TRACHEOTOMY OF INFERNALITY IN ARREST AND DETENTION LAWS: A GENDER PERSPECTIVE

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Abstract

The latest advancements in human civilization have impacted development of law in myriad ways. A very significant change in legal thinking is reflected by a paradigmatic shift in criminal jurisprudence in as much as the accused person is to be treated as a patient and not an incurable diseased body to be eliminated from the society. The criminal jurisprudence has, therefore, got well influenced by modern developments in legal thought with due orientation to democracy and protection of human dignity. The gender has also emerged as a very significant area of study and action influencing legal developments world over. The criminal justice system is being improved and oriented to gender sensitivities for better protection of women from persons in power and those virtually yielding power. Law of arrest is a specialised area of study and needs thorough study in the context of new thinking.

I Introduction

'TO ERR is human' is an old adage. But 'crime' is also a reality, existing in every society. It has to be controlled with appropriate measures to keep the society in functional harmony. To deal with this phenomenon, criminal justice system has, therefore, been invariably a feature of all societies in different forms. In the contemporary world, almost every society/country has an established system to deliver justice and control crime as per its requirements. Measures are being taken every now and then to improve the system. Earlier, the focus was on punishment of the offender only. Now, besides the punishment of the offender,

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compensation to the victim of a crime and giving a humane treatment to the offender are also matters of primary concern for the system. Whenever a crime takes place or an attempt is made to commit a crime, police action is supposed to follow. The person involved becomes a part of criminal justice process and, practically speaking, becomes a subject of police action. Whether such a person is taken into custody or not depends upon the nature of the charge. When arrested and put into a police lock up or jail or a remand home, such a person remains, in every case under the grip of police or any like custodial authority. The worry is that when the person involved happens to be a woman, there is every possibility of her exploitation by those in whose custody she is put. The present paper gives a detailed account of the Indian law on the subject with possibilities of exploitation of women suspects at the hands of law enforcement agencies and points out the inadequacies in the relevant statutory provisions with reference to reports of various commissions, committees and the judicial pronouncements.

II General law of arrest and custody

Power to arrest

The general law of arrest is found in chapter five of the Code of Criminal Procedure, 1973 (Cr PC). These provisions empower a police officer to arrest, without an order from a magistrate and without a warrant, any person:[1]

(a) who has been concerned in any cognizable offence, or against whom a reasonable complaint has been made or credible information has been received, or a reasonable suspicion exists, of his having been so concerned; or
(b) who has in his possession without lawful excuse, the burden of proving which lies on such person, any implement of house-breaking; or
(c) who has been proclaimed as an offender either under the Cr PC or by an order of the state government; or
(d) in whose possession anything is found which may reasonably be suspected to be stolen property and who may reasonably be suspected of having committed an offence with reference to such thing; or

1. Cr PC, s. 41(1).

(e) who obstructs a police officer while in the execution of his duty, or who has escaped, or attempts to escape, from lawful custody; or
(f) who is reasonably suspected of being a deserter from any of the armed forces; or
(g) who has been concerned in, or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists, of his having been concerned in, any act committed at any place out of India which, if committed in India, would have been punishable as an offence, and for which he is, under any law relating to extradition, or otherwise, liable to be apprehended or detained in custody in India; or
(h) who, being a released convict, commits a breach of any rule about change or absence from residence; or
(i) on whose arrest any requisition, whether written or oral, has been received from another police officer. For the purpose of arrest on requisition, the requisition should specify the person to be arrested and the offence or other cause for which the arrest is to be made.

In the like manner, any officer in charge of a police station has been authorised to arrest or cause the arrest of any person for getting security for good behaviour from suspected persons and habitual offenders.[2] Further, the arrest of any such person can be effected who commits an offence in the presence of a police officer. Where a person has been accused of committing a non-cognizable offence and refuses, on demand being made by a police officer, to give his name and residence or gives false name or residence, such a person may be arrested but such arrest shall be only for the limited purpose of ascertaining his name and residence. After such ascertaining, he has to be released on executing a bond with or without sureties. In case the name and residence of such person cannot be ascertained within 24 hours from the date of arrest or if such person fails to execute a bond as required, he would have to be presented before the nearest magistrate having jurisdiction.[3]

Arrest can be made or caused to be made by a private person also. This is mainly to put hand on proclaimed offenders and those who

2. S. 41(1), Cr PC, for not effecting arrest, 2010 amendment to Cr PC requires the police officer to give reasons.

3. *Id.,* s. 42.

commit a non-bailable and cognisable offence in the presence of such a private person. After arrest, the arrestee has to be handed over to the police officer or a police station. A magistrate is also authorised to arrest and commit to custody an offender, if the crime is committed in his presence. The members of the armed forces have been granted exemption from such arrests.[4]

Procedure for arrest

The Cr PC sets out the manner in which the arrest should be made and enables a police officer to enter a place if he has reason to believe that the person to be arrested has entered into that place or is within that place. A police officer is also empowered to pursue an offender in any place in India beyond their jurisdiction. However, "the person arrested shall not be subjected to more restraint than is necessary to prevent his escape".[5] The police officer is under an obligation to communicate forthwith to the person arrested full particulars of the offence and grounds for which he is arrested.[6] Where a person is arrested for a bailable offence without a warrant, the police officer shall inform the person arrested that he is entitled to be released on bail and that he may arrange for sureties on his behalf.[7] There are specific provisions in the Cr PC which provide for search of arrested persons, seizure of offensive weapons from the arrested persons, medical examination of the arrested persons, and deputation by a police officer or his subordinate to arrest a person without warrant.[8]

Section 56, which corresponds to clause (2) of article 22 of the Constitution of India, provides that the person arrested shall not be kept in the custody of police officer for a longer period than is reasonable and that in any event such period shall not exceed 24 hours exclusive of the time necessary for the journey from the place of arrest to the magistrate's court. However, if the magistrate permits the police officer to keep such person in his custody, he can do so beyond the period of 24 hours. Section 58 casts an obligation upon the officer in charge of a police station to report to the specified authorities of arrests made without warrant within their jurisdiction and of the fact whether such persons

4. *Id.,* ss. 43-45.
5. *Id.,* ss. 46-49.
6. *Id.,* s. 50 (Corresponding to clause (1) of art. 22 of the Constitution of India).
7. *Ibid.*
8. *Id.,* ss. 51-55.

have been admitted to bail or not. Any person arrested by a police officer cannot be discharged except on his own bond or bail or under the special order of a magistrate. The Cr PC empowers the person having the lawful custody of an accused to re-arrest him if he escapes or is rescued from his custody.[9]

Probabilities of abuse

Looking to the practical aspects of these provisions, they confer unlimited power on police. For example, section 41(b) empowers a police officer to arrest a person who is in possession of "any implement of house breaking", the burden is placed upon that person to justify possession of such implement and to show that it is not without "lawful excuse". It may be asked as to what does an "implement of house breaking" and "lawful excuse" mean. Any iron/steel rod or any implement used in a house or a work place can also be used for house breaking. Such a provision can be used by any unscrupulous policeman against any person to set personal scores or to exploit women. Similarly, section 41(d), providing for the arrest of any person found in possession of stolen property and who may be reasonably suspected of having committed an offence with reference to such thing, confers wide discretion on police leaving much scope for violation of the norms of fairness. Similarly, the expressions such as "concerned in any cognizable offence", "against whom a reasonable complaint is made that he is "concerned in a cognizable offence"; "credible information", "suspected of being "concerned in any cognizable offence" leave a wide amplitude for exploitation. The generality of language and the consequent wide discretion vesting in police officers is indeed enormously threatening and has been the very source of abuse and misuse. The qualifying words "reasonable", "credible" and "reasonably" in the above mentioned provisions carry no specific connotation and need practically to be followed in the specific social context.

There are certain provisions in the Cr PC which empower the police to arrest any person, without orders from a magistrate and without warrant, "if it appears to such officer" that such person is designing to commit a cognizable offence and that the commission of offence cannot be prevented otherwise.[10] As regards the assessment of an honest use of powers by a police officer, it is practically improbable. Moreover, the

9. *Id.,* ss. 59-60.
10. *Id.*, s.151.

police officers making a wrongful arrest under these provisions are generally not being proceeded against, much less punished. Persons who are subjected to excessive use of the police power avoid complaints against police because in the existing circumstances that involves more risks than benefits.[11]Also, action against any police officer is considered by the authorities as having demoralising effect.

The constitutional safeguards against excessive use of power of arrest, as mentioned above, are specified in article 22 of the Constitution of India, which declares that "no person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice."[12] It further provides that every person arrested and detained in custody shall be produced before the nearest magistrate within twenty-four hours of such arrest excluding, of course, the time necessary for the journey from the place of arrest to the court of magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate.[13] The protection, however, cannot be claimed by an enemy-alien or a person who has been arrested under any law providing for preventive detention.[14]

In actual practice, these safeguards contained in the Cr PC and the Constitution are not much effective and the power of arrest is being wrongly and illegally exercised in a large number of cases all over the country. There are generally complaints that the police power of arrest is being used either to extort money and other valuables or at the instance of an enemy of the arrestee. This power is being resorted to in civil disputes also on the basis of a false allegation against a party at the instance of his opponent. The worst hit in the process are women as is being frequently reported now.

The vast discretion to the police to arrest a person even in the case of a bailable offence, whether cognizable or non-cognizable, and its further authority to make preventive arrests,[15] often results in abuse of power. It

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11. There is yet another group of provisions, ss. 107 to 110, in the Code which empower the magistrate to call upon a person, in situations/circumstances stated therein, to execute a bond to keep peace or to be on good behaviour. These provisions do not empower a police officer to arrest such persons. Yet, the fact remains that large number of persons are arrested under these provisions as well.

12. The Constitution of India, art. 22(1).

13. *Id.*, 22(2).

14. *Id.*, 22(3).

15. Cr PC, s. 151.

may not be forgotten that these vast discretionary powers are vested with the persons equipped with firearms, which are becoming more and more sophisticated with each passing day and who have, so far not been accountable for their acts. This has been the reason for the police excesses against women without accountability. Thus, these unbridled powers are genuinely a matter of great concern for women.

Legal framework for custodial justice

The legal framework relating to custodial justice to women comprises of various enactments passed by the Parliament or state legislatures, subordinate legislations, executive instructions, circulars, memoranda and manuals. Besides, there are notable judicial decisions of the Supreme Court in this context.[16]

As regards the substantive provisions for crimes and sentences, these are found in the Indian Penal Code, 1860 (IPC). There is an urgent necessity to work out sentencing strategies appropriate to women which could not be contemplated when the IPC was enacted. Krishna Iyer Committee on Women Prisoners has explicitly referred to this fact.[17]

The Police Act, 1861, defines powers and conduct of the police for the prevention and detection of crimes. Concerning women. it requires a fresh look. Appropriate amendments may be made to it to reflect the special needs of women. The Iyer committee has recommended for replacing this outmoded statute by a new one. A complete overhauling is also required in all other relevant Acts which have been adopted earlier in a different perspective of justice.

The Prisoners Act, 1900, consolidates the law relating to prisoners confined by order of a court and provides for custody of prisoners in presidency towns as well as their removal from one prison to another including discharge of prisoners. The Prisoners (Attendance in Courts) Act, 1955, specifically makes provision for the attendance in courts of

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16. *Hussainara Khatoon (III)* v. *State of Bihar*, AIR 1979 SC 1360; *Prem Shankar Shukla* v. *Delhi Admn,* AIR 1980 SC 1535; *Upendra Baxi* v. *State of Delhi Admn.* (WP No. 2526 of 1981, order dated 14.9.81); *Nandini Satpathy* v. *P.L. Dani*, AIR 1978 SC 1025; *Sheela Barse* v. *State of Maharastra*, AIR 1983 SC 1086; *State of Maharastra* v. *Ranikant* (1991) 2 SCC 373; *Nilabati Behera* v. *State of Orissa* (1993) 2 SCC 746; *Nilabati Behera* v. *State of Orissa* (1981) Cr LJ 481 (SC); *MM Hoskot* v. *State of Maharastra*, AIR 1978 SC 1548; *Zasrolina* v. *Government of Mizoram* (1981) Cr LJ 1736; *Sukhdas* v. *Union Territory of Arunachal Pradesh*, AIR 1986 SC 991; *D.K. Basu* v. *State of West Bengal*, 1997 Cri LJ 743 (SC).

17. *Report on Custodial Justice for Women*, para 480.5 (1987-88).

persons confined in prisons for obtaining their evidence or answering a criminal charge. This special Act supplements the Prisoners Act, 1900, to that extent. The Transfer of Prisoners Act, 1950 is also a special Act enacted by the Parliament to answer the specific exigencies for the removal of prisoners from one state to another. The Identification of Prisoners Act, 1920, also involves many questions of human rights importance.

The Prisons Act, 1894, provides for the regulation of prisons almost throughout India. This Act defines the duties of prison officers including (a) medical officers; (b) admission, removal and discharge of prisoners; (c) discipline of prisoners; (d) food, clothing and bedding and different categories of prisoners as well as issues relating to their health and employment. Above all, there are also provisions defining prison offences and punishments. The Act regulates situation in custody as well as treatment of jail inmates.

The Probation of Offenders Act, 1958, the Reformatories School Act, 1897 and the Family Courts Act, 1984 are also related to the present subject. The jurisdiction of the family courts may be extended to include all cases concerning women offenders and speeding up justice to women in custody. Mobile judicial camps for pending cases can be a measure to be considered. Krishna Iyer Committee in its report has recommended *nari bandigrah adalats* for dispensation of justice to detainees, both offenders and non-offenders. The *mahila* courts in Andhra Pradesh provide an interesting model. The Suppression of Immoral Trafficking in Women Act, 1956, should also be looked into in this respect with due concern.

With respect to non-prison custodial institutions, there are several enactments, like the Orphanages and other Charitable Homes (Supervision and Control) Act, 1960, the Women's and Children's Institutions (Licensing) Act, 1956, the Mental Health Act, 1987 replacing the Indian Lunacy Act, 1912 and the Juvenile Justice Act, 2000.

III Judicial guidelines

The effort of the judiciary, in particular the Supreme Court, over the last more than two decades has been to circumscribe the vast discretionary powers vested by law in police by imposing several safeguards and to regulate it by laying down numerous guidelines. The effort throughout has been more in the nature of preventing the abuse and compensating the victims, while leaving it free to use the power genuinely. In *Joginder Kumar* v. *State of UP*,[18] while dealing with the power of arrest and its

18. (1994) 4 SCC 260 at 263.

exercise, the Supreme Court has appropriately made a perceptive observation: "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?"

The observation seeks the adoption of a realistic approach in the matter of police powers. The rights, liberties and privileges of an individual *vis-à-vis* the society are to be properly balanced. This is more significant because in modern times, a nation's civility is being judged by the methods it uses in the treatment of the offenders who are a part of it. The Supreme Court in *Nandini Satpathy* v. *P.L. Dani*,[19] quoting Lewis Mayers, stated that, "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." It made clear that there exists a conflict between societal interest in effecting crime detection and constitutional rights, which the accused individuals possess. Emphasis may shift, depending on the circumstances, in balancing these interests as has been happening in America. Since *Miranda*,[20] there has been a retreat from stress on protection of the accused and gravitation towards society's interest in convicting law-breakers. Currently, the trend in the American jurisdiction 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."[21] Our constitutional perspective has, therefore, to be relative and cannot afford to be absolutist, especially when torture technology, crime escalation and other social variables affect the application of the principles in producing humane justice.[22]

In order to control abuse of police power, in *Sheela Barse* v. *State of Maharastra*,[23] the Supreme Court held it to be absolutely essential that legal assistance must be made available to prisoners in jails, whether they be under-trials or convicted prisoners. The court outlined seven guidelines to come to the aid of women in custody, *viz.* (i) exclusive police lockups for female suspects, (ii) interrogation of women prisoners in the presence

19. AIR 1978 SC 1025 at 1032.
20. *Miranda* v. *Arizona* (1966) 334 US 436.
21. *Couch* v. *United States* (1972) 409 US 322, 336.
22. *Supra* note 19 at 1034.
23. AIR 1983 SC 378.

of a female police officer, (iii) arrestee being informed of the grounds of arrest immediately, (iv) provision for legal aid, (v) visits to police lockups, (vi) communication immediately to the nearest relatives or friends of arrested women, (vii) inquiry by the magistrate about any torture meted out to the women arrestee and her right to medical examination, *etc.*

In *D.K. Basu* v. *State of West Bengal,*[24] the Supreme Court issued some directions to be followed as preventive measures in all cases of arrest or detention, till legal provisions are made in that behalf. The directions are as follows:

(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 contain the time and date of arrest.
(3) A person who has been arrested or detained and is being held in custody in a police station or interrogation centre 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.

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24. (1997) 1 SCC 416.

(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 notice board.

To ensure the compliance of these directions, the court held that the failure to comply with these requirements shall apart from rendering the concerned official liable for departmental action, would 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 court emphasized that these directions flow from the right to life and personal liberty enshrined in articles 21 and 22(1) of the Constitution and need to be strictly followed. These would apply with equal force to all other governmental agencies and are in addition to the other 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 court further directed that these requirements

should be forwarded to the director general of police and the home secretary of every state/union territory to circulate the same to every police station under their charge and get the same notified at every police station at a conspicuous place. The Supreme Court observed that 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 be a step in the right direction to combat the evil of custodial crime and bring in transparency and accountability. The court expressed the hope that these requirements would help to curb, if not totally eliminate, the use of questionable methods by police during interrogation and investigation leading to custodial commission of crimes.

IV Reports of commissions

In spite of some safeguards contained in the Cr PC and the Constitution against abuse of power of arrest and detention, the fact remains that the power is being wrongly and illegally exercised in a large number of cases all over the country. The Law Commission has observed that "we are not unaware that crime rate is going up in our country for various reasons .... 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." The Commission has, however, pointed out that "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." It is the poor who suffer most at the hands of the police and their poverty itself makes them suspects. Nowadays, even middle class and other well-to-do people, who do not have access to political power-wielders, are also becoming targets of police excesses. In the prevailing circumstances, the fundamental significance of the human rights needs to be appreciated and steps must be taken to preserve, protect and promote the rule of law which constitutes the bedrock of our constitutional system.[25]

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25. Law Commission of India, *Working Paper on Law of Arrest* 5-6 (2001).

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 organisation. The report suggested that, by and large, nearly 60 per cent of the arrests were either unnecessary or unjustified and that such unjustified police action accounted for 43.2 per cent of the expenditure of the jails. The Commission observed thus:[26]

> 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. [The Commission] 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 Report of the National Police Commission is now more than two decades old, Since then, the position has not improved. Even the legal aid requirement is not being properly respected as revealed by a recent survey conducted by the students of University School of Law and Legal Studies from 23-30 October 2009 under the supervision of the present author and the Delhi legal services authority.

The Royal Commission had earlier suggested restrictions on the power of arrest on the basis of the "necessity 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 and to investigate crime. The commission was of the view that such restrictions would diminish the use of arrest and produce more uniform use of powers. According to the Commission, the detention upon arrest for an offence should continue only on one or more of the following criteria:

a) the suspects unwillingness to identify himself;
b) the need to prevent the continuation or repetition of an 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

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26. National Police Commission, *Third Report on Corruption in Police* 31 (1980).

e) the likelihood of the person failing to appear before court to answer any charge made against him.[27]

The commission proposed the introduction 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. In this way, the accused may be directed 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.[28]

The *Third Report* of the National Police Commission has also suggested that an arrest during the investigation of a cognizable offence may be considered justified only when: (a) 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; or (b) the accused is likely to abscond and evade the processes of law; or (c) the accused is given to violent behaviour and is likely to commit further offences unless his movements are brought under restraint; or (d) the accused is a habitual offender and unless kept in custody, is likely to commit similar offences again.

Besides, through departmental instructions, a police officer making an arrest should be made to record in the case diary the reasons for making the arrest because the existence of power to arrest is one thing, while 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 lockup 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 reasonable satisfaction reached after some investigation as to the genuineness and *bona fides* of a complaint and a reasonable belief both as to the complicity and the need to effect arrest. Except in heinous offences, an arrest must be avoided. A notice to person concerned to attend the police station house and not to leave station without permission would suffice.[29]

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27. Sir Cyril Philips, *Report of the Royal Commission on Criminal Procedure* 45 (1981).
28. *Id.* at 46.
29. See *supra* note 26, para. 241.

The National Police Commission also expressed a belief that these rights are inherent in articles 21 and 22(1) of the Constitution and are required to be recognised and scrupulously protected. For effective enforcement of these fundamental rights, the commission set out certain requirements, similar to the directions given by the Supreme Court in *D.K. Basu* case, such as: (a) 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, be told, as far as is practicable, that he has been arrested and where he is being detained; (b) the police officer shall inform the arrested person of this right when he is brought to the police station; and (c) an entry shall be required to be made in the diary as to who was informed of the arrest.[30] These protections from power must be held to flow from articles 21 and 22(1) and enforced strictly.

V Process for improvement

In spite of efforts of judiciary, there is a need for providing statutory safeguards to prevent abuse of power of arrest. Even if it is legitimately presumed that the decisions and guidelines contained in the Supreme Court decisions were duly published in all the states and were brought to the notice of all the police officers, the complaints about abuse of power of arrest still continue unabated. Thus, something more needs to be done to prevent the abuse and misuse of the power of arrest while at the same time not hurting the societal interest. Since 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 necessary to take appropriate legislative measures for making such changes in law as may be necessary to prevent abuse/misuse of the power of arrest.[31]

An important proposal about improvement in law of arrest and custody and its better implementation is of the authorisation to the members of civil society to visit police stations. Quite often, a person is detained in police custody without registering the crime and without making any record of such detention/arrest. Persons are kept for a number of days in such unlawful custody and quite often subjected to ill-

30. *Id.*, paras. 26 to 29. The commission has made some other observations which are similar to the directions of the Supreme Court in *D.K. Basu*, *supra* note 24.

31. See *supra* note 25.

treatment and third-degree methods. There should be a specific provision in the Cr PC creating an obligation on the officer in charge of the police station to permit such persons to visit and ensure that no persons are kept in the police stations without keeping a record of such arrests.

Every police station should maintain a custody record, which shall be open to inspection by members of the bar and the representatives of the registered NGOs interested in human rights protection containing the following particulars, among others:

(a) name and address of the person arrested/detained;
(b) name, rank and badge number of the arresting officer and any accompanying officers;
(c) the time and date of arrest and when was the person brought to police station;
(d) reasons/grounds on which arrest was effected;
(e) details of any property recovered from or at the instance of the person arrested/detained; and
(f) names of the persons (friends or relatives of the person arrested) who were informed of the arrest.

Another important step in improvement of laws can be to increase compoundability of offences and effectiveness of the method of plea-bargaining. Since quite a few offences in the IPC are essentially of civil nature, there is need for decriminalization of law at a substantial basis.

No arrests should be made under sections 107 and 110, Cr PC or similar other provisions. Police must be empowered to take, if necessary, a personal *interim* bond to keep peace for good behaviour from such persons. This should be extended to all similar offences under the local police Acts. Arrests under section 151 should also be well in terms of fairness, and rare.

As regards the grant of bail, the Law Commission has proposed that in respect of all offences other than murder, dacoity, robbery, rape and offences against the state, the provisions of law should be made liberal and bail should be granted almost as a matter of course except where it is apprehended that the accused may disappear and evade arrest or where it is necessary to prevent him from committing further offences. It has also been proposed that no person should be arrested or detained by police merely for the purpose of questioning because such an arrest or detention amounts to unwarranted and unlawful interference with the personal liberty of an individual guaranteed by article 21 of the

Constitution.[32] Law should expressly provide that once a person is arrested, the arresting authority should ensure the safety and well being of the detainee. Moreover, the requirement of mandatory medical examination of the arrested person should be followed. The decision of A.P. High Court in *Challa Ramkrishna Reddy* v. *State of Andhra Pradesh*,[33] which was later affirmed by the Supreme Court in *State of Andhra Pradesh* v, *Challa Ramkrishna Reddy*,[34] about the state liability for damages for the negligent or indifferent conduct of police/jail authorities, should be kept in mind in this regard. Take a case where a person (a heart patient) is arrested for simple theft or simple rioting and is not allowed to take his medicines with him at the time of his arrest and no medicines are provided to him in spite of his requests for that and he dies. It would certainly be too big a punishment and, in such cases, the state should be liable for damages.

Maintenance of 'diary' by investigating officers, as mentioned above, is an important issue in the present context. Sub-section (1) of section 172, Cr PC requires every police officer making an investigation to enter his proceedings in the investigation in a diary everyday setting forth the time at which the information reached him, the time at which he began and closed his investigation, the place or places visited by him and a statement of the circumstances ascertained through his investigation. Such diary would also record and reflect the time, place and circumstances of arrest. The Supreme Court in *Shamshul Kanwar* v. *State*[35] pointed out the vagueness prevailing in this respect saying that in every state there are police regulations/police standing orders prescribing the manner in which such diaries are to be maintained, but there is no uniformity among them. In view of such a state of affairs, the Supreme Court suggested a legislative change to prevent any confusion and vagueness in the manner of maintenance of diaries under section 172. The contents of the diary are to be communicated to the court and the superior officers. The significance of such a diary is evident from its relevance as a safeguard against unfairness of police investigation.[36] An amendment of section 172, Cr PC should ensure that the time, place and circumstances of the arrest of an accused are required to be properly recorded and reflected in the diary.

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32. *Ibid.*
33. AIR 1989 AP 235.
34. AIR 2000 SC 2083.
35. AIR 1995 SC 748.
36. See *Ashok Kumar* v. *State*, 1979 Cr LJ 1477 (Del).

The Law Commission reviewed the provisions of different enactments related to the subject in its *84th and 135th Reports*, which are concerned with women in custody. Some of the recommendations of the commission have now been given a statutory shape as discussed below:

Not to touch body of women in custody

Earlier, section 46, Cr PC, *inter alia*, provided that in arresting a person, the police officer or other person making the arrest shall actually touch or confine the body of the person to be arrested unless there be submission to the custody by word or action. Dealing with this section, from the point of view of arrest of women, the Law Commission, in its *Report on Rape and Allied Offences,*[37] had expressed the view that a provision should be incorporated in the Cr PC to the effect that in the case of women, their submission of custody should be presumed unless proved otherwise, and that the police officer should not actually touch the person of the woman for making arrest. The following proviso has been accordingly added at the appropriate place in the Cr PC:

> Provided that where a women is to be arrested, unless the circumstances indicated to the contrary, her submission to custody on an oral intimation of arrest shall be presumed and, unless the circumstances otherwise require or unless the police officer arresting is a female, the police officer shall not actually touch the person of the woman for making her arrest.

The same position had been reiterated by the Law Commission in its *135th Report*.[38]

Not to arrest women after sunset and before sunrise

The Law Commission had also examined the question of time of arrest of women and expressed the view that except in unavoidable circumstances, no woman should be arrested after sunset and before sunrise. For this purpose, by 2005 amendment of Cr PC, new sub-section (4) has been inserted in section 46, Cr PC in the following terms:

> Save in exceptional circumstances, no woman shall be arrested after sunset and before sunrise, and where such exceptional circumstances exist the woman police officer shall by making a written report obtain the prior permission of the judicial magistrate

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37. Law Commission of India, *84th Report on Rape and Allied Offences* 14 (1980).
38. Law Commission of India, *135th Report on Women in Custody* 3 (1989).

> of the first class within whose local jurisdiction the offence is committed or the arrest is to be made.

Medical examination of women accused

Section 53, Cr PC, requires that in the case of a female accused, the medical examination should be done by a female medical practitioner. There was, however, another type of medical examination contemplated under section 54, where the accused himself or herself desired such examination, in order to prove his or her innocence. The Cr PC was silent as to how far a woman could insist that such examination be done by a female registered medical practitioner and with strict regard to decency. The Law Commission had recommended that the Cr PC should be amended, by providing that whenever the person of a female is to be examined under section 54, the examination should be made only by or under the supervision of a female registered medical practitioner, and with strict regard to decency. According to Law Commission, when the accused herself could request for such examination, she could make it a condition that the examination be done by a woman only. Nevertheless, the law should itself provide for this safeguard.

The Supreme Court had suggested, *inter alia*, that the magistrate should inform the arrested person about this right in case that person has any complaint against torture by the police. The Law Commission had recommended that a provision should be inserted in the Cr PC to provide:[39]

> The magistrate shall, whether or not the arrested person makes a request for examination of the body under this section, inform that person about his right to such examination, in order to bring on record any facts which may show that an offence against the body has been committed with respect to such person after he was arrested."

But, instead of that, the 2008 Cr PC amendment replaced the earlier section 54 by making medical examination of the accused a general provision ommiting the provision "at the request of the arrested person".

The judiciary will have to clarify the difference between sections 53 and 54. In the author's view, the medical examination at the request of

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39. *Id.* at 6 (1989). The Cr PC amendment Act, 2010 requires recording of statement of sexually assaulted woman under section 161 by a police officer. For a minor victim, a blood relation should report the matter to be taken cognizance by the court.

the arrested person should continue.

Examining women in their place of residence

In general, the police can summon any person believed to be acquainted with the facts of the case and such person can be directed to come to the police station for the purpose. But, in the case of person below 15 years[39*a*] and also in the case of women, it is expressly provided in the proviso to section 160(1), Cr PC, that they shall not be called to the police station for the above purpose, but they should be examined in their place of residence. This is an eminently sound provision, but, unfortunately, there is no any specific sanction provided therein for its infringement. At present, the proviso to section 160(1) reads as under:

> Provided that no male person under the age of fifteen years or woman shall be required to attend at any place other than the place in which such male person or woman resides.

In the opinion of the Law Commission, it does not indicate very clearly that in the context of section 160(l), the word "place" means the actual dwelling place of the minor or woman. It is possible that it may be construed as meaning the 'locality of residence'. The commission has, therefore, recommended that it should be provided that:[40]

> [N]o male person under the age of fifteen years or woman shall be required to attend at any place other than his or her dwelling place.

A relative, friend, etc. to be present on examination

The Law Commission has pointed out that when a 'young person below fifteen years or a woman is examined by the police during investigation, a relative or friend of such male person or woman or a representative of a recognised organisation interested in women and children's welfare should be allowed to be present. In this respect, the following provision should be incorporated in the Cr PC:[41]

> Where during investigation the statement of a male person under the age of fifteen years or of a woman is recorded by a male police officer, either as first information of an offence or in the

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39*a*. The Cr PC (Amendment) Act 2010 has increased the age for this purpose to 18 years.

40. *Ibid.*

41. *Id.* at 6.

> course of an investigation into an offence, a relative or friend of such male person or woman, and also a person authorised by such organisation interested in the welfare of women or children as is recognised in this behalf by the State Government by notification in the official gazette, shall be allowed to remain present throughout the period during which the statement is being recorded.

The question of providing penalty for violation of the proviso to section 160(1), Cr PC was earlier examined by the Law Commission of India in its *Report on Rape and Allied Offences*. The commission noted that merely summoning a person in violation of this statutory mandate would presumably be punishable as wrongful restraint under section 341, IPC, which provides a maximum punishment of up to one month imprisonment or fine up to hundred rupees. This, being inadequate, warranted a change. A charge under section 166, IPC (public servant disobeying direction of law with intent to cause injury to any person) could also be made. But, in the opinion of the Commission, it would be better to have an express provision to cover such a violation, and the provision could be appropriately placed in the IPC in the chapter on offences by or against public servants. The Commission, therefore, recommended that section 166A should be inserted in the IPC, in the following terms:

> 166A. Whoever, being a public servant:
>
> (a) knowingly disobeys any direction of the law prohibiting him from requiring the attendance at any place of any person for the purpose of investigation into an offence or other matter, or
>
> (b) knowingly disobeys any other direction of the law regulating the manner in which he shall conduct such investigation, to the prejudice of any person. shall be punished with imprisonment for a term which may extend to one year or with fine or with both.

The proposed offence has been recommended to be made cognisable, bailable and triable by any magistrate. This recommendation can be carried out, as a preventive measure, against malpractices or acts of indifference which may create situations of harassment to women.

No capital punishment to a pregnant woman

Section 416, Cr PC, provided earlier that if a woman sentenced to death was found to be pregnant, the High Court shall order the execution of the sentence to be postponed and may, if it thinks fit, commute the sentence to imprisonment for life. The Law Commission had strongly

felt that time had come to make commutation of the sentence mandatory in all such cases. The change has been effected by the 2008 amendment and the section now reads:

> Postponement of capital sentence on pregnant woman.- If a woman sentenced to death is found to be pregnant the High Court shall commute the sentence to one of imprisonment for life.

The word postponement in the head note should be replaced by the word "commutation" and the commuted sentence should be subject to further remission in appropriate cases. As regards the detention of such a woman after arrest, if there are no suitable arrangements in the locality for such detention, the woman should be sent to an institute established and maintained under the Women's and Children's Institutions (Licensing). Act, 1956. A new provision may be added to the Cr PC for the purpose.

Grant of bail to women

At present, the Cr PC, while dealing with the question of bail, requires to take into account the fact that women deserve a special consideration. While directing the court not to release a person on bail if he is accused of an offence punishable with death or with imprisonment for life, the Cr PC takes care to provide that this prohibition shall not apply where the accused is a woman. The absence of a more specific provision emphasizing the duty of the court to take into account the fact that the accused is a woman, can be regarded as a lacuna in the present law. The existing proviso to section 437(1), which reads: "Provided that the court may direct that a person referred to in clause (ii) be released on bail if such person is under the age of sixteen years or is a woman or is sick or infirm" was recommended by the Commission to be replaced by the proviso: "Provided that where the person referred to in clause (i) or clause (ii) is under the. age of sixteen years or is a woman or is sick or infirm, the court shall direct that such person be released on bail, unless the court, for reasons to be recorded, considers it proper not to release such person on bail." The 2005 Cr PC amendment has effected this recommendation without requiring the court to record reasons for not granting bail to a woman accused.

Suspension of sentence on pregnant woman

The Law Commission is of the view that the convicting court should have a power to suspend the execution of any sentence of imprisonment that might have been passed on a pregnant woman, At present, the

criminal law of the country gives no such discretion to the court. The peculiar needs of a pregnant woman ought to be taken into consideration by the trial court and the law should contain a provision, vesting in the court a discretion, to suspend execution of the sentence of imprisonment (whether it be for life or for a specified term), subject, of course, to certain safeguards.[42]

Protection of female prisoners

The Law Commission in its *135th Report* proposed that the High Courts on the administrative side should be vested with power to direct sessions judges to satisfy themselves that female prisoners are protected and properly looked after. Further, they should have power to take such measures as may be desirable in order to move a state government to take necessary action for ensuring compliance in the matter.[43] The Commission specifically proposed that a female prisoner on admission to jail should be medically examined by a lady medical officer and, wherever deemed necessary for medical reasons, she should be kept separately in a female enclosure for such period as in the opinion of the medical officer may be necessary. Medical examination of female prisoners should also be made on readmission to the jail after release for a specific purpose. The Commission further proposed:

(a) If the officer in-charge or the medical officer suspects that a female prisoner is pregnant, the female prisoner shall be sent to the district hospital for detailed examination and report.
(b) The lady medical officer of the district government hospital to whom the female prisoner has been referred shall certify the state of her health, pregnancy, duration of pregnancy and probable date of delivery and the special diet, if any, to be prescribed and other measures to be adopted.
(c) Gynaecological examination of the female prisoners shall thereafter be performed in the district government hospital by a lady medical officer and proper prenatal and antenatal care shall be provided to the female prisoner, according to medical advice.
(d) In cases of advanced stage of pregnancy, the female prisoner shall be shifted to a female ward of the government hospital.
(e) Such a pregnant female prisoner shall be kept in the woman's

42. *Id.* at 10.
43. *Id.* at 11.

ward of the government hospital for not less than fifteen days after the birth of a child or for such longer period as may be advised by the gynaecologist.

Certain safeguards have also been proposed as regards the transit of female prisoners: (a) from one jail to another, or (b) for being taken to the court, or (c) for investigation:

(i) a female prisoner shall not be handcuffed and shall not be required to wear any fetters or cross-bars during such transit;
(ii) a female prisoner shall be escorted by the matron or female warden, if required to leave the female enclosure and such matron or female warden shall remain with the prisoner till her return to the enclosure or release from the jail; and
(iii) a female relative of the female prisoner shall be allowed to accompany the female prisoner during transit.

Inspection of jails

The bare legislative provisions generally stand the risk of non-implementation unless proper machinery is devised to oversee their enforcement. The Law Commission has, therefore, recommended the inspection of jails by the judicial officers, preferably a lady officer (where one is available), to be nominated by the sessions judge. Where a lady judicial officer is not available, a male judicial officer to be accompanied by a lady social worker be nominated. At places other than the headquarters of the sessions courts, they will, at least once in every two months, make a surprise visit to jails for inspection, with a view to:

(i) providing the arrested females an opportunity to communicate their grievances;
(ii) ascertaining the conditions in the jails and verify whether the requisite facilities are being provided and the provisions of the law relating to female prisoners are being observed;
(iii) bring to the notice of the sessions judge lapses, if any, on the part of the officers in charge of jails in regard to female prisoners.

At the headquarter of the court of sessions, the sessions judge should carry out similar inspections of the jails and forward copies of the inspection reports to the commissioners of police (or other corresponding officers), the inspector-general (prisons) and the state government, and make necessary recommendations. If the authorities fail to carry out the recommendations of the sessions judge, the matter should be brought to

the notice of the High Court.[44] Additionally, Law Commission has found desirable that at stated intervals, the visitors appointed by the government (two to three in each district) should visit the jails. Of these visitors, at least one should be a medical officer and two social workers, one of them being a woman. Not less than two visitors (one a lady) should once in every six months, make a joint inspection of every part of the jail in the district in respect of which they have been appointed. They should ascertain the conditions prevailing therein and to check if the requisite facilities are being provided and the provisions of the law are being complied with and the directions given by the competent court are being carried out, regarding women prisoners. These visitors should send the inspection report to the sessions judge for further action. For this purpose, "jail" includes a police lock-up, a prison and a place where persons are kept under detention under a law providing for preventive detention.

Protection against custodial rape

The IPC, which constitutes the general substantive criminal law of India, contains many provisions that can be availed of by persons in custody, irrespective of sex. But, the sexual abuse of women has received specific attention in several sections of the IPC. The most frequently invoked sections of the IPC in his context are sections 254 (indecent assault on women), 375-376 (rape) and 376B, 376C and 376D (covering some specific situations). To prevent harassment, exploitation and sexual abuse of women, the Criminal Law (Amendment) Act, 1983, focusing its attention on custodial rape, has made the punishment for such rape more stringent. Section 376(2) of the IPC, as inserted in 1983, deals specifically with rape by a police officer in certain circumstances, including: rape of a woman in his custody; rape committed by a public servant on a woman in his custody as such public servant; rape by a person who is on the management or staff of a jail, remand home or other place of custody or of a women's or children's institution; rape committed in respect of an inmate of such jail, *etc.*; rape by a person who is on the management or staff of a hospital; and rape committed on a woman in that hospital. For such custodial rape, the minimum punishment laid down in section 376(2) is rigorous imprisonment up to ten years, which is higher than the minimum punishment of seven years imprisonment prescribed for an ordinary rape case. In both these cases, the imprisonment can be for life. For adequate and special reasons, to be recorded in writing, the minimum

44. *Id.* at 12.

punishment can be relaxed by the court. "Hospital", includes, *inter alia*, any institution for the reception and treatment of persons requiring medical attention or rehabilitation.

In 1983, sections 376B, 376C and 376D were inserted in the IPC to deal with custodial sexual abuse not amounting to rape. Section 376B provides that if a public servant takes advantage of his official position and induces and seduces any woman in his custody or in the custody of a public servant subordinate to him to have sexual intercourse with him, such sexual intercourse not amounting to the offence of rape, shall be punished with imprisonment of either description for a term which may extend to five years and shall also be liable to fine. Same punishment has been prescribed for such intercourse by superintendent of jail, remand home, or manager of a women's or children's institution under section 376C. Section 376D contains similar provisions for punishment of a person for intercourse by any member of the management or staff of a hospital with any woman in that hospital. The offences under sections 376B, 376C and 376D are cognisable but no arrest is to be made without a warrant or without an order of a magistrate. All the offences are bailable and can be tried by the court of sessions only.

The Law Commission has observed that the present provisions of the IPC designed to deter potential offenders from committing rape or cognate offences including subtler forms of seduction or harassment, are fairly adequate so far as women in custody are concerned.

Recommendations of the Iyer Committee

The National Expert Committee on Women Prisoners headed by V.R. Krishna Iyer, former Judge, Supreme Court of India. constituted by the Government of India in 1987 made a number of operational recommendations referring to judicial, legislative, administrative and participative aspects of detention of women. Some of these recommendations are:[45]

(1) Greater uniformity of judicial and correctional processes to ensure equitable custodial conditions for all citizens, men and women.
(2) Critical assessment of the efficacy of existing legislation with the specific objective of de-penalization, decriminalization and de-institutionalization; introduction of specific provisions in IPC, Cr

45. NCW Seminar Report on *Women in Detention* (2001); see also Dipangshu Chakraborty, *Atrocities on Indian Women* 145-47 (1999).

PC, Prison Act, Police Act, *etc.* to reflect the special needs of women in custody and enlightened sentencing in view of women's responsibilities for raising their younger children and their indispensability in households.

(3) Visiting rights of recognized individuals and institutions to custodial centres including access to inmates and institutional records, without prejudice to the inmate's right to privacy.

(4) Prison service to be developed as a cadre with greater representation of women, scope for upward and lateral mobility, and parity in status *vis-à-vis* men in the service and a woman DIG must be attached to every state headquarter.

(5) Women representation in police should be likewise enhanced and mobility provided.

(6) Segregated custody is desirable for women as are specialized approaches to them; where crimes by or against women are endemic, special booths or units should be set up to assist women coming in conflict or contact with the judicial system; and such booths must be managed by an integrated force of men and women police jointly managing police stations, police lockups, escort, community outreach, and other amenities for women.

(7) To enhance prison's corrective impact, *Bandi Sabhas* are recommended where prisoners can interface freely with each other and with the management. Special mobile women prisoner *adalats* have been recommended to expedite judicial processing of inmates cases. Judicial camps have been similarly advocated for being held inside mental homes and places of social welfare custody.

(8) Socio-legal counselling to be operated by law faculties and schools of social work or by voluntary bodies are recommended in prisons and in other custodial centres. These would help to bring legal aid to the users at doorstep.

(9) The media must be welcomed as an independent assessor and not frowned upon or banned from access to custodial centres.

The above recommendations of the Iyer Committee have been widely discussed and have had a good impact on the development of law. To get fully implemented, these recommendations need popular understanding and support.