



JUDICIAL TRAINING & RESEARCH INSTITUTE, U.P., LUCKNOW

Session -1

Legal Protection to Prisoners and Its Implications in the Wake of COVID-19 Pandemic

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- **Meaning of 'arrest'** – The seizure or forcible restraint; an exercise of the power to deprive a person of his or her liberty; the taking or keeping of a person in custody by legal authority, especially, in response to a criminal charge.
- The National Police Commission in its third report pointed out that power of arrest is one of the chief sources of corruption in the police. The report suggested that nearly 60% of the arrests are unnecessary and results in 43.2% of unjustified expenses of our jails.

Condition in Prisons:

- As on 31 December, 2019 there were 1350 jails in the country. Rajasthan (144) has highest number of prisons. Uttar Pradesh had 72 prisons.
- U.P. with capacity of 60,340 reported highest capacity in the country. The capacity of all prisons in India is 4,03,739.
- Against this there were 4,78,600 prisoners. U.P. with 1,01,297 had highest number of inmates. U.P. reported highest overcrowding – 167.9% (National average 118.5%).
- The percentage of under trial prisoners at the national level is 69.7% (3,30,396) and number of convicted prisoners was 1,43,800.
- On 31 January, 2021, 73 Jails of different nature in U.P. Total capacity 60,685; there were 1,08,243 inmates – 27,127 convicted and 1,08, 243 under trial; overcrowding – 1.78 times of capacity.

- Overcrowding in jails results in poor hygiene, lack of sleep, violation of basic human rights, commission of offences of various nature etc.
- The issue of overcrowding and other aspects related to jails has been/is being considered by the Hon'ble Supreme Court in Re – Inhuman Conditions in 1382 Prisons, 2016 CrLJ 1589 (WP (Civil) No.406/2013).

Personal Liberty Protective Provisions under CrPC:

- Arrest for alleged commission of a cognizable offence punishable with imprisonment which may be less than or extend up to 7 years, only if conditions provided u/s 41(1)(b)(i) emanates.
- Pre-arrest or anticipatory bail (S. 438).
- Default or compulsive bail, if the accused is in custody and the police report not submitted by 60th or 90th day, depending upon gravity of the alleged offence.
- Bail u/s 436A, 437 or 439.
- Legal protections at and after the arrest of a person (Chapter V).
- 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. It would be prudent for a police officer to make an arrest only on reasonable satisfaction reached after some investigation as to bonafides of a complaint and reasonable belief both as to the person's complicity and the need to affect the arrest. **Joginder Kumar vs. State of U.P., AIR 1994 SC 1349.**

From the various provisions relating to arrest as are presently included under the CrPC, the following aspects are discernible:-

1. The powers of arrest have been restricted on the basis of the 'necessity principle'.
2. Arrest should only be in genuine cases to enable the police to prevent the commission of offences and to investigate crime.
3. Arrest in apparently non-serious matters only when certain exceptional circumstances exists.
4. Arrest to be made when the accused is not cooperating in the investigation and fails to respond to the summons by the police (S.41A).
5. The police officer affecting the arrest should be clearly identifiable and he should prepare a memorandum of arrest duly attested by independent witness and further should be countersigned by the person arrested. (S. 41B)

6. 6. A close friend or family member of the arrested person should be duly informed about the arrest.
7. 7. Arrest can be made primarily by the police and in certain circumstances by a private person or by the magistrate (S. 41, 43 & 49).
8. Arrest to be made by actually touching or confining the body of the person arrested unless there is a submission to custody.
9. If female
 - (i) Body can be touched only by a female officer.
 - (ii) Arrest if necessary to be made only during permissible hours.
10. Every person arrested without warrant to be informed about the ground of arrest and entitlement of bail if arrested for any bailable offence. (S. 50)
11. Every arrested person to be examined by a registered medical practitioner. (S. 54).
12. Person arrested to be taken before a Magistrate and to be detained beyond 24 hours only on the special orders of a Magistrate issued u/s 167 CrPC (S. 57).

Guidelines laid down in Joginder Kumar v. State of U.P., AIR 1994 SC1349:

1. As far as practicable one friend or relative or a known person to be informed about the arrest.
2. The arrested person to be informed about his rights.
3. Entry about the person informed to be made in the diary i.e. C.D.
4. Duty of the Magistrate to satisfy himself about the compliance.

Background:

- The constitution of India guarantees several rights, including human and fundamental, to every citizen.
- Violations made by the police machinery in effecting arrests.
- Interventions required by the courts. Matters even reach the High Courts & also the Supreme Court of India.

Article 22(1) and (2) of the Constitution:

- Right to be informed, as soon as may be, of the grounds for such arrest;
- Right to consult and to be defended by a legal practitioner of his choice;
- Right to be produced before the nearest magistrate within twenty four hours of his arrest excluding the time necessary for the journey from the place of arrest to the

court of magistrate; and

- Right not be detained in custody beyond the period of twenty four hours without the authority of the magistrate.

Right to know the grounds of arrest:

- Timely information of the grounds of arrest is the legal requirement.
- Enables the arrestee to move proper court for bail or a writ of habeas corpus or to make expeditious arrangement for his defence.
- This right not applicable to cases, where a person is placed under preventive detention in respect whereof mandate of other provisions of the constitution of India comes into play.
- **Section 50 (1) Cr.P.C.:-** “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.”
- When a subordinate officer is deputed by a senior police officer to arrest a person under section 55 Cr.P.C., 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.
- **Section 75 Cr.P.C.:-** “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.”

Directions in D.K. Basu v. State of W.B, AIR 1997 SC 610:

The police personnel carrying out the arrest and handling the interrogation of the arrestee:

- To bear accurate, visible and clear identification and name tags with their designations
- Prepare a memo of arrest at the time of arrest to be attested by at least one witness
- To notify time, place of arrest and venue of custody of the arrestee to relative or friend
- To make the arrestee aware of this right to have someone informed of his arrest.
- To make entry in the diary regarding the arrest and 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.

- At the request of the arrestee to examine at the time of his arrest and record major and minor injuries, if any at that time; and to prepare “inspection memo” in this regard to be signed both by the arrestee and the police officer.
- Medical examination of arrestee by trained doctor every 48 hours.
- Copies of all the documents including the memo of arrest to be sent to the illaqa magistrate.
- Permission to meet his lawyer during interrogation.
- Police control room to be informed at all district and state headquarters regarding the arrest and the place of custody.
- There is a battle b/w the law makers and the police and it seems that the police has not learnt its lesson. The police has not come out of its colonial image. The need for caution in exercising the drastic power of arrest has been emphasised time and again by the court but has not yielded desired result. As there were no signs of improvement Parliament had to intervene and act on the recommendation of the 177th Report of the Law Commission and accordingly section 41 CrPC, in the present form came to be enacted.
- S. 41 (1)(b)(ii) provides that arrest for any offence punishable less than or upto 07 years can be made only on the following satisfaction:
 - To prevent such person from committing any further offence;
 - For proper investigation;
 - To prevent disappearance or tampering of evidence;
 - To prevent inducement, threat or promise to the witness and thereby dissuading the person from disclosing the evidence to court or police;
 - To ensure the presence of the person in court;
 - Police Officer shall record such reasons in writing both for making an arrest or not arresting the person.

Arnesh Kumar vs. State of Bihar & Anr. (2014) 8 SCC 273:

Safeguards regarding arrest and detention:

- Police officers not to automatically arrest
- To forward the check list duly filed and furnish the reasons and materials which necessitated the arrest

- Magistrate to peruse the report furnished by the police officer and only after recording its satisfaction, to authorise detention
- Failure to comply with the directions render the police officers concerned liable or departmental action
- Notice of appearance in terms of S. 41A be served on the accused within 02 weeks from date of institution of case.
- Non compliance would make the police officer liable for departmental action and punishment for contempt of court.
- Authorising detention by Magistrate without recording reasons shall also make them liable for departmental action by the High Court. **Also see – Shaukin vs. State of U.P., 2012 (76) ACC 159.**

Follow up Post Inhuman Conditions in 1382 Prisons Case:

- UTRC (Under Trial Review Committee) constituted comprising of DJ, DM, SSP/SP, Secretary, DLSA & Jail Superintendent.
- Jail Superintendent of every jail to prepare detailed report/data regarding the UTPs/convicted persons.
- Secretary, DLSA to prepare report regarding UTPs/convicts falling u/s 436A CrPC; UTPs released on bail but not able to furnish sureties; accused of compoundable offences; eligible u/s 436 CrPC; imprisoned for offences which carry maximum punishment upto 02 years; Sick or infirmed requiring specialised medical treatment; women offenders; those between 19 to 21 years and have suffered ¼th of maximum sentence; those of unsound mind and those eligible for release u/s437(6) CrPC.
- The UTRC to make appropriate recommendation for the court having jurisdiction.
- With respect to S. 436A directions also issued in **Bhim Singh v. UoI, MANU/SC/0786/2014.**

Free Legal Aid:

- In matters concerning personal liberty and penal statutes, it is the obligation of the court to inform the accused that he or she is entitled to free legal assistance as a matter of right. It is the duty of Magistrate before whom a person accused of committing a cognizable offence is first produced to make him aware that if he does not have means, the accused will be provided legal aid at the expense of the State.

Failure to fully discharge the duty would amount to dereliction of duty and would make the Magistrate concerned liable to departmental proceedings. **Mohammad Ajmal Mohammad Amir Kasab v. State of Maharashtra, (2012) 9 SCC 1.** Also see – **Rajoo @ Ramakant v. State of M.P., (2012) 8 SCC 553; Khatri v. State of Bihar, (1981) 1 SCC 627.**

Right to be informed of right to bail:

Section 50(2) OF CR.P.C.

- “Where a police officer arrests without warrant any person other than a person accused or 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.”

Right to be taken before a magistrate without delay:

- “56. Person arrested to be taken before magistrate or officer in charge of police station – 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.”
- “76. Person arrested to be brought before court without delay – the police officer or other person executing a warrant of arrest shall (subject to the provisions of section 71 as to 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 twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the magistrate’s court.

Medical examination of arrested persons, including the injured among the arrested:

Section 54 Cr.P.C.

- Medical examination of all arrested persons is compulsory and the police has no discretion in this regard.
- If the arrested person is a female, the doctor in question has to be a female.
- The Doctor conducting the medical examination has to prepare a record of such examination, mentioning any injuries or marks of violence found on the arrested

person and also record the approximate time when such injuries or mark may have been inflicted. The Doctor shall also furnish a copy of that record to the arrested person or his nominee.

Health and safety of arrested person:

Section 55-A Cr.P.C.

- It is the duty of the person having the custody of an accused to take reasonable care of the health and safety of the accused.

Pro-active initiative of the Hon'le Apex Court in Suo Motu W.P. (C) No.1/2020 – Re Contagion of COVID-19 Virus in Prisons.

Reasons:

1. Protection of Right to health and life of both nature of prisoners – Convicted and undertrial through decongestion.
2. Overcrowding in jails poses real threat to the safety mechanism of prison inmate and jail/police officials.
3. Most of the prisons lack facilities of proper sanitation, hygiene and medical facilities.
4. State Government directed to constitute High powered Committees to determine the class of prisoners who can be released on parole or on interim bail for appropriate periods (Constituted in U.P. vide notification dated 26 March, 2020).
5. HPC in its discretion to take appropriate decision for release of prisoners/inmates, taking note of the concerns of Public Peace, Safety and Security, and the interest of the administration of justice.
6. For preventing fresh ingress of inmates, the directions of the Supreme Court in **Arnesh Kumar v. State of U.P., (2014) 8 SCC 273**, issued in the light of the provisions u/s 41(1)(b) CrPC, also to be strictly adhered to.
7. Thus, effective management of pandemic both from outside and within the jails. Thus, a process of management through release of prisoners/inmates and limiting the number of fresh inmates.
8. Process of release to effectively calibrate concerns of criminal justice system, health hazards and rights of the accused.
9. The SOP laid down by NALSA in compliance of the directions of the Hon'ble Supreme Court in Re: Inhuman Conditions in 1382 Prisons (W.P. (C) No. 406/2013)

to act as guidance.

10. Decision making process be transparent.
11. Consent and safety if prisoners, who are eligible for release to be kept in mind. No forced release.
12. Facilities of transportation and regular checkup, and medical treatment, where necessary without delay.
