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## CONSTITUTIONAL RIGHT TO BE INFORMED TO AN ARRESTED PERSON FOR FAIR AND EFFECTIVE INVESTIGATION: COMPARATIVE STUDY BETWEEN MALAYSIA AND INDIA

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**Abstract:** The right to be informed is one of important right for the arrested person in pre-trial stage refers to various aspects of criminal procedure designed to safeguard the innocent from the harassment of the state authorities, both judiciary and executive. Each arrested person of the offence should be treated as an innocent person till been proved guilty by the court. Therefore, the arrested person has rights to be just, fair, reasonable, and effective investigation before deciding the cases as they will defense themselves during the investigation when they know what offences they alleged to. The United Nations contributed a lot in adopting declarations, conventions, and principles towards rights to justice in the court of law of the arrested person. Thus, this paper aim to discover how the right to be informed in fair and effective investigation applies in Malaysia and Indian criminal justice systems. This is important to see whether criminal justice system in Malaysia and India upholds the principles deemed necessary under constitutional rights. The researcher using doctrinal comparative method to emphasising the constitutional provisions which has been adopted in Malaysia and Indian Constitutions as well as their criminal procedure codes and in international convention and judgments of the courts. Right to be informed is the fundamental right of the arrested person in a criminal charge. In conclusion the necessity of discovering the truth is needed to apply the inappropriate procedures or methods and even may, sometime, infringe the fundamental rights of the arrested or any person involved, the liberty and jurisprudential concept of human rights in criminal justice must not be denied.

**Keywords:** criminal law, right of arrested person, Criminal Procedure Code, constitutional rights, investigation, right to be informed.

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## 1. Introduction

Liberty is the most precious of all the human rights. The Universal Declaration of Human Rights adopted by the General Assembly of the United Nations on December 10, 1948, contains several articles designed to protect and promote the liberty of individual. So does the International Covenant on Civil and Political Rights, 1966.<sup>1</sup> One of equal importance is the maintenance of peace and law and order in the society. Liberty is precious to an individual, so is the society interested in peace and maintenance of law and order in the society. Both are equally important. A major problem of human society is to combine that degree of liberty without which law is tyranny with that degree of law without which liberty becomes license.

Whether it is for securing the liberty of an individual or for maintaining the peace and law and order in the society, law is essential. Not only should there be a proper law, there should also be proper implementation of law. In short, the society should be governed by the rule of law and not by the rule of an individual, however benevolent he may be. Failure of rule of law is a sure indication of the liberty of the individual coming into peril and so does the peace of the society. It is therefore required of law that it should try to promote both these contending concepts and to maintain a balance between them, the balance between the necessity to protect and promote the liberty of the individual and the necessity to maintain peace and law and order in the society.

In this article, the comparative analysis of the Malaysia Constitutional provisions and Indian Constitutional provisions in light of right to be informed ground of arrest for fair and effective investigation by the investigating officer will be examined. Furthermore, the rights of the arrested person to know the reason of arrest should be granted or safeguarded by the Constitutional provisions in order to ensure the rights of the arrested person to fair and effective investigation before the criminal justice proceedings, particularly the pre-trial stage proceedings . Another purpose of this article is also to discover how the right to fair and effective investigation specifically right to be informed ground of arrest applies in Malaysia and Indian criminal justice systems, and to make exploratory finding that how important this rights for the arrested person of a criminal offence to access a fair and effective investigation criminal proceedings in pre-trial stages.

### **Right to Protection Against Arbitrary Arrest**

To arrest and detain anyone without observing due process of law is a serious infringement of individual liberty. Anyone who has been arrested will lose educational, employment and other

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<sup>1</sup> Human Rights and Detention Pre-Trial Detention, A Handbook of International Standard relating to Pre-Trial Detention (1994), p 9

opportunities seriously. In fact, an act of arrest and detention which damage reputation of person irreparably tarnishes the name of his family and deprive the source of sustenance. The stigma of arrested person remains subsequent to the release after 24 hours of his arrest. The freedom from unlawful arrest and detention is the one of the most fundamental and important right among the civil and political right. Any arrest should be justified to avoid unsecured life of individual in society. Arrest is an interference with the fundamental right of the personal liberty of citizen and it must be clearly understood that police officers have no right to detain somebody for the purposes of getting them help in their enquiries.<sup>2</sup>

Generally, it can be justified on the grounds that individual's prosecution is actually intended or at least contemplated as a possibility. The police, as important agency of state to maintain the law and order, required to justify the every exercise of their powers of arrest by reference to the legal source of these powers. Thus, arrests can also be problematic for the police officers who conduct them. Officers put themselves at risk when they pursue fleeing suspects or counter physical resistance. In fact, more officers are injured and killed during arrests than during almost any other single police activity. Arrests also affect public perceptions of the police, causing friction between communities and departments, especially for minority communities that disproportionately suffer the costs of arrests for minor offenses.<sup>3</sup>

Arrest is not desirable to sue in each and every case. But it accepted that arrest is the most effective method of securing attendance of the arrested person at his trial. Sometime arrest may become necessary as a precautionary measure in respect of person intending to commit an offence and sometime it becomes necessary for obtaining the correct name and address of a person committing an offence. Each country has its own constitutional and statutory provisions and judicial decisions regulating the exercise of arrest powers.

### **1.1 Meaning of Arrest**

There is no standard definition of an arrest and not defined in the Criminal Procedure Code or at common law. It is an ordinary word and whether a person has been arrested depend not on the legality of the arrest but on whether he has been deprived of the liberty to go as he pleases.<sup>4</sup> Arrest is defined in Black's Law Dictionary as to deprived a person of his liberty by lawful authority. Taking, under real or assumed authority, custody of another for the purpose of holding or detaining him to answer a criminal charge. Arrest is the taking of a person into

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<sup>2</sup> R v Lemsatef [1977]2 All ER 835, p.8396

<sup>3</sup> Rachel A. Harmon, Why Arrest? Why Arrest? Michigan Law Review Michigan Law Review (2019), p.318.

<sup>4</sup> Spicer v Holt [1969] RTR 389, p.400

custody in order that he may forthcoming to answer for the commission of an offence. A mere pronouncement of arrest or touching of body would be sufficient to put someone under arrest unless the person or persons sought to be arrested surrenders himself to arresting officer. A person or persons deemed to be under arrest either after the submission of himself to police or police overpowers such person.

What is an arrest has been the subject of extensive judicial interpretation. Based on *Pendakwaraya v. Kang Ho Soh*<sup>5</sup> whether in a particular case a person is under actual arrest at a given moment in time is a question of fact, to be decided according to the circumstances of each case. If a person stopped in connection to the investigation by police and his command to stop obeyed, would constitute a valid arrest. A mere threat to arrest, which is not accomplished by an overt act on the part of police, does not constitute an arrest. Thus, arrest implies apprehension or restraint or deprivation of one's personal liberty. Arrest defined as it consists in taking into custody of another person under authority empowered by law, for the purpose of holding or detaining him to answer a criminal charge or of preventing him the commission of a criminal offence.<sup>6</sup> A private individual can also arrest a person or persons in *flagrante delicto*, or where an offender has actually committed an offence. A reasonable force may be used by a private individual, in order to give effect to arrest. After arresting a person or persons by private individuals must send the arrested person or persons to the police station as soon as reasonably possible.

## 2. Ground for Arrest

There are certain requirements need to be fulfilled before the suspect been arrested, based on *Dallison v Caffery*<sup>7</sup> where Lord Diplock said one word about the requirement that the arrestor should act honestly he himself at the time believed that there is was a reasonable and probable cause. In *Chong Fook Kam & Anor v Shaaban bin Hussien & Ors*<sup>8</sup> a reasonable complaint may be equated with a reasonable or probable cause. The objective test and not a subjective test should be applied which as mentioned in *Tims v John Lewis & Co Ltd*<sup>9</sup> where the court has to decide on the evidence before it. In another word, those who arrest must be persuaded of the guilt of the arrested person. The authorities cannot bolster up their assurances or the strength of the case by seeking further evidence and detaining the man arrested meanwhile or taking him to some spot where they can or may find further evidence.

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<sup>5</sup> [1992] 1 MLJ 360, p.367

<sup>6</sup> *Roshan Beevi v. Joint Secretary to the Govt. of Tamil Nadu*, 1984 Cri. L.J. 134 (Mad.)

<sup>7</sup> [1964] 2 All ER 610, p.619

<sup>8</sup> [1967] 2 MLJ 54, p 58

<sup>9</sup> [1951] 2 KB 459, p.472

The rule of reasonableness applies in relation to an arrest. Based on Article 5 (1) (c) of European Convention of Human Right (ECHR) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicious having committed an offences or when it is reasonably considered necessary to prevent his committing an offences or fleeing after having done so.. It always been extremely reluctant to question whether the arresting authority had really acted upon reasonable suspicious. Reasonable suspicious which the foundation of the power under section 23 (1) (a) of Malaysian Criminal Procedure Code there is a different between reasonable suspicious and prima facie proof. Prima facie proof consists of admissible evidence where suspicious could not be put in evidence at all.<sup>10</sup> In the Court's view, probable cause before arresting safeguards individuals "from rash and unreasonable" interferences with privacy, liberty, and unfounded charges of crime, and therefore protects them.<sup>11</sup>

### **3. Right to be Informed of ground of arrest**

The police arrest powers are indeed awesome even though they protect society, they can destroy a life of a person. International convention state the right to receive information about the charge is guaranted to everyone who is arrested.<sup>12</sup> ECHR obliges the authorities to convey information at the time of arrest, the ECHR obliges the authorities to convey information promptly.<sup>13</sup> It is a condition of lawful arrest that they the party arrested should know on what charge or suspicion of what crime he is arrested. In *R v Lemsatef*<sup>14</sup> it was stated that neither arrest nor detention is properly carried out without the arrested person being told the offence which he is being arrested.

Public makes the work of the police more difficult by their captious attitude and the public expects and demands that police should provide protection and should give justice to arrested person promptly. Thus, the practical problem falls primarily under the police. If a person or persons arrested with warrant, he is entitled to ask to show warrant to him. He has to be satisfied himself that he is being arrested properly. Arrest will be illegal if warrant is not shown to the person arrested with warrant. It is considered that warrant is a media of information of arrest. Thus, the person arrested with warrant will be able to know the grounds of his arrest immediately.

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<sup>10</sup> Ibid 10

<sup>11</sup> Rachel A. Harmon, *Why Arrest? Why Arrest?* Michigan Law Review Michigan Law Review (2018), p.323

<sup>12</sup> Stefan Trechsel, *Human Rights in Criminal Proceedings*, Academy of European Law (2006), p 457-48.

<sup>13</sup> Article 5 of the European Convention of Human Rights.

<sup>14</sup> [1977] 2 All ER 835.

The person arrested without warrant has to be served with separate note of information of grounds of arrest. In *Christie and another v. Leachinsky and another*<sup>15</sup>, the House of Lords of the United Kingdom held that: If a policemen arrests without warrant upon reasonable suspicion of felony, or of the other crime of a sort which does not require a warrant, he must in ordinary circumstances inform the person arrested of the true ground of arrest. He is not entitled to keep the reason to himself or to give a reason which is not the true reason, in other words, a citizen is entitled to know on what charge or on suspicion of what crime he is seized. Thus, the arrested person must be informed of precise act done by him for which he would be tried. In a landmark Judgment regarding with arrest, the Supreme Court of India in the case of *Joginder Kumar*<sup>16</sup> case held that “Constitutional and legal provisions requiring an arrested person to be informed about the grounds of arrest, her/his right to be represented by a lawyer and to be promptly produced before a court must be strictly followed.

#### **4. Comparative Analysis**

Arrest means the deprivation of a person of his liberty by legal authority or at least by apparent legal authority. Personal liberty is a basic human right that can be seriously curtailed by arrest, which is the first step of criminal process in most legal systems.<sup>17</sup> The right of personal liberty is a basic human rights recognized by the General Assembly of the United Nations in its Universal Declaration of Human Rights (UNDHR), European Convention of Human Rights (ECHR), International Covenant on Civil and Political Rights (ICCPR), African Charter and America Covention of Human Rights (ACHR). Based on the International Convention and Constitution consider arrest begins the process of detention and should only occur when authorised by the law. Arrest must always be subject to judicial control or supervision to ensure it is legal.<sup>18</sup> Whatever the nature of the offence involved, informing the grounds of arrest to the arrestee is important for the protection of personal liberty of individuals.

##### **4.1 Malaysia Position**

In Malaysia law of arrest confined under section 15 (1) of Criminal Procedure Code of Malaysia that an arrest may be made in the following manner (a) by actually touching the body of the person to be arrested or (b) by actually confining the body of the person to be arrested or (c) where there is submission to custody by word and action. In *Polis Diraja Malaysia v Keong Mei Cheng*

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<sup>15</sup> [1947] AC 57

<sup>16</sup> *Joginder Kumar v. State of U.P.*, 1994 SCC 26

<sup>17</sup> Asoka Silva, The right to be informed of the grounds of arrest in criminal proceedings as guaranteed by the constitutions of the South- Asian states and the European convention on human rights, *The International Journal of Human Rights* (2000), p.2.

<sup>18</sup> Human Rights and Detention Pre-Trial Detention, A Handbook of International Standard relating to Pre-Trial Detention (1994), p 9

Audrey<sup>19</sup> there must always be some lawful basis for an arrest and detention including a clear nexus between the suspect and offence. The police must bring a person arrested immediately to the nearest police station and nowhere else. A police officer who has taken a person into custody must produce him before a Magistrate without necessary delay. Police detention of the arrested person must not exceed 24 hours.<sup>20</sup> The rights of an arrested person are clearly spelt out under section 28A of the Criminal Procedure Code of Malaysia. Under this section an arrested person will have the right to be informed for his arrest as soon as possible, right to contact legal practitioner and right to communicate with a relative or friend with regard to his arrest. However right to communicate with relative or friend will be refuse where is there is reasonable belief that to do so could result in an accomplice of the person arrested taking step to avoid apprehension or there would be destruction, concealment or fabrication of evidence or intimidation of witnesses or where taking regard to the safety of other persons, the questioning or recording of any statement should not be delayed.<sup>21</sup> This is the exception given under Malaysian jurisdiction toward the general principle rights of arrest. In this exception the police officer who can authorized need to be Superintendent of Police and above and the reason not to give need to be put on record. In *Theresa Lim Chin Chin & Ors v Inspector General of Police*<sup>22</sup> that the matter should best be left to the good judgment of the authority as and when such right might not interfere with police investigations.

When arrested a person, they has a fundamental right under the Federal Constitution of Malaysia to be informed in ordinary language of the ground of arrest. Under Malaysian constitutional provisions, Article 5 (1) Malaysian Constitution provides that no person shall be deprived of his life or personal liberty save in accordance with law.<sup>23</sup> Here, the right to liberty and right to life of a person are granted by the constitution. Article 5(3), Where a person is arrested he shall be informed as soon as may be of the grounds of his arrest. While under section 28A (1) CPC also stated a person arrested without a warrant shall be informed as soon as may be of the grounds of his arrest by the police officer making the arrest. The phrase “as soon as may be” has been interpreted to mean “as nearly as is reasonable in the circumstances of the particular case”.<sup>24</sup> There is no provision as to the time frame within which this must be done but in *Public Prosecutor v Mah Chuen Lim & Ors*<sup>25</sup> reference was made to the clause 38 of the Interpretation and General Clause Ordinance 1948 Eleventh Schedule which applied to the Constitution where

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<sup>19</sup> [1994] 3 MLJ 296.

<sup>20</sup> Section 28 Criminal Procedure Code of Malaysia.

<sup>21</sup> Section 28A (8) Criminal Procedure Code of Malaysia

<sup>22</sup> [1988] 1 MLJ 293.

<sup>23</sup> Article 5 of Federal Constitution of Malaysia

<sup>24</sup> *Abdul Rahman v Tan Jo Koh* [1968] 1 MLJ 205 (FC).

<sup>25</sup> [1975] 1 MLJ 95, p.96

no time is prescribed or allowed within which anything shall be done, anything shall be done with all convenience speed and as often as the prescribed occasion arises. Reference was also made to the section 54 (2) of the Interpretation Act 1967, which applied to legislation set out in section 2 of the Act what is convenient speed would depend on the circumstances of each case. In *Ooi Ah Phua v Officer in Charge Criminal Investigation, Kedah Perlis*<sup>26</sup> as soon as may be was said to mean he should be informed as soon as possible or in the shortest practicable time. The phrase as soon as may be what the detainee had been told by some other members of the police force a few hours later would satisfy the requirement of article 5 of the Malaysian Federal Constitution.<sup>27</sup> A person arrested without being told the reason is entitled to resist the arrest and any force used to overcome the resistance would amount to an assault.<sup>28</sup>

This right is applicable to all arrests whether with warrant or without warrant.<sup>29</sup> With regard to an arrest with a warrant, the Criminal Procedure Code of Malaysia itself requires that the substance of the warrant of copy thereof to be shown to person arrested.<sup>30</sup> A person without been told the reason is entitled to resist of his arrest.<sup>31</sup> When the circumstance are such that the arrested person must know the nature of alleged offence for which he is being detained, or when the arrested person himself produces a situation which makes it impossible for him to be informed of the grounds, he need not be informed of the ground of arrest.<sup>32</sup> Section 7 of Criminal Procedure Code of Malaysia provided the place in which any criminal Court is held for the purpose of inquiring into or trying any offence shall be deemed an open and public Court to which the public generally may have access. However, under Article 149 of the Malaysia Constitutions give limitation to the general rule which stated legislation against subversion, action prejudicial to public order, etc. providing for preventive detention.

Article 149 empowers the Parliament to make law against subversion regardless of whether there is an emergency proclaimed and such law is valid even if it violates the constitutional guarantee of fundamental liberties under Article 5 (liberty of the person), Article 9 (prohibition of banishment and freedom of movement), Article 10 (freedom of speech, assembly and association) and Article 13 (rights to property). Article 149 in its current form is too widely and ambiguously drafted that directly legitimized the Parliament's discretion to enact laws that may explicitly and "legally" violate human rights. It authorizes laws to be made to detain a person without trial which is against the right to personal liberty, the right to a fair trial and the

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<sup>26</sup> 1975] 2 MLJ 198.

<sup>27</sup> *Aminah v Superintendent of Prison, Pengkalan Chepa, Kelantan* [1968] 1 MLJ 92.

<sup>28</sup> *Abdul Rahman v Tan Jo Koh* [1968] 1 MLJ 205.

<sup>29</sup> *Ibid.*

<sup>30</sup> Section 41 Criminal Procedure Code of Malaysia

<sup>31</sup> *Ibid* 14

<sup>32</sup> *Christie v Leachisky* [1947]AC 573



right to be presumed innocent until proven guilty. Most laws created under Article 148 authorizes the Home Minister to make a detention order to detain a person without trial if he is satisfied that the detention is necessary to prevent such person from acting in any manner prejudicial to the security of Malaysia or any part of it or to the maintenance of essential services or to the economic life of Malaysia.<sup>33</sup> In *Kerajaan Malaysia & 2 Ors.v Nasharuddin bin Nasir*<sup>34</sup> the powers extended to the Minister of Home Affairs are valid under the Malaysian Constitution. It is an undisputed fact that the provisions allow the Minister to arbitrarily detain someone indefinitely at his pleasure. However, Art 5 of the Federal Constitution provides guarantees that we have freedom of liberty, the right to be represented by a lawyer and be informed of the reasons of his arrest. If these laws<sup>35</sup> is allowed to exist, then it certainly is in conflict with Art. 5.

Based on current preventive laws in Malaysia, which are Prevention of Crimes Act 1959 (POCA), Prevention of Terrorism Act 2015 (POTA) and Security Offences (Special Measures) Act 2012 (SOSMA) and Dangerous Drugs (Special Preventive Measures) Act 1985 (DDSPM) all of the laws does not provide specific clause regarding rights of the arrested person to be informed grounds of arrest. Based on *Inspector General of Police & Anor v. Lee Kim Hoong*<sup>36</sup> the applicant has been detained under Ordinance Detention under Emergency (Public Order and Prevention of Crime) Ordinance, 1969 on of preventive laws in Malaysia which have been abolished. The powers under s. 3 of the 1969 Ordinance, the police must have known on 16 February 1979 the grounds for arresting and detaining the applicant. It is clear from the wording of the section that the police must have this knowledge (i)before the arrest since under s. 3(2) there must be failure to satisfy grounds (i) or (ii); or suspicion of ground (iii); or reason to believe grounds (iv) or (v) or grounds (i), (ii) or (iii) of s. 3(1). There is no question of arresting a person first under this section and after enquiries to determine if possible, the particular grounds of his arrest and subsequent detention. The purpose of the enquiry is merely to confirm or otherwise the reasons for the belief or suspicion or the failure to give a satisfactory explanation required by the police. In applying the provision under article 5 (3) to an arrest under section 3 of the 1969 Ordinance, there is no reason why arrestee could not have been informed of the grounds of applicant arrest on 16 February 1969. It should make it clear that the police are not being called upon to disclose the evidence which led to the arrest and detention but merely the grounds of arrest. All the Police have to say, for example, is that "Lee was arrested because we have reason to believe that it is necessary for the prevention of crimes involving violence."

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<sup>33</sup> Prevention of Crimes Act 1959, Prevention of Terrorism Act 2015 and Security Offences (Special Measures) 2012 and Dangerous Drugs (Special Preventive Measures) Act 1985.

<sup>34</sup> [2003] 6 AMR 497, p. 50

<sup>35</sup> Ibid 31

<sup>36</sup> [1979] 1 LNS 34

Another case would explain this exception under article 149 of the Malaysian Constitution in the case of Mohamad Ezam Nor & Ors v. Tan Sri Norian Mai & Ors<sup>37</sup> stated article. 149 and 150 of the Federal Constitution, designed to protect the legality of preventive detention laws, validated the provisions of the Internal Security Act 1950 (ISA) (which was abolished in 2012 and replaced by SOSMA), they could not validate provisions that did not appear in the ISA. The ISA did not contain any provision explicitly allowing the police the power not to inform the person arrested of the grounds of arrest. In the absence of any specific provision in the ISA that took away an arrested person's right to be informed of the grounds of his arrest, his fundamental right under art. 5(3) of the Constitution prevailed. Nothing in the Federal Constitution states that article 5 was invalid because of the ISA. If Parliament had intended for the police to be able to arrest under s. 73(1) of the ISA without the need to inform the arrested person of the grounds of arrest, it would have been so worded in s. 73(1). The arresting officers should have informed the plaintiffs of the 'grounds' of their arrest at the point of arrest and there must have been sufficient material particulars to show the basis for their reasons to believe the detention of the plaintiffs was necessary to prevent them from acting in a manner prejudicial to the national security. The phrase "save in accordance with law" in article 5(1) requires that there must be specific and explicit law that actually provides for it. Section 28A (1) of the CPC is a specific and explicit law that authorises the deprivation of the personal liberty in respect of the right of an accused person to be informed ground of arrest.<sup>38</sup>

## 5.2 India Position

While in India, there are certain fundamental rights of arrested persons guaranteed under Articles 20, 21 and 22 of the Constitution of India. The Supreme Court, while interpreting these articles, has built up jurisprudence of the rights of arrested persons. Article 21 of the Indian Constitution provides that no person shall be deprived of his life and personal liberty except according to procedure established by law.<sup>39</sup> Further, the procedure contemplated by this article must be right, just and fair and no arbitrary, fanciful or oppressive; otherwise it would be no procedure at all and requirement of article 21 would be satisfied. Immediately after arrest, at the end of statutory period of 24 hours of police custody, the police must produce the arrested person before the nearest Magistrate for cognizance of further criminal proceedings. The supreme court has strongly urged upon the state and its police authorities to ensure that the constitutional and legal requirement to produce an arrested person before a Judicial Magistrate within 24 hours of the

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<sup>37</sup> [2013] 3 CLJ 81

<sup>38</sup> Mohamad Ezam Nor & Ors v. Tan Sri Norian Mai & Ors [2013] 3 CLJ 81

<sup>39</sup> Article 21 Constitutions of India

arrest be scrupulously observed. The healthy provision enables the magistrates to keep and check over the police investigation and it is necessary that the magistrates should try to enforce this requirement and where it is found disobeyed, come heavily upon the police.<sup>40</sup> In *Maneka Gandhi v. Union of India*<sup>41</sup>, a constitution bench of the Supreme court went into the meaning of the expression “procedure established by law” in article 21. The court held that the procedure established by law does not mean any procedure but a procedure which is reasonable, just and fair. Be that as it may, the fact remains that the procedure established by law which affects the liberty of a citizen must be right, just and fair and should not be arbitrary, fanciful or oppressive and that a procedure which does not satisfy the said test would be violative of article 21. Therefore, the procedure established law must be fair, just and reasonable.

In addition, certain basic rights of arrested persons have been incorporated in the Code of Criminal Procedure, 1973 (CrPC), some of which are as under: - Section 41, 41D, 46 and 47 also included rights of the arrested person.<sup>42</sup> Section 50 (1) CrPC provides, “every police officer or other person arresting any person without a warrant shall forthwith communicate to him full particulars of the offence for which he is arrested or other grounds for such arrest. The decision in *Sunil Chainani and Others Vs. Inspector of Police, C.B. Control, Bombay and Another*<sup>43</sup> the accused under the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS ) were arrested and produced before the Additional Chief Metropolitan Magistrate, before whom an application for remand to police custody was made to facilitate further investigation in the case. Simultaneously, the accused moved their applications for bail before the learned Magistrate. The submission of the accused was that their arrest was illegal in as much, as, the grounds of their arrest were not at all communicated to them. On the other hand, the respondent claimed that the accused were orally communicated the grounds of their arrest. The learned Magistrate observed that Section 50 of the code was mandatory, and as there was no compliance therewith, the accused were entitled to grant of bail. While in *Moin Akhtar Qureshi vs Uoi & Ors*<sup>44</sup> stated the important of ground of arrest. Without the ground of arrest, the order of arrest is incomplete, this is because the arrestee would not know what is that material, on the basis of which the competent authority has formed his belief that the arrestee is guilty of the offence under the Act. He would also not know the reasons which led the Competent Authority to form the belief based on the materials in his possession.

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<sup>40</sup> *Khatri (II) v. State of Bihar*, 1981 SCC (Cri) 228. 233-234: (1981) 1 SCC 627; *D.G. & I.G. of Police v. Prem Sagar*, (1999) 5 SCC 700: 1999 SCC (Cri) 1036

<sup>41</sup> *India AIR 1978 SC 597: (1978) 1 SCC 248, 284. See also Sher Singh v. State of Punjab*, AIR 1983 SC 465: (1983) 2 SCC 34

<sup>42</sup> Criminal Procedure Code of India

<sup>43</sup> (1987) SCC OnLine Bom 424 : 1988 Mah LJ 634

<sup>44</sup> [2017] SC 2645

According to Art.22 (1) of the Constitution of India, 'No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest. The nature and type of information Art.22 requires to be communicated under the term 'grounds of arrest' are connected very much with the above-mentioned objectives of the safeguard. As a full Bench of Allahabad High Court held in the case of *Vikram v. State of Bihar*<sup>45</sup> the arrested person must be informed of the bare necessary facts which led to their arrest, including the date, time and place of the alleged offence. An arrest would be declared illegal if the grounds made known are illusory or irrelevant. This, however, does not mean that the authorities are obliged to furnish, at the very moment of arrest, full details of the offence. According to the High Court of Punjab in *Prem Nath v. Union of India*," withholding of facts does not violate the constitutional rights of the accused insofar as the information furnished is comprehensive enough to enable the person concerned to understand why they have been arrested and make a representation against the arrest."<sup>46</sup>

However, there are two exceptions to clauses (1) and (2) of the Article 22 of the Constitution. The two exceptions are provided in clauses (3) "Nothing in clauses (1) and (2) shall apply (a) to any person who for the time being is an enemy alien; or (b) to any person who is arrested or detained under any law providing for preventive detention". The preventive detention must not exceeding of three months unless there is proved of sufficient causes and reasons which are required to extend the period of preventive detention. In case of preventive detention under this article, the Court cannot interfere with the exercising of discretion by authority of the executive<sup>47</sup> unless there is a complaint of arbitrary arrest and the court with reason to believe their mala fide act of the authority in concerned arrest and preventive detention. According to the Indian Supreme Court ruling in the very landmark judgment of *Maneka Gandhi v. Union of India* article 21 envisages "reasonable, fair, and just procedure". Strange thought it may seem, the Constitution of India visualizes the possibility of a law of preventive detention as a peace-time measure. In case *Chhagan Chandrakant Bhujbal v. Union of India*<sup>48</sup> the petitioner Chhagan Chandrakant Bhujbal had advanced the submission before the Division Bench that the grounds of arrest were not communicated to him in writing and, therefore, his fundamental rights under Article 22(1) and Section 19 of the Preventive of Money Laundering Act (PMLA) had been breached. The provision of Section 19(1) also does not state that the grounds of arrest are to be informed to the person arrested, immediately. The use of the word in the said provision "as soon as may be", makes it clear that grounds of arrest are not to be to be supplied at the time of

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<sup>45</sup> [1996] CriLJ 1536

<sup>46</sup> AIR 1958 P H 340

<sup>47</sup> M.P. Jain & S.N. Jain, *Principle of Administrative Law* 652 (Lexis Nexis, 6th edn., 2013

<sup>48</sup> [2016] SCC Online Bom 9938

arrest itself or immediately on arrest, but as soon as may be. If it was the intention of the legislature that in the Arrest Order itself the grounds of arrest should be stated, that too in writing, the legislature would have made strict provision to that effect by using the word 'immediately' or 'at the time of arrest'. The fact that legislature has not done so but used the words 'as soon as may be', thereby indicating that there is no statutory requirement of grounds of arrest to be communicated in writing and that too at the time of arrest or immediately after the arrest. The use of the words 'as soon as may be' implies that such grounds of arrest should be communicated at the earliest.

In India, however, with all the emphasis on individual liberty and fundamental rights, it has been found necessary to resort to preventive detention even in peace time because of unstable law and order situation. Law for preventive detention can be made by parliament “exclusively for reasons connected with defence, foreign affairs or the security of India<sup>49</sup>, and by Parliament and State Legislatures concurrently for reasons connected with their security of a State, maintenance of public order, or maintenance of supplies and services essential to the community. Clause (4) to (7) of article 22 provide some protection to the individual in preventive detention by requiring the law providing for preventive detention to contain a few procedural safeguards mentioned therein. Clause (5) of the article provides that the detaining authority “shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earlier opportunity of making presentation against the order”.

Article 22 of the Indian Constitution has been composed to cover all cases of arrest, including “protective detention”. If a person apprehended by a legal authority he must be deemed to be arrested within the meaning of Article 22. Therefore, it is immaterial whether the term arrest has been used or not in the statute or the rules.<sup>50</sup> Article 22 lays down certain safeguards to the arrested and detained person. However, the safeguards enshrined in Article 22 are not available in all cases of ordinary arrest or detention. These safeguards are only for punitive reasons. The safeguards of Article 22 do not apply in the case of arrest made for protection and in view of benefit for arrested person. The guarantee provided in Article 22 and detained person in custody will become meaningless if the magistrate act mechanically without applying judicial mind to see whether the arrest of the person produced before him is legal in accordance with law.

### 5.3 Findings

From the above discussion, the researcher may conclude that under Malaysian law whatever provided under CPC is the same as provided under Malaysian Constitution when it comes on the right to be informed as soon as possible. The term “as soon as possible” had been stipulated either under CPC and also Malaysian Constitution. But in India there is the different between

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<sup>49</sup> Seven Schedule of the Constitution of India, List I, entry 9

<sup>50</sup> Ajaib Singh v. State of Punjab, AIR 1952 Punjab. 309 F.B

CrPC and India Constitution. The word “as soon as possible” does not exist in section 50 CrPC, however law in India provide specific section for the investigator to informed to the nominated person and this does also apply in Malaysia but Malaysia put exception clause under section 28 (8) CPC which the right to informed family or relative is not absolute as it will depend to certain circumstances as discussed above. Other than that we can see the same law applicable between India and Malaysia when its comes on the issues of preventive detention laws . As a safeguard India and Malaysia does not provide the rights to be informed to the suspect when involve security offences under preventive laws. The researcher provide the table as follow to illustrated the different between India and Malaysia in these aspect to be more clear.

**Table 1: The different rights to be informed between Malaysia and India**

No	Subject	India	Malaysia
1	Rights to be informed under Constitution	Article 20, 21 & 22 right to be informed “as soon as possible’	Article 5 – right to be informed, “as soon as possible”
2	Law of Arrest	Section 41 until 41D CrPC	Section 15 CPC
3	Right of arrested person to be informed	Section 50 CrPC “communicate ground of arrest”	Section 28A CPC right to be informed “as soon as possible”
4	within 24 hour before further remand	Section 57 CrPC	Section 28 CPC
5	Exceptional from right to be informed ground of arrest	Article 22 (3) Indian Constitution invovle preventive detention laws	Article 149 FC preventive detention laws
6	Right to communicate to family or relative when arrested	Provided under section 50A CrPC informed to nominated person	Not absolute section 28 (8) CPC

## 5. Conclusion

The purpose of any criminal justice system is to punish the offender and protect the innocent. Offenders are the threat to the society. State machinery is operative to prevent the crime and penalize the offender. The wrong doer should be punished in accordance with the law and the innocent too should be safeguarded by the law. While the necessity of discovering the truth is needed to apply the inappropriate procedures or methods and even may, sometime, infringe the fundamental rights of the accused or any person involved, the liberty and jurisprudential concept of human rights in criminal justice must not be denied. Of course, the accused or arrested person may, in somehow, be sanctioned by procedures established by law, but the rights of the accused to justice before the court of law cannot be putting aside.

The interests of the parties of the crime have to be balanced and adjusted with a just, reasonable and fair manner. Thus, it is a matter of concern for all that innocent must not suffer in the name of justice. It is also the duty of the investigating Officer to conduct the investigation avoiding any kind of mischief and harassment to any of the accused. The Investigating Officer should be fair and conscious so as to rule out any possibility of fabrication of evidence and his impartial conduct must dispel any suspicion as to its genuineness. The Investigating Officer is not to bolster up a prosecution case with such evidence as may enable the court to record conviction but to bring out the real unvarnished truth. Investigation is a delicate painstaking and dexterous process.

Ethical conduct is absolutely essential for investigative professionalism. Therefore, before countenancing such allegations of mala fides or bias it is salutary and an onerous duty and responsibility of the court, not only to insist upon making specific and definite allegations of personal animosity against the Investigating Officer at the start of the investigation but also must insist to establish and prove them from the facts and circumstances to the satisfaction of the court. Malice in law could be inferred from doing of wrongful act intentionally without any just cause or excuse or without there being reasonable relation to the purpose of the exercise of statutory power.

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