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## **Balancing power and rights: Examining police procedures and accountability in India**

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### **Abstract**

This research paper examines the intricate relationship between police powers and the protection of individual rights in the context of law enforcement in India. Focusing on the provisions of the Code of Criminal Procedure, 1973, it explores the balance between police authority and constitutional safeguards, particularly concerning arrest, detention, interrogation, and use of force. By analyzing judicial interpretations and landmark cases, the paper highlights instances of abuse of power, such as arbitrary arrest, custodial violence, and disregard for procedural fairness. Moreover, it discusses the legal framework aimed at safeguarding the rights of the accused, including the right to legal representation, protection against self-incrimination, and the right to a speedy trial. Through comprehensive analysis and critique, this paper underscores the importance of upholding the rule of law and ensuring accountability in policing practices to safeguard individual liberties and promote justice in society.

**Keywords:** Custodial violence, procedural fairness, constitutional safeguards, legal representation, self-incrimination, speedy trial, accountability, rule of law, justice

### **Introduction**

The police is assigned the job of preventing and investigating crimes. They have the responsibility to maintain public order, protect VIPs and play a crucial role in the security of the State. To accomplish these tasks the police are vested with wide legal powers. These include the power to arrest people, search their person and property. Call them to police station for investigation and to take such lawful actions as required for discharging their duties. In order to ensure that the people exercise these powers properly, the law has imposed various restrictions on the police. With the advent of democratic institutions the people have become the source of power and the State has recognised their basic rights. In other words, the basic duty of police today is to ensure the 'rule of law' which is the essence of a democratic State<sup>[1]</sup>. The framers of the law were well aware that in a country like India, where majority of the people are illiterate and unaware of their rights, the police might exploit the innocent people by using their discretions arbitrarily. In order to avoid such a situation, it was expedient to curtail the powers of the police so that they would perform their duties without subjecting the people to undue harassment and hardship. Hence various laws were enacted and detailed procedures were laid down to maintain the balance between the powers of the police and the rights of the people. The main provisions are as follows:-

### **Arrest and Detention in Custody**

Section 41, Chapter V of the Code of Criminal Procedure, 1973, deals with the powers of the police to arrest and the procedure to be followed by them. The police also have the powers, under section 42 CrPC, to arrest a person who, in the presence of a police officer, has committed or has been accused of committing a non cognizable offence, refuses to give his name and residence or who gives a name or residence which such officer has reason to believe to be false. Arrest means the taking away temporarily the right to personal liberty. Arrest is always a matter of shock for any self esteemed person hence the Right to Life and Personal Liberty is incorporated as a fundamental right under Article 21. But in spite of all the legal provisions the arrest is seen as a means to humiliate people as it is seen that the arrested is unnecessarily handcuffed, chained and paraded in public<sup>[2]</sup>. The Courts have time and again criticised the way the arrests are made and the manner in which the arrested are taken by the police. Instances have come where even the Judicial Officers were arrested and humiliated and the courts had to intervene to set things right. In certain case, compensation was awarded to the persons arrested and humiliated for the damage the investigating officers had caused to the reputation and name. Another violation carried out by the police is the carrying out of informal arrests and keeping of suspects incommunicado.

The law doesn't recognise formal and informal arrests. It speaks only of arrests. When an individual not in police uniform takes away a citizen and keeps him under custody and detains him, that is called an offence and is considered as kidnapping or abduction in law whereas the same is done by police authority, it is called 'informal arrest'. Again, the law does not accept legal and illegal detentions in police custody. The law admits only detention which is legal. Illegal detentions by the police are nothing but wrongful confinement, which is an offence punishable under penal law. Police resort to this reprehensible practice of keeping the kidnapped or abducted people without recording the arrest for days or even months together.

### Use of Force While Making Arrest

Section 46 prescribes how arrest is to be made. Section 46(1) of the Code of Criminal Procedure 1973 prescribes that in making the arrest of a person, the police officer shall "actually touch or confine the body of the person to be arrested, unless there is submission to the custody by word or action". The allegation is that the law is applied only in the cases where the arrested person is influential person or otherwise affluent in the society. The people coming from the poor strata of the society do not receive a fair deal from the police when they are arrested. The police are inclined to think that the use of force, no matter whether it is necessary, essential or warranted, gives them some glamour and elevates their status in the society. The police often resort to violence while carrying out arrests of the under privileged section of the society. If a person who receives an unexpected slap at an unexpected time in a sudden way, he may retaliate it, sometimes, by aggressive methods and in such instances, he has to taste the muscle of the police in a very severe way<sup>[3]</sup>.

### Physical Restraint and Handcuffing

The CrPC<sup>[4]</sup> imposes another restriction on the powers of the police to handle the arrested person. It pronounces that the police are not permitted to use more restraint than necessary to prevent the escape of the arrested person. The police use this provision to exercise their discretion to handcuff in order to humiliate a person who has been arrested. The issue of handcuffing a person was taken up before the Supreme Court of India in a number of cases and the apex court, after in depth discussions has issued directions and guidelines to be followed by the police and other authorities.

In Shukla's case<sup>[5]</sup> the apex court has held that handcuffing is prima facie inhumane, unreasonable, arbitrary and as such repugnant to Article 21 of the Constitution of India. In the case of Sunil Batra<sup>[6]</sup>, the Supreme Court has held that the indiscriminate resort to handcuffs when accused persons are taken to and from Court and the expedient of forcing irons on prison inmates are illegal and shall be stopped forthwith save in small categories of cases where an under trial has a credible tendency for violence and escapes a humanely graduated degree of

"iron" restraint is permissible if other disciplinary alternatives are unworkable. The apex court in the case of Citizens for Democracy<sup>[7]</sup>, once again dealt with the subject of handcuffing. Reiterating the guidelines issued in its earlier judgements and showing a grave concern on the instances of violation of the laid down directions, the Court issued more detailed guidelines to be followed by all

concerned authorities. It held that the police and jail authorities are under a public duty to prevent the escape of prisoners and provide them with safe custody but at the same time the rights of the prisoners guaranteed to them under Articles 14, 19 and 21 of the Constitution of India cannot be infringed. The Supreme Court, in this judgement said that violation of any of the directions issued by it by any rank of police officer in the country or members of the jail establishment shall be summarily punishable under the Contempt of Courts Act apart from other penal consequences under law.

### Grounds for Arrest and Right to Bail

Sections 46, 47, 49, 52, 53, 54 and 55 of the Code of Criminal Procedure 1973 prescribe the procedure for dealing with the arrested persons whether arrested on a warrant or without a warrant. Sub Section (1) of Section 50 CrPC enjoins every police officer arresting a person without a warrant to communicate to him the full particulars of the offence for which he is arrested and the grounds of such arrest<sup>[8]</sup>. It is provided under Sub Section (2) of section 50 that where a police officer arrests without warrant any person other than the person accused of a non bailable offence, he shall inform the person arrested that he is entitled to be released on bail. This is relevant to point out that under Section 436(1) CrPC any person arrested in a bailable offence is entitled to be released on bail. The provisions of Section 436 impose an obligation on the officer in charge of a police station who has arrested such person to release him on bail if he is prepared to give bail<sup>[9]</sup>. But the police seldom respect this provision of law. As per Section 57 of the CrPC no police officer shall detain in custody a person arrested without a warrant for a longer period than under all circumstances of the case are reasonable and such period shall not, in the absence of special order of a magistrate under section 167 of the CrPC exceed twenty four hours exclusive of the time necessary for the journey from the place of arrest to the magistrate's court. This restriction of the period is guaranteed fundamental right under the Constitution of India but in practice the police fully violate this right.

### Interview and Interrogation by the Police

Interview is conducted with the witnesses and interrogation with the suspects. There exist some differences between interrogation and questioning. A witness is and always should be considered as a person coming forward to help the police and the prosecution in proving the guilt of the accused. This means that the witness expects to be treated with respect by the police, but the witnesses often complain that the police not only with disrespect but also deal with them as if they are the culprits. People usually hate to become witnesses in criminal cases as they are harassed and troubled by the police during the investigation stage. This means that the miscarriage of justice takes place even against the witnesses and others who come forward to aid the police. The interviewees are seldom able to understand the difference between interview and interrogation by the police. Interrogation is, as indicated earlier, done with the suspects and the police resort to all kinds of shortcuts- crude, decent, coercive, understanding, humiliating, pressurising and sympathetic attitudes, approaches and methods<sup>[10]</sup> to elicit or extract a confession from them. Allegation is that the police are not reluctant to

adopt all or any of these objectionable methods and approaches to unwilling, lying, disinterested, hostile witnesses in criminal cases. The end result is that the witnesses turn hostile which ultimately leads to the acquittal of the accused.

### Medical Examination of the Arrested Persons

The Code of Criminal Procedure <sup>[11]</sup> empowers the police for effective investigation. Section 53(1) provides that when a person is arrested on a charge of committing an offence of such nature and alleged to have been committed under such circumstances that there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of an offence, it shall be lawful for a registered medical practitioner, acting at the request of a police officer not below the rank of a sub-inspector, and for any person acting in good faith in his aid and under his direction, to make such an examination of the person arrested as is reasonably necessary in order to ascertain the facts which may afford such evidence, and to use such force as is reasonably necessary for that purpose. Sub Section (2) of Section 53 CrPC creates a safeguard for women. It requires that whenever a female is to be examined, the examination shall be made only by, or under the supervision of, a female registered medical practitioner. While Section 53 confers a very important power on the police, it also imposes the following obligations on the police:

- a. The power of getting an arrested person examined can be exercised only by an officer not below the rank of a sub-inspector;
- b. There should be a reasonable ground to believe that such examination will afford evidence as to the commission of an offence;
- c. A female person can be examined only by, or under the supervision of, a female registered medical practitioner.

Similarly there are ample provisions which create an obligation on the part of the police in the form of Constitutional and Legislative Provisions for the protection of accused in India. Indian law provides certain rights to the prisoners, suspects and accused persons while in the custody. These rights are so fundamental that no one can lawfully violate them. Certain fundamental rights enumerated in Part III of the Constitution are available to them. These rights are mainly contained in articles 19, 20, 21, 22, 32 and 226 of the Constitution. Besides these constitutional rights, they enjoy certain other legal rights under Indian Penal Code, 1860; Criminal Procedure Code, 1975 and the Indian Evidence Act, 1861. Various Police and Prison Acts and manuals also carry certain rules and regulations. The Indian Supreme Court on a number of cases has not only acknowledged these rights but has expanded their scope through the process of judicial activism giving a new and liberal interpretation <sup>[12]</sup>.

### Protection under Indian Constitution

The main rights of an accused which have been recognized and guaranteed by the Constitution may be stated as under:

#### Right of Equality and Equal Protection of Laws

The Article 14 of the Constitution of India prohibits the State from denying equality before the law or the equal protection of the law to any person within the territory of

India. This concept is borrowed from British Constitution. The source of the doctrine in the criminal justice is Article 21 of the Constitution of India <sup>[13]</sup>. In a criminal trial, there are two parties: the state and the individual. However, both the parties are unmatching in their strength and resources, in which the individual, i.e. accused, is placed in a disadvantageous position. The role of the doctrine of equality becomes more significant in the context of the rights of a person who happens to be an accused of having committed a crime <sup>[14]</sup>.

#### Right to Speedy Trial

The right to have speedy trial is enshrined in the Constitution <sup>[15]</sup> and in the Criminal Procedure Code. It is rightly said that 'Justice delayed is justice denied'. Though there are no specific provisions either in the Constitution or in the Code of Criminal Procedure for ensuring a speedy trial, the Supreme Court of India has held that this right is implicit under Article 21 of the Constitution. Firstly, in the famous case concerning the trial of juvenile delinquents, namely, *Sheela Barse v. Union of India*, the Supreme Court announced the time-schedule for the conclusion of a criminal trial of a juvenile accused. At that time, the Supreme Court showed its unwillingness to fix any time schedule for the conclusion of the trial of an adult accused. Later on, in a significant judgement delivered in *Abdul Rehman Antuley v. R.S. Nayak*, <sup>[16]</sup>.

#### Right against Ex-post Facto Operation of Criminal Law

A basic feature of the concept of 'Rule of Law' hinges on basic understanding that a person should not be punished for act, which was not prohibited by law at the time when the alleged acts were committed. The salient features of the right against ex-post facto operation of law are:

- a. It prohibits retrospective imposition of criminality;
- b. It prohibits the extension by analogy of a criminal rule to convey a case not obviously falling within it and
- c. It provides formulation of the penal laws is excessively vague and wide terms.

An ex-post facto law is a law which imposes penalties retrospectively i.e.

an act already done and imposes the penalty for such acts. Clause (1) of Article 20 imposes a limitation in the law making power of the legislature and prohibits the retrospective operation of criminal laws. <sup>[17]</sup> However, it does not prohibit imposition of civil liability retrospectively <sup>[18]</sup>, i.e., with effect from a past date. Article 20(1) runs as under:

No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.

#### Right against Double Jeopardy

Article 20(2) of the Constitution of India provides for the Right against Double Jeopardy. This means that an individual can be punished for a crime only once and also not beyond the period prescribed by the authority. In order to seek the protection of the right; an accused has to establish the following facts:

- a. A previous prosecution has taken place;
- b. Punishment has ensued or acquittal as well;

c. The punishment or acquittal is for the same offence.

Clause (2) of Article 20 of the Constitution recognizes another important Human Right as a fundamental right of every citizen when it provides that: "No person shall be prosecuted and punished for the same offence more than once". This clause embodies the common law maxim rule of 'nemo debet bis vexari' which means that 'no man should be put twice in peril for the same offence'. If he is prosecuted again for the same offence for which he has already been prosecuted he can take complete defence of his former conviction<sup>[19]</sup>.

### Right against Self-Incrimination

From the verdict of the Supreme Court in Nandni Sathpathy's case<sup>[20]</sup>, the following aspects of the right can be stated as under:

- a. Suspects, not yet formally charged were entitled to right to silence during custodial interrogation.
- b. "To be a witness against himself" in Article 20(3) extended beyond the court process to convey any giving of incriminating evidence of information even during police investigation.

It points out that if Article 20(3) were to be construed as to permit police interrogation then the protection granted under the article would be nullified. This is so as it would enable the police to prove such facts which are forcibly elicited from the accused by other evidence. Police are expected to secure evidence without the accused being forced to become a party to such effort. It covers not only such evidence, which actually incriminates a person as well as the evidence which may tend to incriminate him. The protection not only is applicable to an instant case but also to other cases which the accused has reasonable apprehension of implication. The compulsion included both the physical as well as psychological facets<sup>[21]</sup>.

One of the motives of torture is to extract confession from the suspect for crime he is alleged to have committed. He is subjected to various kinds of constant torture until he breaks down and finally makes confessional statement. However, he has right to refuse to answer all self-incriminatory questions. The presumption of innocence until proved guilty according to law is the right of the suspect or accused person guaranteed under International Covenant of Civil and Political Rights under Article 14(2). The doctrine of presumption of innocence is also the basis of Indian jurisprudence. This is a very important right provided to the accused/ suspect person under the Indian Evidence Act 1872<sup>[22]</sup>.

### Right to Life

The most basic and fundamental right of the prisoners, suspects and accused persons is the right to life. It is the basis of all human rights, If there was no right to life, there would be no point in having other rights<sup>[23]</sup>. Article 6 of the International Covenant on Civil and Political Rights characterises the right to life as 'inherent', to emphasize its primacy. The covenant further makes right to life non-derogatory under article 4(2). Right to life is conferred by the Constitution under Article 21. Before the enactment of the 44<sup>th</sup> Amendment Act of 1978, the right to life along with other fundamental rights was a derogable right. In ADM Jabalpur case<sup>[24]</sup>, the Supreme Court took the view that if

the President had declared a state of emergency in the country and has also suspended the right to move the court for the enforcement of any right, the right of life under Article 21 could also be suspended. The 44<sup>th</sup> Amendment Act engrafted an exception *viz.*, that such declaration suspending the right to move any court for the enforcement of fundamental rights shall not cover Article 20 or 21 of the Constitution<sup>[25]</sup>. The result is that the right to life has been made a non-derogable right like under article 4(2) of the covenant. Under Article 21 no person shall be deprived of his life or personal liberty except according to procedure established by law.

### Rights against Handcuffing

The Supreme Court In the cases of Prem Shankar Shukla v. Delhi Administration, Sunil Batra v. Delhi Administration and Citizens for Democracy v. State of Assam gave salient features of the right:

- a. Handcuffing of prisoners (accused or under trial) is to be the exception and not the rule. Further, it cannot be mechanical routine for the escorting or prison authority. Any restriction imposed has to be based on reasonable and reliable material evidence and which on balance or consideration renders it as an unavoidable necessity.
- b. Further, the reasoning or logic so advanced has to be recorded in writing to enable scrutiny.
- c. Even inside the prisons chains, manacles and hoops etc. cannot be resorted mechanically.
- d. Each and every case of handcuffing especially in relation to escorting to and from the judicial portals must be judicially approved or ratified. iii) For the purpose of escorting prisoners to and from the prison to the court, there can be no class differentiation made amongst the prisoners.
- e. Failure to comply with the prescription made by the Apex Court, which results in violation of human dignity, would expose the concerned police escorts to the legal consequence of compensation and punishment.

Accused persons in handcuffs are paraded on the road by the police while taking them to the court. They are made to stand handcuffed in the court for hours waiting for their turn. This makes them feel humiliated and puts them in a lot of inconvenience. A person is to be considered innocent unless proved guilty beyond doubt by the court is an axiom of our legal system. But a person stands punished by this humiliation though he may be subsequently acquitted by the court<sup>[26]</sup>.

### Right against Arbitrary Arrest

The Constitutional protection conferred by Article 22 is a reiteration of the provisions of Sections 56, 57 and 76 of the Code of Criminal Procedure. The intention of law is that such an arrested person must be produced before a Magistrate, competent to try or to commit the case without any delay. Protection of personal liberty of an individual is his basic Human Right and, thus, in order to protect this right relating to dignity of a person while arrest, the Supreme Court has interpreted Article 21 of the Constitution in favour of the accused. In India, arrest can be made with a warrant or without one. In the former case, there is already application of mind by a judicial authority, while in the latter case, such arrested person is required to be brought



within 24 hours of arrest before the judicial authority <sup>[27]</sup>. Clauses (1) and (2) of Article 22 guarantee the following rights to the persons who are arrested under an ordinary law:

a. to be produced before a Magistrate.

### Right to Legal Aid

Article 22(1) of the Constitution of India states that "No person who is arrested shall be denied the right to consult and to be defended by a legal practitioner of his choice." The international Covenant on Civil and Political Rights also provides the same right to the accused person under article 14(3)(b). This right begins as soon as he is taken into police custody in relation to criminal or quasi-criminal proceedings. The Supreme Court in one of its rulings extended the operation of this right, "to any accused person under circumstances of near custodial interrogation <sup>[28]</sup>. The court held that while undergoing interrogation in the police custody he has right to have his lawyer by his side. But in the Indian Constitution, there is no specific provision which provides the right to free legal aid to the accused person. In Hussainara case <sup>[29]</sup>, Supreme Court specifically held that article 22(1) of the Constitution does provide the accused person the right to the services of a legal practitioner at the state cost. There is of course a directive principle of state policy contained in Article 39-A which requires the state to provide free legal aid by suitable legislation or schemes so that opportunities for securing justice were not denied to a citizen on account of his economic or other disabilities. However, a directive principle of State policy is not enforceable in a court of law and therefore it does not confer a constitutional right to the accused person to secure free legal assistance at the cost of the state. The Supreme Court later filled up this constitutional gap through the creative judicial interpretation of Article 21 in number of cases. In its rulings in Hoskot <sup>[30]</sup>, and Hussainara Khatoon case <sup>[31]</sup>, the Apex Court held that a procedure which does not make legal services available to an accused person who is too poor to afford a lawyer and who would, therefore, have to go through the trial without legal assistance, cannot possibly be regarded as reasonable, fair and just procedure guaranteed under Article 21. The court thus spelt out the right to legal aid of the poor accused person from the language of Article 21. However, in spite of these constitutional provisions and the rulings of the Apex Court, the police usually refuses to allow a lawyer to meet and interview the accused person in custody unless the court intervenes on his behalf.

### Right to Appeal

The Constitution <sup>[32]</sup> provides for an appeal to the Supreme Court on the certificate of fitness' granted by the High Courts and also for an appeal to the Supreme Court by special leave granted by it under Article 136 of the Constitution; but the appeal by special leave may be filed only when the certificate applied for filing an appeal has been refused by the High Court.

### Protection of an Accused under Indian Penal Code, 1860

Monitoring of rights of accused in police custody is very essential. The government officials are not conscious of the fact that it is a grave crime and needs immediate attention. If there is torture, it is a crime under the Indian Penal Code <sup>[33]</sup>. Torture and death in custody are crimes <sup>[34]</sup>. Section 330 and Section 331 of this code deals with causing hurt and grievous hurt respectively for of extorting

confession or to compel restoration of property, principle object of these sections is to prevent torture by police. A police officer is under a legal duty to prevent implication of torture on those who are in his custody and his failure to discharge that duty makes him a party to the crime. The offence is complete as soon as the hurt or confession or any other information is extracted by means of force while a person is in custody. The punishment under Section 330 is with imprisonment of either description for a term which may extend to seven years and shall be liable for fine. The offence under section 331 is punishable with imprisonment of ten years and fine. Section 330 specifically states in its illustrations (a) and (b) that if a police officer tortures anybody in order to induce him to confess that he has committed an offence or to induce him to point out where certain stolen property deposited, the police officer is guilty of an offence under this section. The police officer by inflicting torture on persons in their custody also commits offences of voluntarily causing hurt by dangerous weapon i.e. means under section 324; murder under section 302; force under Section 349, criminal force under section 350; assault under Section 351; rape under section 375. The police officers are liable under law for any act or omission and commission. Apart from the provisions which specially deal with torture, other provisions relating to murders, homicides, hurt, rape etc. are equally applicable to policemen whose unlawful recourse to violence against a person in custody may result in any such contingency. The Supreme Court in *Bhagwan Singh and another v. State of Punjab*, <sup>[6, 7, 9]</sup> pointed out that it may be legitimate of any police officers to interrogate or arrest any suspect on some credible material, but it is needless that such an arrest must be in accordance with law and the interrogation does not mean inflicting injuries. The police would be accomplishing behind their closed doors precisely what the demands of our legal order forbids

### Conclusion

Police while discharging its duties indulges in actions like arrest, search, and interrogation and so on, and for this the police has various procedural guidelines mandatory by law. These guidelines are to be inferred or appreciated from a perusal of the Constitution of India; Code of Criminal Procedure, 1973, and also other laws like Police Act or the Police Manual etc. The significance of each of such standard is of fundamental import. Amongst the total range of rights of accused relating to the police processes commonly referred to as pre-trial processes, it is essential to understand, the criminal justice administration in totality. For a procedure to valid and permissible, it has to be "fair, reasonable and just". These yardsticks have been widening the horizon of the obligations of the state *viz-a-viz* the people in general. Such dynamic vibrations provide the needed protection to those who come in adverse contact with the penal processes in particular. Several other rights, are now being considered as inclusive under the umbrella of Article 21. It is of immense significance to the very concept of 'rule of law' that everything is done to ensure that the penal processes are reflective of the constitutional values and procedural mandates envisaged under the law of land.

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