to the search of an arrested person⁴⁵ forcible medical examination of the body of

an accused cannot be held without his consent.⁴⁶ Such a provision would not offend Article 20(3) of the Constitution.⁴⁷ Without a statutory provision compulsory medical examination of the accused would have been illegal.⁴⁸

An examination of the body would reveal valuable evidence and may take various shapes, e.g. (a) examination of the body for ascertaining the accused's part in a sexual offence, or for finding out the injuries received by him; (b) examination for identification mark; (c) examination of internal parts, taking of fluids (e.g. in intoxication case) and so on. The provision further provides that the person of a female is to be examined only by, or under the supervision of a female registered medical practitioner.⁴⁹

4.2. Examination of arrested person by medical practitioner at the request of the arrested person:

Section 54 provides that 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. The provision was not recommended by Law Commission, but was inserted on the recommendation of the Joint Committee Report,⁵⁰ which observed that such a provision is desirable, in order to enable the person concerned to establish that the offence charged was not committed by him or that he had been subjected

⁴⁴ Prakash Sen's case 1998. Cr. L. J. 1275 Calcutta.

⁴⁵ Under section 51.

⁴⁶ *Bhandar*, AIR 1931 Cal 601; *Hanuman*, 36 CWN 1152; AIR 1932 Cal 723; *Deoman*, AIR 1959 Bom. 284.

⁴⁷ *State of Bombay v. Kathi Kalu Oghad*, AIR 1961 SC 1808: (1962) 3 SCR 10: (1961) 2 Cr.LJ 856: (1963) 1 SCj 195: 1963 MLj (Cr) 97.

⁴⁸ Law Commission of India 37th Report, para 183 and 41st Ref. Vol. 1. para 5.

⁴⁹ Section 46(2)

⁵⁰ Report of the Joint Committee of the Parliament dated 4-12-1972, p.9.

to physical injury while in custody. The accused must be informed of his right under section 54.⁵¹

4.3. Procedure when police officer deposes subordinate to arrest without warrant:

Section 55 authorises an officer-in charge of a police station for making an investigation under Chapter XII to depute a subordinate officer to arrest without warrant any person by an order in writing. Any officer subordinate is not limited to police officer (as in sections 41, 42, 57 etc.), but may be any other subordinate officer, e.g., Chowkidar.⁵² The jurisdiction of the police officer under this section is not excluded by the Magistrate issuing a warrant. "

4.4. Police to report apprehensions:

The object of section 58 is that the Magistrate should be kept informed of all arrests without warrant by the police in order that he may see whether their powers were being exercised properly or abused, or to detect infractions of sections 56 and 57 and also to enable him to issue promptly such order as may be necessary in regard to the person arrested, as it is his duty to see that persons are not unnecessarily kept - in custody.

4.5. Arrest to prevent the commission of cognizable offences:

Under section 151 two prerequisites are necessary, (1) the police officer knew that the offender had a design to commit a cognizable offence, and (2) that the commission could not be otherwise prevented.⁵³ The officer must know that the person is designing to commit a cognizable offence. An apprehension that he may commit an offence is not sufficient.⁵⁴ If an arrest or attempt to arrest is made without any emergency contemplated by the section it is illegal and resistance or retaliation against use of criminal force is justified.³ There is no absolute *dictum* that under no circumstances can the High Court go into the question of proper exercise of

the discretion by a police officer in arresting under section 151.⁵⁵

4.6. Right to be Produced before Magistrate within 24 hours of Arrest:-

Two sections of the Code deal with this right of the accused, which are discussed as under:

(a) Person arrested to be taken before Magistrate or officer in-charge of police station:

This right is contained in section 56 of the Code, according to which if the police does not think it fit to take bail, the arrested person has to be taken to the Magistrate having jurisdiction, i.e., jurisdiction to try the case.⁵⁶ Person arrested should not be kept in any other place but sent immediately to the Thana.⁵⁷ He can be discharged on personal bond or bail⁵⁸ or under a Magistrate's order under section 167.

Police officer, who finds that the order under section 55(1) is not valid, he can exercise his own powers independently under section 41(1). Under section 56, production must be before the Magistrate having jurisdiction.⁵⁹ Under Article 22(2) of the Constitution, production must be before the nearest Magistrate. It need not be interpreted to mean a Magistrate with judicial powers.⁶⁰ The construed appeal is that the arrested person' is to be produced before the nearest Magistrate having other power to deal with the case.

(b) Person arrested not to be detained more than twenty four hours: We have already discussed this provision, as contained in section 57, under "Protection against arbitrary arrest and right to know specific ground of arrest".

Right to consult and to be defended by a counsel of his choice and to get free legal aid in case of economically disabled accused: Apart from ensuring a fair prosecution, a society under the Rule of Law has also a duty to arrange for the defence of the accused, if he is too poor to do so. Free legal aid to persons of limited means is a service which the modern State, in particular a Welfare State, owes to

⁵¹ *Sheela Barse v. State of Maharashtra*, AIR 1983 SC 378: (1983) 2 SCC 96: (1983) 2 SCR 337: (1983) 1 SCALE 140: 1983 Cr LR (SC) 207: 1983 Cr LJ 642: 1983 SCC (Cri) 353: 1983(1) Crimes 602.

⁵² *Bahubal*, 10 CWN 287.

⁵³ *Md. Ali*, AIR 1965 All 161.

⁵⁴ *Balraj Madhok v. Union of India*, AIR 1967 Del 31: 1967 Cr LJ 865.

⁵⁵ *Yellappachari v. State of Mysore*, (1974) 1 Kant LJ 152; *Revamappa v. S.N. Raghunath*, 1983 Cr LJ 321 (Karn).

⁵⁶ *Gulam Mohammad Azimuddin v. State of Madhya Pradesh*, AIR 1959 MP 147: 1959 Cr LJ 600.

⁵⁷ *Behary*, 71 WR Cr 3.

⁵⁸ See Chapter 33 of Cr PC

⁵⁹ *Gulam Mohammad Azimuddin v. State of Madhya Pradesh*, AIR 1959 MP 147: 1959 Cr LJ 600.

⁶⁰ *Hariharnand*, AIR 1954 All 601.

its citizens⁶. The provisions to deal with this right under the Code are discussed as under:

(c) Right of person against whom proceedings are instituted to be defended: Section 303 recognises the right of any person brought before the criminal courts to answer any charge or accusation to be defended by a lawyer of his choice. A person against whom no process has been issued is neither an "accused" nor a "person against whom any proceedings have been instituted" and he has no right to be represented by a pleader during a preliminary enquiry under section 202.⁶¹ An application by the police for remand under section 167⁷ is a "proceeding" under the Code and the right to be represented begins at least from that moment after arrest.⁶² Recording of confession is a "proceeding" within section 303. It is absolutely essential for all Magistrates to explain to the accused, before proceeding to record confession, his fundamental right under Articles 22(1) and 20(3) and provisions of section 303 that he has a right to consult his lawyer.⁶³

The right to consult and to be defended by a legal practitioner of accused's choice is now recognized in Article 22(1) of Constitution. Arrest and trial in jail in hot haste on the next day without an opportunity to defend or inform⁹ the accused of their right under Article 22 of Constitution and section 303 is in a sense a denial of fundamental rights.⁶⁴

5. Legal aid to accused at State expense in certain cases: Section 304 places on a statutory footing the right of the accused without sufficient means to engage a lawyer to be defended at the expense of the State in regard to Sessions trials with a provision also enabling the State Government to extend this right by notification to any class of trials before other court in the State. A representation by a lawyer at Government expense to an accused person has been provided for statutorily, appointment of such lawyer to defend such an accused and the facilities to be allowed to such lawyers by the courts and the fees payable to such lawyers by the Government have also been provided for statutorily under sub-section (2) making the same governable by rules under this sub-section(2) that are to be framed by the High Court

with the previous approval of the State Government.⁶⁵

6. Discussion:

The right of bail is one of the most important rights granted to the accused by the Code Section 436 says that it is the right of every accused arrested on a bailable offence to be released on bail. Section 50(2) specifies that where the person is arrested for a bailable offence, the police officer shall inform him of the right to be released on bail so that he can arrange for sureties. In *Hussainara Khatoon v. Home Secretary, State of Bihar*, the Supreme Court held that pre trial release on personal bond should be allowed where the person to be released on bail is indigent, not having the adequate means to furnish a bond and there is no substantial risk of his absconding. Section 35 of the 2005 Amendment Act added an explanation to Section 436 which says that if an accused is unable to give bail within a period of one week, it shall raise a presumption that such person is indigent for the purpose of the section.

Even in non-bail able offences, the accused may be release on bail at the discretion of the Court if it is reasonably satisfied that such release will not endanger public peace. Moreover, certain special concessions has been made for women, children and the infirm with regard to their right of acquiring bail in non-bail able offences.

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⁶¹ Sheikh Chand, 8 Cr LJ 20.

⁶² Evans, 27 Cr LJ 1169.

⁶³ Kuthu Goala, 1981 Cr LJ 424 (Gau)

⁶⁴ *Hansraj*, 1956 AIR 641.

⁶⁵ Ashutosh Dr. 'Rights of Accused', Universal Law Publishing Company, New Delhi, 2009 edition, p 25.

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