

# Arrested persons in common law countries law constitutional administrative essay

Law



RESEARCH PAPER ON ARREST AND RIGHTS OF ARRESTED PERSONS IN  
COMMON LAW COUNTRIES. C: UsersSharadDesktop\ili-logo. jpg

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## Introduction

The personal liberty being the cornerstone of social structure of a country the legal provisions relating to arrest have special significance and importance in legal system of common-law countries. Ever since classical times jurists have expressed concern for the protection of liberty of an individual. The constitution of common law countries provides for an liberal democratic ideology which means that the liberty of the individual should be given paramount consideration under such circumstances it becomes necessary to encompass a balance between the constitutional objective and compelling state interest of common-law countries. On global platform also the right and liberty of individual has been given paramount consideration. The United Nations programme on protection and promotion of individual liberty is based upon realisation that, the individual right should be protected by the ambit of rule of law. In this era of human rights, where a lot of prominence is given to the fundamental rights of individuals, where every act of state is tested on the touchstone of the constitution, where the state is not considered merely to be a police state, the acts of enforcement agency of the state particularly the police is time and again questioned. The police force is such an instrument of the state which is shouldered with the responsibility of prevention and detection of crime in order to maintain the situation of law and order in the state.[1]According to Professor Sayre : " All criminal law is a compromise between two fundamentally conflicting interests- that of the public which demands restraints of all who injure or menace the social well being and that of the individual who demand maximum liberty and freedom from interference".[2]In this process of

compromise a mechanism has to be developed which strikes a balance between the two conflicting interests. It is mainly because of the judicial precedents that arrest laws in common law countries has been rationalised. Mostly the criminal administration system has ignored such safeguards and the judiciary took cognizance of such ignorance of the rights of arrested persons and the manner in which the arrests take place in the country. So there have been many later declarations and statutory changes which reaffirm the faith in the rights of arrested persons. The endeavour is to look into the substantive changes brought by Common law countries in the area of arrest through amendments and determine various rights of arrested persons, enshrined in statutes and declared by lucid pronouncements. The common law countries such as United states of America, India and United Kingdom have given paramount consideration to encompass a balance between the liberty of individual as constitutional objective and compelling state interest as power of arrest. American convention of human rights, 1969(ACHR), Article 5(2) to 5(4) the European convention on human rights, 1950(ECHR) prohibit the arbitrary use of power to make arrest and prescribe the procedure to be followed on causing arrest. On other hand Article 21 of constitution of India states that no person shall be deprived of his life and personal liberty except according to procedure established by law. In Article 22 there is provision for protection against arrest and detention. In U. S. A. the Bill of Rights in section 23 provides the right of arrested person and individual liberty. In United Kingdom public order act of 1994 clearly mention the arrest procedure and individual liberty. In India the prime importance of criminal procedure has to be borne in mind, as it is the procedure that spells

much of the difference between rule of law and rule by whim and caprice.

[3]The Criminal Procedure Code, 1973 control and regulates the working of the machinery set up for the investigation and trial of the offences. On one hand it has to give adequately wide powers to make the investigative and adjudicatory process strong, effective and efficient, and on the other hand it has to take precautions against errors of judgement and human failures and to provide safeguards against probable abuse of powers by the police or judicial officers.[4]As the law of criminal procedure is complementary of the substantive criminal law, its failure would seriously affect the same which in turn would considerably affect the protection that it gives to the society.[5]In United States of America when police has reasonable believe that a person has committed a serious crime, the police arrest wrongdoer, and hold him in a police station or jail pending a judicial bail determination or an arraignment. In R vs. Goodwin[6]U. S. A Supreme Court has given proper guideline on arrest and liberty of individual. In the united states of America, the Miranda warning is a warning given by the arresting officer to the arrestee in custody, or in a custodial situation, before they are asked question relating to the commission of crime and effectively tell that the arrestee has the right to remain silent or right to refuse to answer any question which may lead to self incrimination[7]. In U. S. A. right to remain silent is also called " Miranda rights". In U. S. A., self incriminating statement by arrested person will not constitute any admissible evidence unless the arrested person was advised of his " Miranda rights" and made a knowing, intelligent and volunteer of those rights. Democratic and accountable policing is one of the hallmarks of democracy. Police has a duty as well as

legitimate right to arrest, interrogate and effectively prosecute the offenders. As the well known doctrine is that liberty and security of individual must yield to that of community and the state. The law of arrest is an attempt to strike the balance between the conflicting claims of individual liberty and maintenance of order in society. However the various reports of common law countries gives an account of increasing tendency of the police and other enforcement agencies to resort to dehumanising practices to make arrest. Such police practices are gravely affecting the credibility of rule of law. The enforcement and compliance of the right of arrested persons is a major issue to be discussed and broached in this research paper. Though the law related to right of arrested person has been made on paper its implementation aspect is nil. It's a myth that greater exercise of power of arrest largely contributes towards an effective crime control system. However researchers have revealed that there is little scientific evidence of clear relationship between wide arrest powers and crime -control objectives. That is why in many common law systems of the world the power of arrest is sparingly deployed.[8]. In most jurisdictions arrest and interrogation is neither an automatic repose to the detection of a suspect, nor even necessarily the most common way in which suspects are dealt with. Procedures in many countries exist for minor offences to be dealt with by alternative means, such as the use of summons or for voluntary attendance at a police station for questioning (in which case if the suspect is charged with an offence, an arrest is often a formality immediately followed by pre-trial release).[9]

## **Chapter 1 - Definition of Arrest and law related to its procedure**

Stroud's Judicial Dictionary<sup>[10]</sup> defines arrest in its simplest form as, " Arrest is when one is taken and restrained from his liberty". Arrest means apprehension, restraint or deprivation of one's personal liberty.<sup>[11]</sup> Arrest is the act of being taken into custody to be formally charged with a crime. In a constitutional sense, an arrest is a seizure of the person.<sup>[12]</sup> Black's law dictionary defines arrest as a seizure or forcible restraint. It is the taking or keeping of a person in custody by legal authority especially in response to a criminal charge.<sup>[13]</sup> The word arrest has not been defined under the code. It has been derived from the French word " arreter" meaning " to stop or stay" and signifies a restraint on the person. Arrest means the total restraint and complete deprivation of liberty of a person by legal authority or at least, by apparent legal authority.<sup>[14]</sup> It has also been defined as " the apprehension and detention of a person suspected of criminal activities".<sup>[15]</sup> The word arrest simply means restraint of a man's person, obliging him to be obedient to the law. In other words arrest is a restraint of the liberty of a person in order to compel obedience to the order of the court of Justice to prevent the commission of a crime or to ensure that a person charged with or suspected of a crime may be forthcoming to answer it.<sup>[16]</sup> Every compulsion or physical restraint is not arrest but when the restraint is total and the deprivation of liberty is complete that would amount to arrest. If a person suppresses or overpowers the voluntary action of another and detains him in a particular place or compels him to go in a specific direction, he is said to imprison that person. If such detention or imprisonment is in pursuance of any legal authority or apparent legal authority, it would amount to arrest.<sup>[17]</sup> An arrest

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consists of the actual seizure or touching of the person body with a view to his detention. The mere pronouncing of words of arrest is insufficient unless the person sought to be arrested submits to the process.[18]When a person is confined or kept in the police station or his movements are restricted within the precincts' of the police station, he can be said to be arrested.

[19]Arrest means a physical restraint put on a person as a result of allegation of accusation that he has committed a crime or an offence of quasi criminal nature.[20]Preventing a person from making his movements and from moving according to his will amount to arrest of such person.

[21]The word 'arrest' thus, when used in its ordinary and natural sense, means the apprehension or restraint of a person, or the deprivation of a person's liberty. The question whether the person is under arrest or not depends not on the legality of the arrest, but on whether the person has been deprived of personal liberty of movement. When used in the legal sense in the procedure connected with criminal offences, an arrest consists in the taking into custody of another person under authority empowered by law, to be held or detained to answer a criminal charge or to prevent the commission of a criminal or further offence. The essential elements to constitute an arrest in the above sense are that there must be an intention to arrest under the authority, accompanied by a seizure or detention of the person in the manner known to law, which is so understood by the person arrested.[22]An Arrest is the act of depriving person of his or her liberty usually in relation to the purported investigation prevention of crime and presenting the arrestee to a procedure as part of criminal justice system[23]. The word arrest has no where defined in the statutory provisions however

the term " arrest" according to oxford dictionary means " an act of something stopping or being interrupting" however according to one of the renowned scholar R. V. Kelkar the term " arrest" means the deprivation of a person of his liberty by legal authority or at least by apparent legal authority. Therefore the term arrest in broader connotation means depriving of a person from his personal liberty in accordance with the procedure established by law. The general assembly and other organs of united nations have promulgated more than 30 instruments followed by common law countries on liberty of individual. The international convents like universal declaration of human right and International covenants on civil and political rights, 1969 have contain sufficient safeguard against misuse of power to make arrest. In India Chapter V of code of criminal procedure, 1973 contains provision when police may arrest, arrest how made and right of arrested persons. The Supreme court of India in D. K Basu v. State of west Bengal[24]has laid down several guidelines to be followed while arrest is to be made.

## **Chapter 2- Law Relating to Arrest in various common law countries**

The common law countries like united states of America, India and united kingdom have given paramount consideration to encompass a balance between the liberty of individual as constitutional objective and compelling state interest as power of arrest. In this Chapter law relating to arrest in various common law countries has been discussed.

## United Kingdom

In United Kingdom the power of arrest had formerly many sources, both statutory and at common law. With the passing of the Police and Criminal Evidence Act 1984, most powers of arrest have been codified.[25] In English law, whether a person has been arrested does not depend on the legal authority of the person enforcing the arrest rather it depends upon whether he has been deprived of his liberty to go where he pleases.[26] Whether an arrest is lawful depends on whether the police officer or civilian exercising the arrest is acting within the scope of her or his powers.[27] Upon arrest, a person must ordinarily be taken to a police station as soon as is practicable, but may be released on bail.[28] Arrests under English law fall into two general categories - with and without a warrant - and then into more specific subcategories. Regardless of what power a person is arrested under, they must be informed that:[29] they are under arrest (as soon as is practicable after the arrest), and the ground for the arrest (at the time of, or as soon as is practicable after, the arrest) If such information is not given the arrest is unlawful. An arrest is still lawful even if the subject escapes custody before the fact he/she is under arrest and the grounds can be explained to him. When we talk about the rights of arrested person in the United Kingdom a person must be told that he is under arrest,[30] and "told in simple, non-technical language that he could understand, the essential legal and factual grounds for his arrest".[31] A person must be 'cautioned' when being arrested or subject to a criminal prosecution procedure unless this is impractical due to the behaviour of the arrestee i. e. violence or drunkenness. The caution required in England and Wales states: You do not have to say anything, but it

may harm your defence if you do not mention when questioned something which you later rely on in court. Anything you do say may be given in evidence.[32]In United Kingdom courts have permitted a limited power to detain a person for the purpose of investigating the crime. The Police and Criminal Evidence Act 1984, deals with Arrest. Section 24 of Police and Criminal Evidence Act provides for Arrest without warrant in arrestable offence. Section 25 of the Act provides for general arrest condition. Where a constable has reasonable grounds for suspecting that any offence which is not an arrestable offence has been committed or attempted, or is being committed or attempted, he may arrest the relevant person if it appears to him that service of a summons is impracticable or inappropriate because any of the general arrest conditions is satisfied. In this section " the relevant person" means any person whom the constable has reasonable grounds to suspect of having committed or having attempted to commit the offence or of being in the course of committing or attempting to commit it. As section 28 of Police and Criminal Evidence Act 1984, provides that persons under arrest must be given reasons for the arrest. This ensures that the police think about the reasons, and it also allows an early explanation of innocence to be offered.

## **UNITED STATES OF AMERICA**

The law of arrest in the United States, the advent of Fourth amendment has made lot of changes and amelioration in the rights of arrested persons.

United States law recognizes the common law arrest under various jurisdictions. The Fourth Amendment to the American Constitution states in part " the right of the people to be secured in their persons against

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unreasonable searches and seizures shall not be violated".[33]Under the American concept the traditional definition of arrest is the deprivation of a person's liberty by a legal authority. In *Terry v. Ohio*[34]the American Supreme Court has made it clear that every detention of citizen by police officer need not be justified by probable cause. A pre-detention of a suspect to obtain his fingerprint would be permitted without full and probable cause to arrest. But in *Payton v. New York*[35]the American Supreme Court has declared that arrest warrant is required to make a non-emergency arrest of a suspect of his house. Based on *Miranda v. Arizona*[36], police now must inform the detainee of his Miranda Rights. A Miranda warning is required only when a person has been taken into custody (i. e. is not free to leave) and is being interrogated. This warning tells the detainee that they have the right to be silent, the right to have counsel present during questioning, and warns them that whatever they say can be used against them. The common law requirement that police must possess a warrant to arrest a person, unless they observe a crime in progress or have probable cause to believe that the person committed a felony, was broadened in the latter part of this century with new exceptions allowing police to make more detentions and arrests for questioning[37]. American convention of human rights, 1969(ACHR), Article 5(2) to 5(4) the European convention on human rights, 1950(ECHR) prohibit the arbitrary use of power to make arrest and prescribe the procedure to be followed on causing arrest. On other hand Article 21 of constitution of India states that no person shall be deprived of his life and personal liberty except according to procedure established by law. In Article 22 there is provision for protection against arrest and detention. In U. S. A. the Bill of Rights in section

23 provides the right of arrested person and individual liberty. In United Kingdom public order act of 1994 clearly mention the arrest procedure and individual liberty. States by official violation of due process or by the enactment of unjust laws negate the personal liberty of individual. Arbitrary arrest, detention and punishment are practice by many states. There are prohibition of such conduct which are essential to human dignity and freedom and thereby make criminals of otherwise innocent citizens.. Latin American states such as argentina, Chili, Paraguay officially condoned or private death squads eliminate political dissidents. In the most totalitarian world personal liberty of citizens is in constant jeopardy.

### **Arrest Procedure in Australia**

Australia one of the common law country which value personal liberty above all else. Australia shares legal and political traditions with other democratic nations for providing a large measure of protection of personal liberty. In Australia, the common law, by virtue of statute, offers the citizen a wide range of safeguards and ensure that any citizen is not deprived of personal liberty except in accordance with the law. Therefore the personal liberty of an individual should not be violated except upon conviction after a full and fair trial. But, in order to bring any wrong-doers to justice and to ensure the safety of citizens, the power of arrest is conceded to police officers. Citizens has also have power but it should be exercised in defined and limited circumstances. According to statues A police officer has wider powers than a citizen. No arrest can be made without a warrant from a competent judge but police has power to arrest without warrant where treason, felony or a breach of the peace has been committed or is being attempted or is

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reasonably apprehended. A citizen's can arrest any wrong doer where such acts have actually taken place, whereas a police officer can use his power on reasonable suspicion. Under the common law without warrant no arrest for a misdemeanour is possible. However, this prohibition has been relaxed somewhat in certain general and special statutes. In cases where a warrant is necessary for arrest, the warrant must be sufficiently specific and is issued only when the competent court is satisfied of the reasons for arrest. Other safeguards is also available to individual in relation to arrest. Police officers must inform the reasons for arrest to suspects and the failure to give reasons of arrest can make the police officer liable to damages for false imprisonment. Non-disclosure of reasons can also justify resistance to arrest. Those who execute an arrest are also enjoined from using unnecessary force on suspects.

## **Detention**

The basic principle regarding the power given to police officer to arrest for bringing a suspect before a court of law. A time limit often as short as 24 hours is specified to produce the suspect in court as soon as practicable. This rule shows that after arrest, a person cannot be detained for any other purpose. In Australia a person cannot be arrested only for the purpose of investigation. In *Bales v Parameter*[38]The Apex Court of Australia has stated that Detention for longer periods is not possible without judicially determination. The court can grant longer period detention in the case of remand, pending trial or imprisonment upon conviction. In the course of actual or pretended investigation of crimes physical abuse of persons that is officially perpetrated generally occurs. National and international

organisations concerned with human rights, continue to record countless instances of torture and abuse in most totalitarian states as well as in some other states where democratic traditions are weak. In western democracies instances of abuse on arrest procedure are rare, mainly due to legal principles, freedom of speech and expression, reporting of investigation and the respect for the rule of law. Common law principles provides protection and statues provides restrictions against physical harm in Australia. The common law provides only limited right to forcibly search a person after arrest, and this right is not available prior to arrest. The police can use his power only when the conduct of the arrestee gives rise to a reasonable suspicion that he conceals weapons or is likely to cause harm to himself or to others. Restraining a person with handcuffs etc is not justified in common law except only in the particular circumstances of the case. The common law also prohibits photographing or forcible finger printing. Involuntary confessions as evidence is not admissible it is one of the most important safeguards against the abuse of power. If any confession is given by threat, fear of prejudice or hope of advantage exercised or held out by a person in authority confession is considered involuntary. The court has the power to exclude voluntary confessions if it considers that they have been obtained improperly. What is improper methods it is decided by court it may include questioning after illegal arrest, delaying the production of the suspect, or even unreasonable insistence in interrogation. The rules regarding the suspects to be advised of their right to remain silent on any question asked by police personnel and to be cautioned that the statements they make may



be used against them at a subsequent trial is protection against forcible extraction of incriminating evidence.

### **Chapter 3 - Right Of Arrested Person in common law countries**

Personal liberty means not only the freedom from unlawful physical restraint or harm but also the freedom from arbitrary interference with one's privacy and lawful belongings, which, in practice, means the freedom from arbitrary search and seizure of personal belongings. " A myriad of common law and statutory rules protect these rights and a comprehensive survey of the law on this subject is outside the scope of this publication. It is proposed to analyse the principal classes of safeguards necessary for the protection of personal liberty"[39]. However, it must be appreciated that personal liberty can be protected only by a combination of principles, each of which is indispensable to liberty. Freedom from arbitrary arrest, detention or punishment is of limited value if the law penalises ordinary moral conduct or non-violent political conduct. Freedom is ineffective without effective remedies for infringement or no safeguards to ensure fair trials. Procedural and evidentiary safeguards have no value unless there is an impartial and independent judiciary. The operation of these principles guarantee the effective enjoyment of personal freedom. Right of arrested person in some common law countries are following.

#### **United Kingdom**

In United Kingdom At the time of arrest, the police may interview or interrogate the arrestee only at the police station. They must " caution" the arrestee, either immediately before or immediately after the arrest, and <https://assignbuster.com/arrested-persons-in-common-law-countries-law-constitutional-administrative-essay/>

police can do without any arrest being made if they suspect the defendant may have committed a crime. Whenever a person not under arrest is cautioned, he must be informed at the same time that he is not under arrest and is not duty bound to remain with the officer[40]. In England, whenever an arrest is made without a warrant, the arrested person has a right to be informed not only that he is being arrested but also of the grounds for the arrest.[41] It would be useful to cite the case of *Christie v. Leachinsky*[42] where the House of Lords held that an arrest without a warrant can be justified, either by a policeman or by a private person, only if it is an arrest on a charge which is made known to the person arrested unless the circumstances are such that the person arrested must know the substance of the alleged offence or where he forcibly resists arrest. Thus, this principle of law where the arrested person has the right to be informed of the grounds for his arrest appears to be well established and hence, merits considerable consideration. A person when arrested, " shall be taken to a police station by a constable as soon as practicable after the arrest[43]." The police may not do or say anything with the intention of dissuading a person in detention from obtaining legal advice. The arrestee must also be informed of his right to independent legal advice free of charge. The police in England do not ordinarily carry firearms. They may sign out firearms from the police station if they will be making what their superiors view as a potentially dangerous arrest. For most arrests, however, guns are not carried. Handcuffs usually are not used. Europe generally views the use of handcuffs and manacles as barbaric and utterly unnecessary in the vast

majority of arrests. The accused usually is simply told he or she is under arrest and is directed to enter the police car.

## **CANADA**

The Canadian Charter of Rights and Freedoms, which is part of Canada's constitution, sets out the rights that individuals have when they have been arrested. Once any person is arrested, he has right to speak to a lawyer, and the police must advise of this right as soon as possible. The police in duty to tell the arrested person about Legal Aid and right to free legal services[44]. If person wish to contact a lawyer, the police must provide him a telephone[45]. The police must also stop questioning until have been given an opportunity to contact a lawyer. Arrested person have the right to speak to a lawyer in private[46]. Individual have the right to be informed promptly of the reason for his arrest. If any person is arrested, he has the right to remain silent. This means that he do not have to answer any questions asked by the police.

## **INDIA**

The Constitution of India provides for the rights of the arrested persons. In the present paper some of the prominent rights provided in the code of Criminal Procedure will be discussed at length. These rights are discussed below.

### **Right of arrested person to meet an advocate of his choice during interrogation**

The code of criminal procedure now explicitly provides that when any person is arrested and interrogated by the police, he shall be entitled to meet an

advocate of his choice during interrogation, though not throughout interrogation.[47]Cooley says in his book, A Treatise on Constitutional Limitations[48], " Perhaps the most important privilege of the person accused of crime, connected with his trial, is to be defended by the counsel. From very early days a class of men who have made the laws of their country their special study, and who have been accepted for the confidence of the court in their learning and integrity, have been set apart as officers of the court. Their special duty was to render aid to the parties and the court, in the application of laws to legal controversies.[49]The right to consult a legal practitioner starts right from the day of arrest was held long back in Motibhai v. State of Rajasthan.[50]The right arises as soon as a person is arrested. [51]This newly recognised statutory right cannot be studied ignoring A. 22 of the constitution. Krishna Iyer J., in Nandini Satpathy[52]said " The spirit and sense of Art. 22(1) is that it is fundamental to the rule of law that the services of a lawyer be available for consultation to any accused person under circumstances of near custodial interrogation".[53]

## **Right to know the grounds of arrest**

The moment a person is arrested, the most obvious question that will arise in his mind is ' Why?' After a while, once the initial shock of the arrest subsides, the foremost question will be ' How can I get out? Thus, Section 50 of the Code specifically provides that when a police officer arrests a person without a warrant, he must forthwith communicate to him the full particulars of the offence for which he is arrested or other grounds for arrest.[54]This Section also provides that when a police officer arrests any person not accused of a non-bailable offence without a warrant, i. e. in a bailable offence, he shall

inform the person so arrested of his entitlement to be released on bail so that he may arrange for bail and for sureties, if required, on his behalf. Thus, under this Section the arresting officer is bound to inform the arrested person the grounds for his arrest, including the full details of the offence for which he has been arrested and whether or not he is entitled to bail. A corollary to this principle is that if a subordinate officer is deputed by a senior officer to arrest a person, then before making the arrest, he shall notify 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.[55] If an arrest is made without complying with these requirements, then the arrest will be deemed illegal and will make the arresting officer liable to all remedies that are available in the case of an illegal arrest.[56] It is also important to note that this Section is in conformity with Article 22(1) of the Constitution, which provides that no person on arrest shall be detained without being informed of the grounds for such arrest, as soon as possible. In *re Madhu Limaye*[57], the Supreme Court held that the requirements of Article 22(1) are meant to afford the earliest opportunity to the arrested person to remove any mistake, misapprehension or misunderstanding in the minds of the arresting authorities.

### **3. Right to be informed to be released on bail**

S. 50(2) of code of criminal procedure makes it obligatory for a police officer arresting a person without a warrant to inform him his right to be released on bail. The section specifies that the arresting authority have to inform the arrested person whether or not he has the right to bail. Non-compliance with this provision will again result in illegality of arrest. In *Padam Dev v. State of*

Himachal Pradesh[58]the Court held that where the police had obtained no warrant for the arrest of the accused and at the time of arrest, did not inform him of his right to bail, such arrest is illegal. S. 436 entitle a person other than the accused of a non-bailable offense to be released on bail. It must be noted that a person accused of a bailable offense, arrested or detained without warrant has a right to be released on bail.[59]But if the offence is non-bailable that does not mean that the person accused of such offense shall not be released on bail: but here in such case bail is not a matter of right, but only a privilege to be granted at the discretion of the court.[60]

### **3. Right against handcuffing**

Section 49 of the Code of criminal procedure states that the person arrested shall not be subjected to more restraint than is necessary to prevent his escape. Thus, this section relates to the manner in which the accused is treated after his arrest.[61]It has been contended that this section lays down the minimal amount of restraint required in order to prevent an arrested person from running away.[62]Of course, it goes without saying that in order to apply this provision and exercise reasonable restraint on the accused, he must first be arrested.[63]In the landmark case of Sunil Batra v. Delhi Administration[64]the Supreme Court pronounced that fetters should be shunned as violative of human dignity and that the indiscriminate use of handcuffs is illegal. The Court also held that handcuffs are permissible only in cases where the person concerned has a credible tendency for violence and escape and when all other modes of restraint have not worked.

#### **4. Right to be produced before a magistrate within 24 hours of arrest**

One of the most important rights of an arrested person is that he be produced before a Magistrate within twenty-four hours of the arrest. This is laid down in Section 57 of the Code which states that " no police officer shall detain in custody a person arrested without warrant for a longer period that under all the circumstances of the case is reasonable, and such period shall not, in the absence of a special order of a Magistrate under Section 168, exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court". Therefore, when a person is arrested, he must be produced before a Magistrate within twenty-four hours of the arrest. The Magistrate can pass an order of remand under Section 167 of the Code for his detention. However, this cannot exceed a term of fifteen days. He can also be produced before a Magistrate who has the authority to try the case and hence, can remand the person into custody for a term more than fifteen days but less than sixty days. It must also be noted that as in the case of Section 50, Section 57 is also in conformity with Article 22(2).[65]

#### **UNITED STATES OF AMERICA**

That no person may be deprived of liberty without due process of law is one of the bedrock principles of the Anglo-American legal tradition, important enough to be mentioned twice in the United States Constitution[66]. This broad principle underlies many important developments in American constitutional law and criminal procedure. The Supreme Court expanded such due process protections as the right to counsel[67], the right to be

informed of the right to remain silent when in police custody[68], and the right to exclude from a criminal trial evidence illegally seized by the police[69]. The Court also used due process to create the right to privacy[70], to extend the right against racial discrimination to the federal government[71], and to require a hearing prior to termination of welfare rights[72]. But while courts determined that state actions lacking due process are illegitimate, and placed additional burdens on state institutions regulating public activity, they nevertheless moved away from an ancient commitment to citizen resistance against arbitrary assertions of governmental authority, particularly in the area of arrest. In USA, since the 1960s, state legislatures and high courts ceased recognizing the individual right to resist unlawful arrest. This right, originally based on the principle that an unlawful arrest constitutes an assault serious enough to provoke its victim or witnesses to forcibly oppose the arrest," was transformed in the early twentieth century into a right of self-defense against police violence. Portraying the right to resist unlawful arrest as counterproductive, twentieth century reformers no longer viewed it as a right to principled resistance against arbitrary power, but rather as a right to protect oneself from injury. They did so on two primary grounds. First, resistance might easily lead to an increased chance of injury for both the arrestee and the officer. Second, the common law right reflected archaic conditions in which defendants were incarcerated for lengthy periods in subhuman conditions without recourse to the expansive due process protections provided in contemporary law. As such, courts argued that a right that might increase the chance of violence was unnecessary because any loss of liberty suffered by those unlawfully



arrested could be remedied by existing due process protections[73]. This abrogation of an individual's right to resist unlawful arrest reflects a shifting preference within society and the courts for order over liberty.

## **Chapter 4 - Consequence Of Non-Compliance With The Provisions Relating To Arrest**

In India Consequence of Non-Compliance with the provision relating to arrest has been discussed as follows:-A trial will not be void merely because the provision relating to arrest have not been fully complied with. If the court has jurisdiction to try an offence, any illegality or irregularity in arrest will not oust the jurisdiction of the court to try the offence[74]. The question whether the police officer making the arrest was acting within or beyond his powers in affecting the arrest , does not affect the question whether accused person was guilty or not guilty of the offence which is charged. Though the illegality or irregularity in making an arrest would not vitiate the trial of the arrested person, it would be quite material if such person is prosecuted on charge of resistance to or escape from lawful custody. If a private person attempts to make an illegal arrest, the person against whom such attempt is made has every right to protect himself and to exercise his right of private defence. If a public servant having authority to make arrests, knowingly exercises the authority in contravention of law and effects illegal arrest her can be prosecuted for an offence under section 22 of I. P. C. Apart from this special provision, any person who illegally arrest another is punishable under section 342 I. P. C., for wrongful confinement[75]. If the arrest is illegal, it is a sort of false imprisonment and person making such arrest exposes himself to a suit for damages in a civil court. It may be mentioned here that the provisions

regarding arrest cannot be by-passed by alleging that there was not arrest but only informal detention. Informal detention or restraint of any kind by the police is not authorised by law[76]. In Queen v. Basooram Dass It was held that " It is notable that the police should pursue the investigation of, crime by defying all the provisions of the law for the protection of the liberty of the citizen under the colourable pretension that no actual arrest has been made when to all intents and purposes person has been in their custody. In Nilabatibehera vs. State of Orissa[77].... IA mother wrote a letter to the Supreme Court of India, requesting monetary compensation for the death of her 22-year-old son, who died in police custody. She claimed that her son was beaten to death. The Supreme Court on his judgement stated that " Article 9 (5) of the International Covenant on Civil and Political Rights, 1966 lays down that anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.. This Covenant has been ratified by India, which means that the State has undertaken to abide by its terms. The State has a duty of care and to ensure that the guarantee of Article 21 is not denied to anyone. This duty of care is strict and admits no exceptions. The State must take responsibility by paying compensation to the near and dear ones of a person, who has been deprived of her/ his life by the wrongful acts of its agents. However, the Court affirmed that the State has a right to recover the compensation amount from the wrongdoers."

## **Chapter 5 -Judgement On Arrest Procedure by Apex court of various common law countries**

### **INDIA**

Guidelines laid down by the Supreme Court on Arrest Procedure- 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 conditional ties. 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 directions and guidelines contained in earlier decisions). In *Joginder Kumar v. State of U. P.*[78]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 judgment:" The horizon of human rights 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? 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. The quality of a nation's civilisation can be largely measured by the methods it uses in the enforcement of criminal law." The Supreme court In Smt. Nandini Satpathy v. P. L. Dani[79]stated:" To strike the balance between the needs of law enforcement on the one hand and the protection of the citizen from oppression and injustice 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 Udaybhan Shuki v. State of U. P.[80]Supreme court has held that " The right to be informed of the grounds of arrest is a precious right of the arrested person. Timely information of ground of arrest serves him in many ways. It enables him to move proper court for bail, or in appropriate circumstances for a writ of habeas corpus, or to make expeditious arrangement for his defence. The Hon'ble Supreme court in D. K Basu v. State of west Bengal[81]has 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 who carrying out the arrest should bear accurate, visible and clear identification and name tags with designations. The particulars of all such police personnel who handle interrogation of the arrestee must be recorded in a register.(2) The police officer carrying out the arrest shall prepare a memo of arrest at the time of arrest and it must be attested by atleast 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. The arrestee must countersigned it .(3) A person who has been arrested 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 possible, that he has been arrested and is being detained at the particular place.(4) The time and 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 arrested place through the Legal Aid Organisation in the District and the police station of the area concerned telegraphically as soon as practicable after the arrest.(5) The person arrested must be informed of his right to have someone informed of his arrest or detention as soon as he is put under arrest or is detained.(6) An entry shall be made in the diary at the place of detention regarding the arrest of the person which shall disclose the name of the next friend of the person to whom information has been given of the arrest and names and particulars of the police officials in whose custody the arrestee is.(7) After Arrest the arrestee shall where he so requests, be examined at the time of his arrest any injuries, if any present on his or her body, must be recorded at that time. The Inspection Memo should be signed both by the arrestee and the police officer effecting the arrest and its copy provided to the arrestee as soon as possible.(8) The medical examination of arrestee must be held by a trained doctor during his detention in custody by a doctor on the panel of approved doctors appointed by Health Service Director of the concerned State. Director, Health Services also prepare such a penal for all Tehsils and Districts of concerned state..(9)The memo of arrest and all other documents , referred to above, should be sent to the nearest Magistrate for his record.(10) It is the right of arrestee to meet his lawyer during interrogation but not throughout the interrogation.(11) police control room should keep all information regarding the arrest and the place of

custody of the arrestee shall be communicated by the officer causing the arrest, and such information of arrest should be displayed on a conspicuous notice board.

## **U. S. A.**

A Trend has developed in the last few years evolutionizing the common law rule that one has a right to use force in resisting an unlawful arrest.' Courts and legislatures have pondered the ramifications of the doctrine, and many have decided that a change is necessary. In Columbus v. Fraley[82], The Supreme Court of United states of America held that if Arresting officer not using excessive or unnecessary force, a private citizen may not use force to resist arrest by one he knows, or has reason to believe, is an authorized police officer engaged in the performance of his duties, whether or not the arrest is illegal under the circumstances. The modern rule resolves the anomaly which the common law presented-that a person who is guilty of a felony or misdemeanour possesses legal right to resist the police officer attempting to arrest him for that crime, if the arrest is in any way unlawful[83]. No longer will the courts justify the offender's actions in forcefully resisting an officer's unlawful arrest. The declining favour of self-help and present changing social conditions have dissipated the necessity for the right. Abolition of the privilege to resist an unlawful arrest with force has been ruled constitutionally permissible[84]as a proper exercise of the police power . This modem approach has recently been accepted by the Ohio Supreme Court in Columbus v. Fraley. Here appellant Fraley forcefully resisted an arrest by police officers for an alleged violation of Columbus' obscene language ordinance . After ruling that the violation was invalid, the

court approached the issue of the use of force to resist unlawful arrest. The court chose to "agree with those courts and legislatures which have chosen to abandon the rule allowing forcible resistance to arrest[85]." In R vs. Goodwin[86]U. S. A supreme court has given proper guideline on arrest and liberty of individual.

## **CANADA**

In R v Bartley[87]the Canada Supreme court , sets out the rights that individuals have when they have been arrested. Once any person is arrested, he has right to speak to a lawyer, and the police must advise of this right as soon as possible. The police in duty to tell the arrested person about Legal Aid and right to free legal services. In R. v. Manninen[88]Supreme Court held that If arrested person wish to contact a lawyer, the police must provide him a telephone. The police must also stop questioning until have been given an opportunity to contact a lawyer. Arrested person have the right to speak to a lawyer in private. Individual have the right to be informed promptly of the reason for his arrest. If any person is arrested, he has the right to remain silent.

## **Chapter 6 - International Conventions and Constitutional provision On the Procedure of Arrest**

The common law countries as united states of America, India and united kingdom have given paramount consideration to encompass a balance between the liberty of individual as constitutional objective and compelling state interest as power of arrest. National and international organisations concerned with human rights, continue to record countless instances of torture and abuse in most totalitarian states as well as in some other states  
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where democratic traditions are weak.. American convention of human rights, 1969(ACHR), Article 5(2) to 5(4) the European convention on human rights, 1950(ECHR) prohibit the arbitrary use of power to make arrest and prescribe the procedure to be followed on causing arrest. On other hand Article 21 of constitution of India states that no person shall be deprived of his life and personal liberty except according to procedure established by law. In Article 22 there is provision for protection against arrest and detention. In U. S. A. the Bill of Rights in section 23 provides the right of arrested person and individual liberty. In United Kingdom public order act of 1994 clearly mention the arrest procedure and individual liberty. Art. 9(5) of the International Convention on Civil and Political Rights, 1966 provides that " any person who has been the victim of unlawful arrest or detention shall have enforceable rigr! to compensation" 13. Art. 5 of the Universal Declaration of Human Rights in 1948 stipulates, " No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment" despite Its pious declaration[89]." Timely information about the grounds of arrest serves the arrested person in many ways. It gives him or her an opportunity to remove any mistakes, misapprehension or misunderstanding, if any in the mind of the arresting authority; it also enables him to apply for bail, or for writ of habeas corpus, or to make other expeditious arrangements for his defence"[90]. Section 10(a) of the Canadian Charter of Rights and Freedom, apply when a person is arrested or detained. They ensure that people under arrest have a chance to challenge the lawfulness of their arrest. The police must tell them immediately of the reasons for the arrest.



- Article 5(2) of European convention on human rights (ECHR) reads as " Everyone who is arrested shall be informed promptly, in a language which he understands. of the reasons of his arrest and the charges against him.

## **CONCLUSION AND SUGGESTIONS:**

Law must change with the needs of a changing society, and must in the process safeguard the interest of innocent as well. With a view to protect the dignity and liberty of its citizens the Common Law Countries has made some remarkable changes in the powers conferred on Police to arrest an accused. The Statues regarding Arrest clearly lays down conditions which need to be met before a person can be arrested. By doing so, the Government of different Common Law Countries has given credence to the most basic Right of its citizens i. e. right to live with dignity. In *People v. Lefore*[91]Justice Cardozo observed: The question is whether protection for the individual would not be gained at a disproportionate loss of protection for society. On the one side is the social need that crime shall be repressed. On the other, the social need that law shall not be flouted by the insolence of offence. The consequences of arrest are far reaching. The social status and dignity of an individual suspect becomes at stake, even his discharge cannot blot out the stigma consequent upon arrest. There are financial implications for the arrested person and his family. The public suffers its repercussion as well. Naturally, it needs to be ensured that arrests are not effected in a frivolous manner and that the rights of arrested persons are fully guaranteed. Illegal arrests and powers of the police to detain a person had been questioned time and again by the public at large. It has often been the judiciary which

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proved to be a lender of the last resort for the people to providing safeguards from the atrocities of the police. In India Many changes have been brought in to by the legislature to rationalise the law of arrest, through amendments of 2008[92]and 2010[93]which are largely based on the judgements of the Apex court in Joginder Kumar's[94]and D. K. Basu's[95]case along with 177th Law Commission Report[96]. Thus, after having examined the different provisions that guarantee different rights to the Arrested person, it emerges that these rights cannot be abrogated by the police officers and that if they do happen to violate any of these rights, they are not only committing a crime under the Indian Penal Code but are also violating fundamental rights guaranteed by the Indian Constitution. Hence, there is no place for laxity on the part of the police force in ensuring that the arrested persons avail of their rights. Thus to conclude the researcher would like to highlight the point that the rights of arrested persons are increasingly being guaranteed on paper but less in reality. Yet there is good amount of public awareness in this regard which is facilitating various human rights agencies and non profit organizations to ensure compliance with procedure. However as compared to international standards of implementation and guarantee of newer and more comprehensive rights, much remains to be done. Some suggestions for reform may be made in the nature of the following: The preventive action of police and their powers under statues of different Countries are still unbridled and they must be rationalised. Provisions shall be incorporated under the statues for penalising the authority concerned if any arrest is not made in accordance with theLaw. There needs to be a strict regime of education and monitoring of police

officials especially at lower levels. In remote areas most of the violations occurs as much out of ignorance. Separate body should be set up solely for the purpose of initiating departmental enquiries and vigilance in this regard. Civil society should bear a greater responsibility and be vigilant about any instances of violation of human rights in the arrest process and report the same to the nearest judicial officer. Therefore, to strike a balance between individual liberty and community interest is never easy or without their own problems. But to strengthen the foundations of our democracy and to make true the spirit of our Constitution the two opposing considerations need to be balanced on the fine scale of justice, equity and good conscience.