

Balancing of Interests in Society Through The Protection of Rights of Accused in India

Eakramuddin & Abroo Khan¹, Dr. Ashish Kumar Singhal²

¹ School of law, Swami Vivekanand Subharti University, Meerut-250005 India

² School of law, Sharda University, Greater Noida-201306 India

Email: drashiah.singhal@gmail.com

Abstract: Balancing of interests in the society through the protection of rights of accused in India or balancing of societal interests and the rights of accused:- we are not unaware that crime rate is going up in our country for various reasons which need not be recounted here as other crimes and crime of rape recently accuse of well known Delhi rape case committed suicide during judicial custody leads some questions whether some rights of accused should be available and must be protected or not. Terrorism, drugs and organized crime have become so acute that special measures have become necessary to fight them not only at the national level but "also at the international level. We also take note of the fact that quite a number of policemen risk their lives in discharge of their duties and that they are specially targeted by the criminal and terrorist gangs. We recognize that in certain situations e.g., like the one obtaining in Kashmir today, a literal compliance with several legal and constitutional safeguards may not be practicable but we must also take note of and provide for the generality of the situation all over the country and not be deflected by certain specific, temporary situations. We must also take note of the fact that very often it is the poor who suffer most at the hands of Police.. Their poverty itself makes them suspects. This was -said, though from a different angle, by George Bernard Shaw. He said "poverty is crime". But nowadays, even middle classes and other well-to-do people, who do not have access to political power-wielders, also are becoming targets of Police excesses. We recognize that ensuring a balance between societal interest in peace and protection of the rights of the accused is a difficult one but it has to be done. We also recognize the fundamental significance of the Human Rights, which are implicit in Part III of our Constitution of India and of the necessity to preserve, protect and promote the Rule of Law which constitutes the Bedrock of our constitutional system.

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1. Introduction

Guidelines laid down by the Supreme Court.- The effort of the courts, and in particular of the Supreme Court over the last more than two decades has been to circumscribe the vast discretionary power vested by law in Police by imposing several -safeguards and to regulate it by laying down numerous guidelines and by subjecting the said power to several conditionalities. The effort throughout has been to prevent its abuse while leaving it free to discharge the functions entrusted to the Police. While it is not "necessary to refer to all of them for the purpose of this working paper, it would be sufficient if we refer to a few of them (which indeed reaffirm and recapitulate the direction and guidelines contained in earlier decisions.¹ The power of arrest and its exercise has been dealt with at length. It would be appropriate to refer to certain perceptive observations in the judgements." The horizon of human right is expanding. At the same

time, the crime rate is also increasing. Of late, this court has been receiving complaints about violation of human rights because of indiscriminate arrests. How are we to strike a balance between the two?

2. The Law on Arrest

A realistic approach should be made in this direction. The law of arrest is one of balancing individual rights, liberties and privileges, on the one hand, and individual duties, obligations and responsibilities on the other; of weighing and balancing the rights, liberties and privileges of the single individual and those of individuals collectively; of simply deciding what is wanted and where to put the weight and the emphasis; of deciding which comes first - the criminal or society, the law violator or the law abider; of meeting the challenge which Mr. Justice Cardozo so forthrightly met when he wrestled with a similar task of balancing individual rights against society's rights and, wisely held that the exclusion rule' was bad law, that society came first, and that the criminal should not go free because the constable blundered. The quality of a nation's civilization can be largely

¹ In *Joginder Kumar v. State of U.P.*

measured by the methods it uses in the enforcement of criminal law."

"To strike the balance. between the needs of law enforcement on the one hand and the protection of the citizen from oppression and in justice at the hands of the law-', enforcement machinery on the other is a perennial problem of statecraft." The pendulum over the years has swung to the right in para 21, at page 1033 of Law Commission of India's Consultation paper on Law Relating to arrest it has been observed:

"We have earlier spoken. of the conflicting claims requiring reconciliation:' Speaking pragmatically, there exists a rivalry between societal interest in effecting crime detection and constitutional rights which accused individuals possess. Emphasis may shift, depending on circumstances, in balancing these interests as has been happening in America Since Miranda ((1966) 334 US 436) there has been retreat from stress on protection of the accused and gravitation toward& society's interest in convicting law-breakers. Currently, the trend in the American jurisdiction according to legal journals is that' respect for (constitutional) principles is eroded when they leap their proper bounds to interfere with the legitimate interests of society in enforcement of its laws.Our constitutional perspective has, therefore, to be relative an cannot afford to be absolutist, especially when torture technology, crime escalation and other social variables affect the application of principles in: producing humane justice."

The National Police Commission in its Third Report referring to the quality of arrests by the Police in India mentioned power of arrest as one of the chief sources of corruption in the police. The report suggested that, by and large, nearly 60% of the arrests were either unnecessary or unjustified and that such unjustified police action accounted for 43.2% of the expenditure of the jails. The said Commission. in its Third Report at page 31 observed thus:

"It is obvious that a major portion of the arrests were connected with very minor prosecutions and cannot, therefore, be regarded as quite necessary from the point of view of crime prevention. Continued detention in jail of the persons so arrested has also meant avoidable expenditure on their maintenance. In the above period it was estimated that 43.2 per cent "Of the expenditure in the connected jails was over such prisoners only who in the ultimate analysis need not have been arrested at all". (The figures given in the Report of the National Police Commission are more than two decades. old. Today, if anything, the position is worse.)

The Royal Commission suggested restrictions on the power of arrest on the basis of the 'necessity of principle'. The two main objectives of this principle

are that police can exercise powers only in those cases in which it was genuinely necessary to enable them to execute their duty to prevent the Commission of offences, to investigate crime. The Royal Commission was of the view that such restrictions would diminish the use of arrest and produce more uniform use of powers. The Royal Commission Report on Criminal Procedure - Sir Cyril Philips, at page 45 said:

"...We recommend that detention upon arrest for an offence should continue only on one or more of the following criteria-

- (a) the person's unwillingness to identify himself so that a summons may be served upon him;
- (b) the need to prevent the continuation or repetition of that offence;
- (c) the need to protect the arrested person himself or other persons or property;
- (d) the need to secure or preserve evidence of or relating to that offence or to obtain such evidence from the suspect by questioning him; and
- (e) the likelihood of the person failing to appear at court to answer any charge made against him."

The Royal Commission in the above-said Report at page 46 also suggested: "To help to reduce the use of arrest we would also propose the introduction here of a scheme that is used in Ontario enabling a police officer to issue what is called an 'appearance notice'. That procedure can be used to obtain attendance at the police station without resorting to arrest. provided a power to arrest exists, for example to be finger-printed or to participate in an identification parade. It could also be extended to attendance for interview "at a time convenient both to the suspect and to the police officer, investigating the case.."

In India, Third Report of the National Police Commission at page 32 also suggested: "...An arrest during the investigation of a cognizable case may be considered justified in one or other of the following circumstances:

- The case involves a grave offence like murder, dacoity, robbery, rape etc., and. it is necessary to arrest the accused and bring his movements under restraint to infuse confidence among the terror stricken victims.
- The accused is' likely to abscond and evade the processes of law.
- The accused is given to violent behaviour and is likely to commit further offences unless his movements are brought under restraint.
- The accused is a habitual offender and unless kept in custody he is likely to commit similar offences again.

It would be desirable to insist through departmental instructions that a police officer making an arrest should also record in the case diary the reasons *for* making the arrest, thereby deifying his conformity to the specified guidelines....."

It would equally be relevant to quote para 24, which read as follows: "The above guidelines are merely the incidents of personal liberty guaranteed under the Constitution of India. 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. The justification *for* the exercise of it is quite another. The Police Officer must be able to justify the arrest apart from his power to do so. Arrest and detention in police. lock-up of a person can cause incalculable harm to the reputation and self-esteem of a person. No arrest can. be made in a routine manner on a mere allegation of commission of an offence made, against a person. It would be prudent *for* a Police Officer in the interest of protection of the constitutional rights of a citizen and perhaps in his own interest that no arrest should be made without a reasonable satisfaction reached after some."²

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. The recommendations of the Police - Commission merely reflect the constitutional concomitants of the fundamental right to personal liberty and freedom. A person is not liable to arrest merely on the suspicion of complicity in an offence. There must be some reasonable justification in the opinion of the officer effecting the arrest that such. arrest is necessary and justified. Except in heinous offences, an arrest must be avoided if a police officer issues notice to person to attend the Station House and' not to leave Station without permission would do."³

The ultimate directions given, contained in paras 26 to 29, as follows:

"These rights are inherent in Articles 21 and 22(1) of the Constitution and require to be recognized and scrupulously protected. For effective enforcement of these fundamental rights, we issue the following requirements:

An arrested person being held in custody is entitled, if he so requests to have one friend relative or other person who is known to him or likely to take an. interest in his welfare told as far as is practicable

that he has been arrested and where 'he is being detained.

The Police Officer shall inform the arrested person when he is brought to the police station of this right. An entry shall be required to be made in the Diary as to who was informed of the arrest. These protections from power must be held to flow from Articles 21 and 22(1) and enforced strictly. It shall be the duty of the Magistrate, before whom the arrested person is produced, to satisfy himself that these requirements have been complied with. The above requirements shall be followed in all cases of arrest till legal provisions are made in this behalf, These requirements shall be in addition to the rights of the arrested persons found in the various Police Manuals. These requirements are not exhaustive. The Directors General of Police of all the States in India shall issue necessary instructions requiring due observance of these requirements. In addition, departmental instruction shall also be issued that a police officer making an arrest should also record in the case diary, the reasons for making the arrests."

3. Case Law

The next, decision which may be usefully referred to is D.K. Basu v. State of West Bengal.⁴ It would be sufficient if we quote paras 36 to 40 which contain the final directions issued in the said decision. They read as follows:

"We, therefore, consider it appropriate to issue the following requirements to be followed in all cases of arrest or detention, till legal provisions are made in - that behalf, as preventive measures:

1. The police personnel carrying out the arrest and handling the interrogation of the arrestee should bear accurate, visible and clear identification and name tags with their designations. The particulars of all such police personnel who handle interrogation of the arrestee must be recorded in a register.
2. That the police officer carrying out the arrest of the arrestee shall prepare a memo of arrest at the time of arrest and such memo shall be attested by at least one witness, who may be either a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. It shall also be countersigned by the arrestee and shall contain the time and date of arrest.

² Law Commission of India, Consultation Paper on law Relating to Arrest (Annexure III Para 10).

³ Ibid (Para 11)

⁴ AIR

3. A person who has been arrested or detained and is being held in custody in a police station or interrogation center or other lock-up, shall be entitled to have one friend or relative or other person known to him or having interest in his welfare being informed, as soon as practicable, that he has been arrested and is being detained at the particular place unless the attesting witness of the memo of arrest is himself such a friend or a relative of the arrestee.
4. The time, place of arrest and venue of custody of an arrestee must be notified by the police where the next friend or relative of the arrestee lives outside the district or town through the Legal Aid Organisation in the District and the police station of the area concerned telegraphically within a period of 8 to 12 hours after the arrest.
5. The person arrested must be made aware of this right to have someone informed of his arrest or detention as soon as he is put under arrest or is detained.
6. An entry must be made in the diary at the place of detention regarding the arrest of the person which shall also disclose the name of the next friend of the person who has been informed of the arrest and the names and particulars of the police officials in whose custody the arrestee is.
7. The arrestee should, where he so requests, be also examined at the time of his arrest and major and minor injuries, if any, present on his/her body, must be recorded at that time. The "Inspection Memo" must be signed both by the arrestee and the police officer effecting the arrest and its copy provided to the arrestee.
8. The arrestee should be subjected to medical examination by a trained doctor every 48 hours during his detention in custody by a doctor on the panel of approved doctors appointed by Director, Health Services of the concerned State or Union Territory, Director, Health Services should prepare such a panel for all, Tehsils and Districts as well.
9. Copies of all the documents including the memo of arrest, referred to above, should be sent to the Ilaqa Magistrate for his record.
10. The arrestee may be permitted to meet his lawyer during interrogation though not throughout the interrogation.
11. A police control room should be provided at all district and State headquarters, where information regarding the arrest and the place of custody of the arrestee shall be communicated by the officer causing the arrest, within 12 hours of effecting the arrest and at the police

control room it should be displayed on a conspicuous police board.

Failure to comply with the requirements hereinabove mentioned shall apart from rendering the concerned official liable for departmental action, also render him liable to be punished for contempt of Court and the proceedings for contempt of Court may be instituted in any High Court of the country, having territorial jurisdiction over the matter.

The requirements, referred to above flow from Articles 21 and 22(1) of the Constitution and need to be strictly followed. These would apply with equal force to the other governmental agencies also to which a reference has been made earlier.

These requirements are in addition to the constitutional and statutory, safeguards and do not detract from various other directions given by the Courts from time to time in connection with the safeguarding of the rights and dignity of the arrestee.

The requirements mentioned above shall be forwarded to the Director General of Police and the Home Secretary of every State/Union Territory and it shall be their obligation to circulate the same to every police station under their charge and get the same notified at every police station at a conspicuous place. It would also be useful and serve larger interest to broadcast the requirements on the All India Radio besides being shown on the National Network of Doordarshan, and by publishing and distributing pamphlets in the local language containing these requirements for information of the general public. Creating awareness about the rights of the arrestee would in our opinion be a step in the right direction to combat the evil of custodial crime,⁵ and bring in transparency and accountability. It is hoped that these requirements would help to curb, if not totally eliminate, the use of questionable methods during interrogation and investigation leading to custodial commission of crimes."

Need for providing statutory safeguards to prevent abuse of power of arrest. Notwithstanding the above decisions we may legitimately presume that the directions and guidelines contained were duly published by respective Directors General of Police of all the State and were brought to the notice of all the police officers - the complaints of abuse of power of arrest still continue unabated. Several instances of such exercise have come to the notice of each of us and to the notice of all responsible persons of the society. The Law Commission, therefore, thought that something more needs to be done to prevent the abuse and misuse of the power of arrest while at the

⁵ Ibid at para 14.

same time not hurting the societal interest in peace and law and order. Indeed, both the decisions referred to above say expressly that the directions and guidelines issued/laid down therein are to be followed "till legal provisions are made in that behalf." It is, therefore, necessary to make appropriate legal provisions not only incorporating the said guidelines/directions but also making such changes in law as may be necessary to prevent abuse/misuse of the said power while at the same time ensuring that interest of the society in maintenance of peace and law and order is not jeopardized.

4.Recommendation of the Law Commission of India Relating to Amend the Code

The Code of Criminal Procedure classifies the offences mentioned in the IPC into four broad categories, namely, (1) bailable and non-cognizable offences; (2) bailable and cognizable offences; (3) non-bailable cognizable offences and (4) non-bailable- noncognizable offences (e.g., sections 466, 467 (first part), 476, 477 and 505 (first part) etc.), (There is a fifth category of offences e.g., sections 116 to 120, where the cognizability and bailability/non-bailability depends upon the nature of the main crime, This category travels along with the main crime and 'will be dealt with accordingly.) In the light of the recommendations of the Third Report of National Police Commission and the ratio and the spirit underlying the decisions in Joginder Kumar and D.K. Basu and the decisions of the Supreme Court on the significance of personal liberty guaranteed by Article 21, a question arises whether would it not be advisable to amend the Criminal Procedure Code " providing that:⁶

No person shall be arrested for offences which are at present treated as bailable and non-cognizable; in other words, a court shall not issue an arrest warrant in respect of these offences. Only a summons to be served through a court process-server or by other means (but not through a policeman) may be issued. For this purpose, the very expression "bailable" may have to be changed. The expression "bailable" implies an arrest and an automatic bail by the police/court. There appears no reason to arrest a person accused of what is now categorized as bailable- non-cognizable offences. It is true that in case of non-cognizable offences, police cannot arrest without warrant as would be evident from clause (a)

of section 41 but there are other clauses in section 41 which may empower this. For example, clause (b) provides that any person found in possession of "any implement of house breaking" is liable to be arrested unless he proves that there is lawful excuse for such possession. Instead of calling/categorizing them as "bailable offences", they can simply be categorized as non-cognizable offences and it must be expressly provided that no arrest shall be made by the police in case of these offences and no court shall issue an arrest warrant either. The court may issue a summons to be served in the manner indicated above alongwith a description of the offences, for e-eren0&. ' 2(2) In respect of offences at present treated as bailable and cognizable no arrest shall be made, but what may be called an "appearance notice" be served upon the person directing him to appear at the Police Station or before the magistrate as and when called upon to do so, unless there are strong grounds to believe which should be reduced into writing and communicated to the higher Police officials as well as to the concerned magistrate that the accused is likely to disappear and that it would be very difficult to apprehend him or that he is a habitual offender. (In case of the latter ground, material in support of such ground shall be recorded.) Accordingly, the expression "bailable" shall be omitted in respect of these offences and they should be termed simply as cognizable.

General principles to be observed in the matter of arrest.- The following general principles shall be observed in the matter of arrest for offences (other than those offences for which the punishment is life imprisonment or death but not offences where the punishment can extend up to life imprisonment) shall be followed:-

Arrest shall be effected (a) where it is necessary to arrest the accused to bring his movements under restraint to infuse confidence among the terror-stricken victims or where the accused is likely to abscond and evade the process of law; (b) where the accused is given to violent behaviour and is likely to commit further offences unless his movements are brought under restraint or the accused is a habitual offender and unless kept in custody likely to commit similar offences again; (c) where the arrest of the persons is necessary to protect the arrested person himself; or (d) where such arrest is necessary to secure or preserve evidence of or relating to the offence; or (e) where such arrest is necessary to obtain evidence from the person concerned in an offence punishable with seven years or more, by questioning him.

In this connection, reference may be made to section 157 of Code of Criminal Procedure which says that where a police officer proceeds to

⁶ Law Commission of India Consultation Paper on Law Relating to Arrest Annexure iii Part III Proposal to Amend The code of Criminal Procedure, 193, p. 19.

investigate the facts and circumstances of a case (on receiving information about commission of an offence), he shall arrest the offender, only where it is "necessary". Sub section (1) of section 157, insofar as relevant reads as follows:

"If, from information received or otherwise, an officer in charge of a police station has reason to suspect the commission of an offence which he is empowered under section 156 to investigate, he shall forthwith send a report of the same to a Magistrate empowered to take cognizance of such offence upon a police report and shall proceed in person, or shall depute one of his subordinate officers not being below such rank as the State Government may, by general or special order, prescribe in this behalf, to proceed, to the spot, to investigate the facts and circumstances of the case, and, if necessary, to take measures for the discovery and arrest of the offender...."

5. Discussion

Merely on suspicion of complicity in an offence. no arrest to be made The law must provide expressly, by amending section 41 and other relevant sections, if any, that merely on the suspicion of complicity" in an offence, no person should be arrested. The Police Officer must be satisfied prima facie on the basis of the material before him.that such person is involved in a crime/offence, for which he can be arrested without a warrant. In this connection, reference maybe made to the decision of the European Court of Human Rights in Fox., Campbell and Hartley v. U.K. delivered on 30th August, 1990 declaring that section 11 of Northern Ireland (Emergency Provisions) Act, 1978 is violative of Article 5(1) of the European Convention on Human Rights. The section empowered a police officer to arrest a person if he is "suspected of being a terrorist". The Court (by majority) held that mere suspicion, however bona fide held, cannot be a ground for arrest. Pursuant to the decision, the aforesaid words were replaced by the words "has been concerned in the commission, preparation or instigation of acts of terrorism". This decision is in accord with the modern concept of human rights, which are implicit in Part III of our Constitution.

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Correspondence To:

Dr. A.K. Singhal,
School of law, Sharda University,
Greater Noida, Uttar Pradesh, India
Email: drashiah.singhal@gmail.com

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