

Rights of Accused at Pre-Trial Stage in Indian Scenario

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Introduction

The term “accused” has not been particularly defined in the code but what we usually understand is that the accused means a person who is charged with the commission of offence. Everyone charged with penal offence has the right to be presumed innocent till proved guilty, it is the well established principle which is incorporated in Indian criminal justice system.¹

In the era of Human Rights each and every one has some basic set of rights and these rights are not denied to a person merely being an ‘accused’. The rights of the accused person are of much concern nowadays because of violation of accused rights in the hands of police during pre-trial stage in contemporary scenario.

This paper will analyze the relevant Constitutional and statutory provisions dealing with the rights of accused persons in Indian scenario in detail and come out with a recommendation to insure basic rights to the accused.

Provisions of Indian Constitution and Criminal Procedure Code

Some important provisions related to rights of the accused/arrested persons are following:-

(i) Protection against *ex post facto* law

Clause (1) of Article 20 of the Indian Constitution says that “no person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence”. Article 11, para 2 of the Universal Declaration of Human Rights, 1948 provides freedom from ex-post facto laws². An *ex post facto* law is a law which imposes penalties retrospectively, *i.e.*, on acts already done and increases the penalty for such acts. The American Constitution also contains a similar provision prohibiting ex post facto laws both by the Central and the State Legislatures. Article 20(1) imposes a limitation on the law making power of the Legislature. Ordinarily, a Legislature can make prospective as well as retrospective laws, but clause (1) of Article 20 prohibits the Legislature to make retrospective criminal laws. However, it does not prohibit imposition of civil liability retrospectively, *i.e.*, with effect from a past date.³

The first part of clause (1) provides that “no person shall be convicted of any offence except for violation of law in force at the time of the commission of the act charged as an offence.” This means that if an act is not an offence at the date of its commission it can not be an offence at the date subsequent to its commission.⁴ In *Pareed vs. Nilambaram*⁵, it was held that the protection afforded by clause (1) is available only against conviction or sentence for a criminal offence under *ex post facto* law and not against the trial.

The second part of clause (1) protects a person from a penalty greater than that which he might have been subjected to at the time of the commission of the offence. In *Kedar Nath vs.*

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¹ Provided under Art. 10 and 11 of the Universal Declaration of Human Rights, 1948, Art. 14 (2) of International Covenant on Civil and Political Rights, 1966,

² Provided under Article 15 of International Covenant on Civil and Political Rights, 1966.

³ *Hathi Singh Manufacturing Co. vs. Union of India*, AIR 1960 SC 923.

⁴ *Chief Inspector of Mines vs. K.C. Thapper*, AIR 1961 SC 883.

⁵ AIR 1967 Kerala 155.

West Bengal,⁶ it was that the accused can take advantage of the beneficial provisions of the ex-post facto law. The rule of beneficial construction requires that ex post facto law should be applied to mitigate the rigorous (reducing the sentence) of the previous law on the same subject. Such a law is not affected by Article 20(1) of the Constitution. The principle is based both on sound reason and common sense.

(ii) Protection against Double Jeopardy

Article 20 clause (2) of The Constitution of India which provides that “no person shall be prosecuted and punished for the same offence more than once.” This clause embodies the common law rule of *nemo debet vis vexari* which means that no man should be put twice in peril for the same offence. The protection under clause (2) of Article 20 is narrower than that given in American and British laws. American and the British Constitution the protection against double jeopardy is given for the second prosecution for the same offence irrespective of whether an accused was acquitted in the first trial. But under Article 20(2) the protection against double punishment is given only when the accused has not only been *prosecuted* but also punished, and is sought to be prosecuted second time for the same offence. The following essentials for the application of double jeopardy rule are as follows:

- (1) The person must be an accused of an offence.
- (2) The proceeding or the prosecution must have taken place before a “court” or “judicial tribunal”.
- (3) The person must have been prosecuted and punished in the previous proceedings.
- (4) The offence must be the same for which he has prosecuted and punished in the previous proceedings.

Article 20(2) will have no application where punishment is not for the same offence. Thus if the offences are distinct the rule of double jeopardy will not apply. Thus, where a person has been prosecuted and punished under Sea Customs Act; and was later on prosecuted under the Penal Code for criminal conspiracy, it was held that second prosecution was not barred since it was not for the same offence.⁷

Prohibition against Self-incrimination

Clause (3) of Article 20 provides that no person accused of any offence shall be compelled to be a witness against himself. Thus Article 20(3) embodies the general principles of English and American jurisprudence that no one shall be compelled to give testimony which may expose him to prosecution for crime. The cardinal principle of criminal law which is really the bed rock of English jurisprudence is that an accused must be presumed to be innocent till the contrary is proved. . It is the duty of the prosecution to prove the offence. The accused need not make any admission or statement against his own free will.

In *M.P. Sharma vs. Satish Chandra*⁸ , the Supreme Court observed that this right embodies the following essentials:

- (a) It is a right pertaining to a person who is “accused of an offence.”
- (b) It is a protection against “compulsion to be a witness”.
- (c) It is a protection against such compulsion relating to his giving evidence “against himself.”

A person, whose name was mentioned as an accused in the first information report by the police and investigation was ordered by the Magistrate, could claim the protection of this

⁶ AIR 1953 SC 404.

⁷ *Leo Roy vs. Superintendent District Jail*, AIR 1958 SC 119.; *Maqbool Husain vs. State of Bombay*, AIR 1953 SC 325.

⁸ AIR 1954 SC 300.

guarantee.⁹ In *Nandini Satpathy vs. P.L. Dani*¹⁰, the Supreme Court has considerably widened the scope of clause (3) of Article 20. The Court has held that the prohibitive scope of Article 20(3) goes back to the stage of police interrogation not commencing in court only. It extends to, and protects the accused in regard to other offences-pending or imminent, which may deter him from voluntary disclosure. The phrase 'compelled testimony' 'must be read as evidence procured not merely by physical threats or violence but by psychic (mental) torture, atmospheric pressure, environmental coercion, tiring interrogatives, proximity, overbearing and intimidatory methods and the like. Thus, compelled testimony is not limited to physical torture or coercion, but extend also to techniques of psychological interrogation which cause mental torture in a person subject to such interrogation. *Smt. Selvi & Ors. vs. State of Karnataka & Ors.*¹¹, it was held that it is also a reasonable restriction on 'personal liberty' as understood in the context of Article 21 of the Constitution. Following observations were made in this milestone case:

- (a) No Lie Detector Tests should be administered except on the basis of consent of the accused. An option should be given to the accused whether he wishes to avail such test.
- (b) If the accused volunteers for a Lie Detector Test, he should be given access to a lawyer and the physical, emotional and legal implication of such a test should be explained to him by the police and his lawyer.
- (c) The consent should be recorded before a Judicial Magistrate.
- (d) During the hearing before the Magistrate, the person alleged to have agreed should be duly represented by a lawyer.
- (e) At the hearing, the person in question should also be told in clear terms that the statement that is made shall not be a 'confessional' statement to the Magistrate but will have the status of a statement made to the police.
- (f) The Magistrate shall consider all factors relating to the detention including the length of detention and the nature of the interrogation.
- (g) A full medical and factual narration of the manner of the information received must be taken on record.

Person arrested to be informed of grounds of Arrest

In every case of arrest with or without a warrant the person arresting shall communicate to the arrested person, without delay, the grounds for his arrest.¹² This is a precious right of the arrested person and has been recognized by the Constitution as one of the fundamental rights.¹³ In *Joginder Kumar vs. State of Uttar Pradesh*¹⁴, the Supreme Court has laid down guidelines governing arrest of a person during investigation. Following are the guidelines laid down by the court-

- (1) 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 or likely to have an interest in his welfare told as far as is practicable that he has been arrested and where is being detained.
- (2) Police officer shall inform the arrested person when he is brought to the police station of this right.
- (3) An entry shall be required to be made in the diary as to who was informed of the arrest.

⁹ *Ibid.*

¹⁰ AIR 1978 SC 1025.

¹¹ 2010 (2) R.C.R. (Criminal) 896.

¹² Provided under Ss. 50, 55, and 75 of the Cr.P.C.

¹³ Provided under Art. 22(1) of the Constitution of India.

¹⁴ 1994 4 SCC 260.

These protections came out from Art.21 and Art. 22 of the Constitution and therefore they must be enforced strictly.

Right to be defended by a Lawyer

Both the Constitution and the provisions of the Cr.P.C. recognize the right of every arrested person to consult a legal practitioner of his choice.¹⁵ The right begins from the moment of arrest. The consultation with the lawyer may be in the presence of the police officer but not within his hearing.

Person arrested to be taken before the Magistrate

Article 22 (2) of the Constitution provides that an arrested person must be taken to the Magistrate within 24 hours of arrest. Similar provision has been incorporated under Section 56 of Criminal Procedure Code. 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.

Person Arrested not to be detained more than twenty- four hours

In case of every arrest, the person making the arrest is required to produce the arrested person without unnecessary delay before the magistrate; and it has been categorically provided that such a delay in case shall exceed 24 hours exclusive of the time necessary for the journey from the place of arrest to the magistrate's Court.¹⁶ If a police officer fails to produce an arrested person before a magistrate within 24 hours of the arrest, he shall be held guilty of wrongful detention.¹⁷

The tendency of certain officers authorized to arrest, to note the time of arrest in such a manner that the accused's production before the magistrate was well within 24 hours of the arrest came to be criticized by the Bombay High Court. The Court ruled that the arrest commences with the restraint placed on the liberty of the accused and not with the time of arrest recorded by the arresting officer.¹⁸ Illegal detention may entail a ward of compensation by the Court.¹⁹ This right has been created with a view:

- (i) To prevent arrest and detention for the purpose of extracting confessions, or as a means of compelling people to give information;
- (ii) To prevent police stations being used as though they were prisons – a purpose for which they are unsuitable;
- (iii) To afford an early recourse to a judicial officer independent of the police on all questions of bail or discharge.²⁰

Information of arrest to a nominated person

The rules emerging from decisions such as *Joginder Singh vs. State of U.P.*²¹ and *D.K. Basu vs. State of West Bengal*,²² have been enacted in Section 50-A.²³ Sub Section (1) of Section 50-A of Criminal Procedure Code provides every police officer or other person making any arrest under this code shall forthwith give the information regarding such arrest and place

¹⁵ Provided under S. 303 of Cr.P.C. and Art. 22(1) of the Constitution of India

¹⁶ Provided under Ss. 57, and proviso to S. 76, See also Art. 22(2) of the Constitution of India.

¹⁷ *Sharifbai vs. Abdul Razak AIR 1961 Bom 42.*

¹⁸ *Ashak Hussain Allah Detha Alias Siddique vs. Asst. Collector of Customs, 1990 Cri. LJ 2201 at p. 2205(Bom HC)*

¹⁹ *D.G. and I.G. of Police vs. Prem Sagar 1999 5 SCC 700.*

²⁰ *Mohd. Suleman vs. King-Emperor, 30 CWN 985, 987 (FB).*

²¹ 1994 4 SCC 260.

²² 1997 1 SCC 416.

²³ Provided under Section 50-A Inserted by Act 25 of 2005

where the arrested person is being held to any of his friends, relatives or such other persons as may be disclosed or nominated by the arrested person for the purpose of giving such information. Sub Section (2) of Section 50-A of Criminal Procedure Code provides the Police Officer shall inform the arrested person for the purpose of giving such information of his right under Sub Section (1) as soon as he is brought to police station. Sub Section (3) of Section 50-A of Criminal Procedure Code provides an entry of the fact as to who has been informed of the arrest of such person shall be in a book to be kept in the police station in such form as may be prescribed in this behalf by the State Government. Sub Section (4) of Section 50-A of Criminal Procedure Code provides that it shall be the duty of Magistrate before whom such arrested person is proceed, to satisfy himself that the requirement of sub-section (2) and Sub-Section (3) have been complied with in respect of such arrested person. These rights are inherent in Article 21 and 22 of the Constitution and required to be recognized and scrupulously protected.

Right to be informed of right to bail

Every police officer arresting without a warrant any person other than a person accused of a non-bailable offence, is required to inform the person arrested that he is entitled to be released on bail and that he may arrange for sureties on his behalf.²⁴

Right to receive the copy of the receipt after search

Power to search under Section 51 of Criminal Procedure Code is available only if the arrested person is not released on bail. After search all the articles other than necessary wearing apparel found upon the arrested person are to be seized, and it has been made obligatory to give to the arrested person a receipt showing the articles taken in possession by the police. This would ensure that the articles seized are properly accounted for.²⁵

Right of medical examination of arrested person

Section 54 Criminal Procedure Code provides the accused the right to have himself medically examined to permit him to defend and protect himself appropriately. It is considered desirable and necessary “that a person who is arrested should be given the right to have his body examined by a medical officer when he is produced before a Magistrate or at any time when he is under custody, with a view to enabling him to establish that the offence with which he is charged was not committed by him or that he was subjected to physical injury.

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 affecting the arrest and its copy provided to the arrestee.²⁶

Right to free legal aid

In *M. H. Hoskot vs. State of Maharashtra*²⁷, the Supreme Court applied the ruling of Maneka Gandhi’s case²⁸ regarding the free legal aid Krishna Iyer, J., declared, “This is the state duty and not Government’s charity.” If a prisoner is unable to exercise his constitutional and statutory right of appeal including special leave to appeal for want of legal assistance, there is implicit in the court, under Article 142 read with Articles 21 and 39-A of the Constitution, the power to assign counsel to the prisoner provided he does not object to the lawyer named by the court. The right to free legal aid is guaranteed

²⁴ Provided under S. 50(2) of Cr.P.C.

²⁵ *Mahadeo vs. State of Uttar Pradesh*, 1990 Cri. LJ 858 (Ald HC).

²⁶ Provided under S. 54, and S. 50-A inserted by Act 25 of 2005 in Cr.P.C. , See also *D.K. Basu vs. State of West Bengal* 1997 1 SCC (Cri.) 92.

²⁷ AIR 1978 SC 1548

²⁸ AIR 1978 SC 597.

fundamental rights under Art. 21. Art. 39-A provides “equal justice” and “free legal aid”. It means justice according to law.

Right to Speedy Trial

Justice delayed is justice denied. This is all the more true in a criminal trial where the accused is not released on bail during the pendency of the trial and trial is inordinately delayed. In *Hussainara Khatoon vs. Home Secretary, State of Bihar*²⁹, a petition was filed by number of under trial prisoners who were in jails in the state of Bihar for years awaiting their trial. The Supreme Court held that “right to speedy trial” a fundamental right is implicit in the guarantee of life and personal liberty enshrined in Article 21 of the Constitution of India and ordered the Bihar Government to release forthwith the under-trial prisoners on their personal bonds. In *Hussainara Khatoon (2)*³⁰ and *Hussainara Khatoon (3)*³¹ cases the Court reiterated the same view. In a significant judgment in *Abdul Rehman Antuley vs. R.S. Nayak*³², the Supreme Court has laid down detailed guidelines for speedy trial of an accused in a criminal case but it declined to fix any time limit for trial of offences. The burden lies on the prosecution to justify and explain the delay. In *Moses Wilson vs. Karturba*³³, the Supreme Court expressed concern in delay in disposal of cases and directed the concern authorities to do needful in the matter urgently before the situation goes totally out of control. Because of delay in disposal of cases people in this country are fast losing faith in the judiciary.

Right to get copies of police report and other document

Where a police officer investigating the case finds it convenient to do so, he may furnish to the Accused copies of all or any of the documents referred to in Section 173(5) of the Criminal Procedure Code.³⁴ According to Section 207 of Criminal Procedure Code the magistrate is under an imperative duty to furnish to the accused, free of cost, copies of statements made to the police and of other documents to be relied upon by the prosecution. The object of furnishing the accused person with copies of the statements and documents as mentioned above is to put him on notice of what he has to meet at the time of the inquiry or trial and to prepare himself for his defence.³⁵ In cases where cognizance of the offence has been taken otherwise than on a police report, the case is not ordinarily investigated by the police and naturally there are no statements recorded by the police. Therefore the valuable right given to the accused by Section 207 Criminal Procedure Code regarding the supply of copies would not be available in such cases.

Right against handcuffing

In *Prem Shankar Shukla vs. Delhi Administration*,³⁶ Krishna Iyer, J., delivering the majority judgement held that every under trial who was accused of a non-bailable offence punishable with more than three years jail-term would be handcuffed, were violated of Arts. 14, 19, 21 of the Constitution of India. His Lordship said:-

“Handcuffing is prima facie inhuman and, therefore, unreasonable, is over harsh and at the first flush, arbitrary. Absent fair procedure and objective monitoring, to inflict irons is to resort to zoological strategies repugnant to Art. 21.....”

²⁹ AIR 1979 SC 1360.

³⁰ AIR 1979 SC 1369.

³¹ AIR 1979 SC 1377.

³² AIR 1992 SC 1630

³³ AIR 2008 SC 379.

³⁴ Provided under S. 173 (1), Cr.P.C.

³⁵ *Gurbachan Singh vs. State of Punjab*, AIR 1957 SC 623: 1957 Cri LJ 1009.

³⁶ AIR 1980 SC 1535.

Right against inhuman treatment

In *Kishore Singh vs. State of Rajasthan*,³⁷ the Supreme Court held that the use of “third degree” method by police is violative of Art. 21 and directed the Government to take necessary steps to educate the police so as to inculcate a respect for the human person. “*Human dignity is a clear value of our Constitution not to be bartered away for mere apprehension entertained by jail officials,*” declared, Krishna Iyer, J., Similarly torture and ill-treatment of women suspects in police lockups has been held to be violative of Art. 21 of the Constitution.

Compensation for wrongful arrest

Section 358 Criminal Procedure Code empowers the court to order, whenever any person causes a police officer to arrest another person, and if it appears to the magistrate by whom the case is heard that there was not sufficient ground for causing such arrest, the Magistrate may order the person causing the arrest to pay compensation. There have been instances where the judiciary ordered compensation by the State to be paid to the victim because of the failure of the police to process prosecution. In *Bhim Singh vs. State of J.K.*,³⁸ the petitioner an MLA was arrested and detained in police custody with *mala fide* intention and deliberately prevented from attending Session of the Legislative Assembly, the Supreme Court ordered awarded a sum of Rs. 50,000 to the petitioner as compensation for the violation of his fundamental rights under Art. 21 of the Constitution of India. In *Nilabati Behra vs. State of Bihar*,³⁹ the Supreme Court held that the provisions of Art. 9(5) of the International Covenant on Civil and Political Rights, 1966, which says “any one who has been victim of unlawful arrest or detention shall have an enforceable right to compensation for enforcing fundamental rights, are enforceable.”

Interpretation of evidence to accused or his pleader

Criminal Procedure Code⁴⁰ provides that whenever any evidence is given in a language not understood by the accused, and he is present in Court in person, it shall be interpreted to him in open Court in a language understood by him. If he appears by pleader and the evidence is given in a language other than the language of the Court, and not understood by the pleader, it shall be interpreted to such pleader in that language. When documents are put for the purpose of formal proof, it shall be in the discretion of the Court to interpret as much thereof as appears necessary.

Accused person as a competent witness

According to Section 315 of Criminal Procedure Code, an accused can be a competent witness for defence and can give evidence in disproof of the charges made against him or against his co-accused. He may give evidence on oath in disproof of the charges made against him or any person together with him at the same trial but he shall not be called as a witness except on his own request in writing and his failure to give evidence shall not be made the subject of any comment by any of the parties or the Court or give rise to any presumption against himself or any person charged together with him at the same trial.⁴¹

Conclusion

Fundamental Rights of a person is violated by arbitrarily making an innocent person accused and at the time of arrest ignoring the procedure laid down by the law and Supreme

³⁷ AIR 1981 SC 625.

³⁸ 1983 4 SCC 677.

³⁹ 1993 2 SCC 746.

⁴⁰ Provided under S. 279 of Cr.P.C.

⁴¹ Baidyanath Prasad vs. State of Bihar, AIR 1968 SC 1363.

Court of India. Detail study of Constitutional provisions and existing Criminal laws reveal that there are enough provisions that safeguard the rights of the accused, what is needed is implementation of the existing laws in their letter and spirit. Every government has one major role to play in a democracy that is to protect the rights of all its citizens. It may be suggested that suspected should be arrested after preliminary enquiry. A basic tenet of our criminal justice system is: "Let hundred guilty walk free but do not punish an innocent." It is generally believed that in spite of the various safeguards in the Cr.P.C. as well as the in the Constitution, the power of arrest given to the police by laws is being misused to a great extend in present scenario. There is imminent need to bring some positive changes in our Criminal Justice Administration so that the basic human rights are protected to the accused person to avail them life with dignity and to sustain their personal liberty.

In the present scenario some modification and changes is required in the existing system and now the state is under an obligation to ensure reformation and socialization of the accused person so that that accused person can start his life in a new way with full dignity and respect.

