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ARREST UNDER THE BHARATIYA NAGARIK SURAKSHA SANHITA, 2023: BALANCING POLICE POWERS, INDIVIDUAL LIBERTY AND CONSTITUTIONAL SAFEGUARDS

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Abstract:

Arrest represents one of the most consequential powers available to law-enforcement authorities. It enables the State to secure the presence of an accused person, facilitate investigation and, where circumstances require, protect the integrity of the criminal justice process. At the same time, arrest directly affects personal liberty and may have consequences extending beyond the period of custody. The legal regulation of arrest therefore involves an ongoing balance between the requirements of effective investigation and the protection of individual liberty.

The Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS), which replaced the Code of Criminal Procedure, 1973, provides the current statutory framework governing arrest and criminal procedure in India.¹ Its provisions concerning arrest must, however, be understood alongside constitutional guarantees and judicial principles developed under the earlier procedural framework. The Supreme Court's decisions in *Joginder Kumar v. State of U.P.*, *D.K. Basu v. State of West Bengal* and *Arnesh Kumar v. State of Bihar* have established important principles concerning justification, procedural safeguards and necessity in the exercise of arrest powers.²

This paper examines arrest under the BNSS not as a sequence of statutory provisions but as a question of legal decision-making. Its central concern is the distinction between the power to arrest and the necessity to arrest. It examines how investigative purpose, police discretion, individual liberty, procedural safeguards and judicial supervision interact in determining whether arrest is justified. The paper further considers the significance of the notice mechanism under Section 35 and the Supreme Court's contemporary interpretation of the provision in *Satender Kumar Antil v. Central Bureau of Investigation*.³

The paper proposes an analytical framework consisting of five interconnected stages, statutory authority, investigative purpose, necessity, procedural safeguards and judicial oversight, through which the legitimacy of arrest may be examined. The framework does not seek to

restrict legitimate police investigation; rather, it seeks to explain how investigative discretion can operate consistently with constitutional protection of personal liberty.

Keywords: Arrest, BNSS, police discretion, personal liberty, necessity of arrest, constitutional safeguards, investigation, judicial supervision.

INTRODUCTION

Arrest is an essential component of the criminal justice process. The ability of law-enforcement authorities to take a person into custody may be necessary in circumstances where the person's presence is required for investigation, where there is a concern regarding interference with evidence or witnesses, or where other legally recognised purposes make custody necessary.

At the same time, arrest represents one of the clearest forms of State interference with personal liberty. A person who has been arrested may lose freedom of movement, be separated from family and employment, and experience consequences to reputation and dignity even before a court determines guilt or innocence. The decision to arrest therefore carries significance that extends beyond the immediate investigative process.

The constitutional framework recognises both sides of this relationship. The State possesses legitimate authority to investigate and prosecute offences, while Article 21 protects personal liberty and requires that its deprivation take place according to legally established procedure.⁴ Article 22 further provides specific safeguards to persons who are arrested, including communication of the grounds of arrest, access to legal representation and production before a Magistrate within the constitutionally prescribed period.⁵

The question is consequently not whether arrest is desirable or undesirable in the abstract. Some investigations may genuinely require custody. Others may not. The more precise legal question is whether, in the circumstances of a particular case, the statutory authority to arrest is accompanied by sufficient justification for exercising that authority.

This distinction is particularly relevant under the BNSS. Section 35 permits arrest without warrant in specified circumstances and, in relation to certain cognizable offences punishable with imprisonment of less than seven years or up to seven years, requires the police officer to have the requisite reason to believe and to be satisfied that arrest is necessary for specified purposes.⁶

The central concern of this paper therefore emerges from a simple distinction:

The existence of the power to arrest and the necessity of exercising that power are not

necessarily the same question.

Understanding this distinction provides a useful way of examining the relationship between police powers, individual liberty and constitutional safeguards under the BNSS.

RESEARCH GAP

The transition from the CrPC to the BNSS has generated considerable discussion concerning changes in criminal procedure, including arrest, investigation and bail. Existing legal discussions commonly approach arrest through one of two perspectives. One focuses on the statutory provisions and compares the BNSS with the previous CrPC framework. The other focuses upon constitutional safeguards and judicial decisions concerning unlawful or unnecessary arrest.

Both approaches are significant. However, there remains scope for examining a more specific issue: the decision-making process through which the police move from possessing a statutory power of arrest to determining whether arrest is actually necessary in an individual case.

The distinction is particularly relevant because Section 35 does not merely identify circumstances in which arrest may occur. For the specified category of offences, it also requires an assessment of necessity and connects arrest to particular purposes recognised by law.⁷

The research gap identified in this paper therefore does not lie in claiming that arrest under the BNSS has never been studied. Instead, the gap lies in examining how existing constitutional principles, statutory requirements and judicial decisions can be brought together into a coherent framework for understanding arrest as a necessity-based decision.

The paper also seeks to approach police discretion from a neutral standpoint. It does not proceed on the assumption that police exercise of arrest power is inherently arbitrary or that restrictions on arrest necessarily improve criminal investigation. Police discretion remains an important feature of investigation because individual cases present different factual and evidentiary circumstances. The concern is instead to examine how that discretion can operate within identifiable legal standards.

RESEARCH QUESTIONS

A. Primary Research Question

- I. How does the BNSS distinguish between the statutory power to arrest and the necessity of exercising that power while balancing investigative requirements with individual liberty?

B. Secondary Research Questions

- I. How has Indian jurisprudence developed the distinction between the power to arrest and the justification for arrest?
- II. What role does investigative purpose play in determining whether arrest is necessary under the BNSS?
- III. How does the notice mechanism under Section 35 operate as an alternative to immediate custody?
- IV. How do Joginder Kumar, D.K. Basu, Arnesh Kumar and Satender Kumar Antil contribute to the contemporary understanding of arrest?
- V. How can police discretion be reconciled with constitutional safeguards relating to personal liberty?
- VI. What role does judicial supervision play in regulating arrest and continued detention?

OBJECTIVES OF THE STUDY

The objectives of this research are:

- A. To examine the legal framework governing arrest under the BNSS.
- B. To distinguish between statutory authority to arrest and the necessity of exercising that authority.
- C. To analyse the relationship between investigative objectives and the decision to arrest.
- D. To examine the development of judicial principles concerning arrest and necessity.
- E. To study the relationship between police discretion and constitutional safeguards.
- F. To examine the significance of notice, procedural protections and judicial supervision.
- G. To develop an analytical framework for understanding the legitimacy of arrest under the BNSS.

HYPOTHESIS

The paper proceeds on the hypothesis that:

The BNSS does not make the existence of statutory authority to arrest synonymous with the necessity of arrest. In specified cases, particularly those falling within Section 35(1)(b), the statutory framework requires an additional assessment of necessity, while notice, procedural safeguards and judicial supervision provide mechanisms through which legitimate investigative interests and individual liberty may be accommodated together.

RESEARCH METHODOLOGY

- A. The research adopts a doctrinal and analytical methodology.
- B. The primary sources include the Constitution of India, the BNSS, the Code of Criminal Procedure, and judgments of the Supreme Court of India. Secondary materials may be consulted for contextual understanding, but the principal analysis is based on statutory provisions and judicial decisions.
- C. The study does not undertake empirical research concerning the frequency or prevalence of arrest practices among police authorities. Accordingly, it does not seek to make general claims regarding the conduct of police officers. Instead, it examines the legal framework within which arrest decisions are expected to be made.

ARREST AS A DECISION INVOLVING BOTH AUTHORITY AND LIBERTY

Arrest is ordinarily understood as the lawful apprehension of a person and the placing of that person under custody. However, its significance in criminal procedure extends beyond the physical act of taking someone into custody. Arrest represents a conscious exercise of State power that results in an immediate restriction of individual liberty. The decision to arrest therefore carries a degree of responsibility that is not apparent from the simple description of arrest as apprehension.

The importance of this decision arises from the fact that arrest generally occurs at a stage when the criminal allegation has not yet been finally adjudicated. An individual may be arrested during investigation without there being any judicial finding that the person is guilty. The investigation may subsequently result in the person being discharged, the proceedings being dropped, or the person ultimately being acquitted. Arrest must therefore remain separate from the concept of punishment. Custody during the criminal process cannot be justified on the assumption that an accused person has already incurred criminal liability.

The distinction becomes particularly relevant when considering the purpose for which arrest is undertaken. Investigation is concerned with establishing the circumstances surrounding an alleged offence, identifying the persons involved, preserving relevant material and determining whether further criminal proceedings are warranted. Punishment, in contrast, is a consequence that may follow only after the legal process has established guilt. Since arrest generally operates during the former stage, its justification should arise from a requirement of the criminal process and not from a desire to penalise the person against whom an allegation has been made.

At the same time, protecting liberty does not mean that the State must refrain from using custody in every investigation. There may be cases where taking a person into custody is necessary to ensure that the investigation proceeds effectively. For instance, circumstances may indicate a genuine risk that the person will evade the process, interfere with material relevant to the investigation, influence persons connected with the case, or obstruct the investigation in some other manner. In such situations, arrest may have a legitimate procedural purpose.

The crucial issue, therefore, is the necessity of arrest in the circumstances of the particular case. The fact that an officer possesses the legal authority to arrest does not automatically establish that the authority should be exercised. A decision to arrest requires an assessment of why custody is required, what objective it is intended to achieve, and whether that objective can reasonably be achieved without taking the person into custody. This distinction is central to preventing arrest from becoming a routine response to the registration of a criminal case¹.

The decision to arrest consequently involves two competing considerations. On one side is the legitimate interest of the State in investigating offences effectively and ensuring that the criminal justice process is not obstructed. On the other is the individual's interest in retaining personal liberty until interference with that liberty becomes legally and factually justified. Neither interest can be completely disregarded. An effective criminal justice system requires investigative powers, but the exercise of those powers must remain subject to legal limitations. The consequences of arrest also demonstrate why this balance is important. Custody can affect a person's employment, education, family responsibilities, social relationships and reputation even before the criminal allegation has been judicially determined. The effect of arrest is therefore not restricted to the period for which a person remains physically detained. For this reason, the decision to arrest should be approached as a serious procedural decision rather than as an ordinary administrative step in every criminal investigation.

The responsibility does not end with the decision of the investigating officer. Once an arrested person is brought before a Magistrate, judicial scrutiny provides an additional safeguard against unjustified deprivation of liberty. The Magistrate is not expected to treat the fact of arrest as sufficient justification for continued detention. The circumstances leading to the arrest and the legal basis for further custody must receive independent consideration. The Supreme Court's decisions in *Joginder Kumar v State of Uttar Pradesh* and *Arnesh Kumar v State of Bihar* are important in developing this understanding of arrest and judicial scrutiny².

¹*Bharatiya Nagarik Suraksha Sanhita*, No. 46 of 2023 [hereinafter BNSS], § 35 (India); *Arnesh Kumar v. State of Bihar*, (2014) 8 SCC 273 (India).

² *Joginder Kumar v. State of Uttar Pradesh*, (1994) 4 SCC 260 (India); *Arnesh Kumar*, (2014) 8 SCC 273.

The concept of arrest may therefore be understood through the distinction between authority and necessity. Authority answers the question of whether the law permits an arrest in a particular situation. Necessity asks whether, despite possessing that authority, arrest is actually required in the circumstances. The two questions are related but are not identical. Treating them as identical risks converting a discretionary coercive power into a routine practice.

Ultimately, arrest should be viewed as a procedural intervention justified by the requirements of the criminal process, rather than as a preliminary form of punishment. The legitimacy of arrest depends not merely upon the existence of statutory power but upon the reason for exercising that power against a particular individual. This understanding allows criminal investigation to remain effective while ensuring that personal liberty is not sacrificed merely for procedural convenience.

FROM THE POWER TO ARREST TO THE NECESSITY TO ARREST

The distinction between arrest power and arrest necessity has deep roots in Indian judicial reasoning.

In *Joginder Kumar v. State of U.P.*, the Supreme Court emphasised that the existence of the legal power to arrest does not automatically justify its exercise. The Court recognised that arrest and detention may have serious consequences for an individual's reputation and self-esteem and therefore required the police to exercise judgment regarding the need for arrest.⁸

The importance of *Joginder Kumar* lies in the fact that the Court did not question the legitimacy of police arrest powers. Instead, it recognised that lawful authority is only the starting point of the inquiry.

This distinction was further developed in *Arnesh Kumar v. State of Bihar*. The Supreme Court addressed arrest in offences punishable with imprisonment up to seven years and required police officers to satisfy themselves that the statutory conditions justifying arrest were present. The Court also emphasised that Magistrates should not authorise detention mechanically.⁹

The principle emerging from these decisions can be expressed as follows:

The question “Can the person be arrested?” is not always identical to the question “Should the person be arrested in the circumstances of the case?”

THE BNSS AND THE CONTEMPORARY FRAMEWORK OF ARREST

The enactment of the Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS) marked a significant transition in India's criminal procedural framework, replacing the Code of Criminal Procedure,

1973 with effect from 1 July 2024³. The change in legislation, however, does not alter the fundamental constitutional significance attached to personal liberty. The exercise of arrest powers continues to operate within the broader framework of constitutional safeguards and the judicial principles developed by the Supreme Court over time.

Within the BNSS, Section 35 occupies a central position in determining when a police officer may arrest a person without a warrant. The provision recognises circumstances in which arrest may be made in connection with a cognizable offence, but its structure is significant because it does not treat the existence of an offence as the sole consideration. In cases involving offences punishable with imprisonment for a term which may be less than seven years or may extend to seven years, the officer must have reason to believe that the person has committed the offence and must also be satisfied that arrest is necessary for one or more purposes identified by the provision⁴.

The purposes identified under Section 35 include preventing the person from committing another offence, enabling proper investigation, preventing the disappearance or tampering of evidence, preventing the person from causing inducement, threat or promise to a person acquainted with the facts of the case, and ensuring the person's presence before the Court whenever required⁵. These purposes demonstrate that arrest is intended to serve a specific procedural function rather than operate as an automatic response to an allegation of criminality. The structure of Section 35 is therefore particularly relevant to the distinction developed in the preceding discussion. The provision effectively requires the arresting officer to consider two connected but separate questions. The first concerns the existence of a reasonable basis to believe that the person has committed the alleged offence. The second concerns whether taking that person into custody is actually necessary for one of the purposes recognised by law.

This second requirement is significant because a person may be suspected of having committed an offence without custody necessarily being required. The mere availability of the power of arrest does not, in itself, answer the question of whether that power should be exercised. The statutory framework consequently introduces an element of individualised decision-making into the arrest process.

Section 35 also reflects the broader principle that the decision to arrest should be related to the requirements of the investigation or the administration of justice. For example, where the presence of a person can be secured without custodial arrest, or where there is no apparent risk

³ BNSS, commencement notification (bringing the Sanhita into force on July 1, 2024).

⁴ BNSS, § 35(1)(b).

⁵ Id. § 35(1)(b)(i)–(v).

of interference with the investigation, the justification for immediate custody may require closer examination. The provision therefore places emphasis not simply on the alleged offence, but on the practical necessity of custody in the circumstances of the individual case.

This approach is consistent with the judicial development that preceded the BNSS. The principles emerging from *Joginder Kumar* and *Arnesh Kumar* remain relevant in understanding why the power to arrest should not be confused with the necessity to arrest. The statutory framework under the BNSS can consequently be viewed as part of a continuing legal effort to reconcile effective investigation with the protection of personal liberty.

The role of the Magistrate is equally important in this framework. Arrest does not bring the question of liberty to an end; rather, production before the Magistrate introduces an additional stage of legal scrutiny. Judicial consideration of custody ensures that deprivation of liberty does not continue merely because an arrest has already taken place. The Magistrate's role thus becomes an important institutional safeguard between the coercive authority of the investigating agency and the individual's right to liberty.

The contemporary framework under the BNSS may therefore be understood as moving beyond a simple “offence–arrest” model. The existence of an alleged offence may provide the starting point for the exercise of police powers, but the statutory framework requires further consideration of the circumstances in which arrest is justified. The central inquiry consequently becomes:

It is not merely whether the law permits arrest, but whether arrest is necessary for a purpose recognised by law in the circumstances of the particular case.

This distinction is particularly important in understanding arrest under the BNSS because it places necessity at the centre of the decision-making process. The effectiveness of criminal investigation and the protection of individual liberty are not necessarily opposing objectives. A properly structured arrest framework seeks to ensure that legitimate investigative needs are met while preventing custody from becoming routine, excessive or disconnected from a genuine procedural requirement.

INVESTIGATIVE PURPOSE AS THE LINK BETWEEN POWER AND NECESSITY

The question of necessity cannot be considered in isolation from the purpose for which arrest is proposed. Since arrest involves a direct restriction upon personal liberty, the decision to place a person in custody should have a discernible connection with the requirements of the

investigation or the administration of criminal justice. The existence of an allegation may justify the commencement of an investigation, but it does not by itself explain why custodial arrest is required.

Criminal investigation may involve a range of activities, including gathering information, examining documents and other material, questioning relevant persons, identifying and preserving evidence, tracing the circumstances surrounding the alleged offence, and determining the involvement of different individuals. In many situations, these objectives can be achieved through ordinary investigative measures without placing the person under arrest. In other situations, however, the circumstances may make custody relevant to the effective conduct of the investigation.

For instance, where there are concrete circumstances suggesting that a person may interfere with material evidence, influence persons connected with the case, evade the investigative process, or otherwise obstruct the investigation, arrest may have a recognisable procedural purpose. Similarly, where the person's presence is genuinely required to ensure participation in the subsequent criminal process, custody may become relevant. The justification in such circumstances lies not in the mere allegation against the person, but in the particular investigative or procedural problem that arrest is intended to address.

Conversely, where the investigative requirements can be adequately met without taking the person into custody, the necessity of arrest requires greater scrutiny. Cooperation with the investigation, availability for questioning, production of relevant material, and compliance with lawful directions may, depending upon the circumstances, make immediate custodial arrest unnecessary. The possibility of adopting such alternatives is important because the restriction imposed by arrest should correspond to an actual requirement of the case.

Necessity is therefore inherently fact-sensitive. The same statutory provision may apply to different factual situations, yet the justification for arrest may differ substantially from one case to another. The seriousness of an allegation alone cannot provide a complete answer to the question of custody. Factors such as the nature of the offence, the conduct of the person, the stage and requirements of the investigation, the availability of evidence, the possibility of interference with the process, and the likelihood of evasion may all become relevant to the decision.

This does not mean that the law establishes a general rule that arrest is either necessary or unnecessary for an entire category of offences. Such an approach would replace individual assessment with a mechanical formula. Instead, the statutory framework requires the authority to examine whether the circumstances of the particular case bring the proposed arrest within a

legally recognised purpose.

The distinction is particularly important because investigation and custody are not synonymous. An investigation can continue without every person connected with it being arrested. Similarly, the ability of the police to investigate an offence does not necessarily depend upon placing the accused in custody. Custody is one of the coercive tools available to the investigating agency; it is not the investigation itself.

The relationship between investigative purpose and necessity can therefore be expressed through a simple inquiry:

What does arrest achieve in the particular case that cannot reasonably be achieved through a less restrictive measure?

This question does not remove the discretion vested in investigating authorities. Rather, it gives that discretion a structured and legally relevant direction. It requires the decision-maker to identify the objective for which custody is sought and to consider whether that objective genuinely requires arrest. In this way, discretion is not eliminated but made accountable to reason.

This approach also helps preserve the distinction between effective investigation and unnecessary incarceration. The objective of criminal procedure is not merely to secure custody but to ensure that the investigation is conducted fairly and effectively. Where custody is genuinely required for that purpose, the power of arrest remains an important investigative instrument. Where it adds nothing necessary to the investigation, its use risks converting a procedural power into an unjustified restriction upon liberty.

Thus, investigative purpose provides the connecting link between the power to arrest and the necessity to arrest. The statutory authority establishes when arrest may be legally available; the circumstances of the investigation determine whether its exercise is justified. The legitimacy of arrest consequently depends upon both the existence of lawful authority and the presence of a sufficiently specific reason for using that authority in the individual case⁶.

NOTICE AND INVESTIGATION WITHOUT IMMEDIATE CUSTODY

The notice mechanism under Section 35(3) of the BNSS is an important feature of the contemporary framework of arrest because it demonstrates that the commencement or continuation of an investigation does not necessarily require the immediate custodial arrest of the person concerned. Where the statutory conditions for arrest are not satisfied or immediate

⁶ *Satender Kumar Antil v. Central Bureau of Investigation*, (2022) 10 SCC 51 (India).

custody is not considered necessary, the law provides an alternative means of securing the person's participation in the investigative process⁷.

Under Section 35(3), where the circumstances do not warrant arrest, the police officer is required to issue a notice directing the person against whom a reasonable complaint has been made, credible information has been received, or reasonable suspicion exists of having committed a cognizable offence, to appear before the officer or at such other place as may be specified in the notice. The provision consequently creates a distinction between being required to participate in an investigation and being required to do so while in custody.

This distinction is significant because investigation and detention serve different purposes. Investigation is directed towards discovering facts and collecting material relevant to the alleged offence, whereas custody involves a direct restriction upon personal liberty. Where the investigative objective can be adequately pursued by requiring the person's appearance, immediate custody may not be necessary. Notice therefore provides a means of maintaining the investigative process without automatically resorting to the more restrictive measure of arrest.

The mechanism also creates a degree of procedural accountability for the person receiving the notice. The person is not simply left outside the investigative process; rather, a lawful obligation to appear is created. The investigative authority can therefore secure the person's participation while avoiding custodial intervention at the initial stage. In this sense, notice operates between two competing considerations: the State's interest in securing cooperation with investigation and the individual's interest in avoiding unnecessary deprivation of liberty. The importance of notice becomes clearer when considered alongside the distinction between the power to arrest and the necessity to arrest. If the law permits an investigating officer to proceed without immediately taking the person into custody, the availability of notice provides a practical means of giving effect to that distinction. It prevents the investigation from becoming dependent upon arrest in circumstances where the objectives of the investigation can reasonably be achieved through attendance and cooperation.

Notice should therefore not be regarded merely as a procedural formality preceding arrest. It represents a less restrictive procedural alternative to immediate custody. Its use reflects the idea that the criminal process can impose obligations upon an individual without necessarily requiring the most intrusive form of State intervention at the outset.

At the same time, receipt of a notice does not create an absolute immunity from subsequent

⁷ BNSS, § 35(3).

arrest. The legal position may change if the person fails to comply with the notice or if circumstances subsequently arise which satisfy the statutory requirements for arrest. The possibility of later arrest therefore remains distinct from the initial decision to proceed through notice. The use of notice should consequently not be understood as a permanent determination that arrest can never be made; rather, it reflects the circumstances existing at that particular stage of the investigation⁸.

This also highlights the dynamic nature of necessity. The justification for arrest must be assessed in light of the circumstances existing at the relevant time. A person who can initially be investigated without custody may, in a different factual situation, become subject to arrest if the statutory requirements are subsequently fulfilled. Conversely, the fact that arrest is legally available does not mean that it must immediately be exercised where notice is capable of serving the investigative purpose.

The notice mechanism can therefore be understood as an important means of reconciling investigative effectiveness with personal liberty. It enables the criminal justice system to require a person's participation in an investigation while reserving custodial arrest for circumstances in which the law and the facts make such intervention necessary. In this respect, Section 35 does not simply regulate when arrest may take place; it also provides a framework for considering whether the objectives of investigation can initially be achieved without arrest. Ultimately, notice demonstrates that the criminal procedure framework contains degrees of State intervention. The choice is not necessarily between allowing a person complete freedom from the investigative process and placing that person immediately in custody. Between these two extremes lies a legally recognised mechanism through which attendance and cooperation can be secured while preserving a greater measure of personal liberty. This makes the notice mechanism an important component of the broader principle that the availability of arrest should not be confused with its necessity.

JUDICIAL DEVELOPMENT:

The contemporary framework governing arrest under the BNSS cannot be understood solely by examining the statutory text. The present approach to arrest has also been shaped by a series of Supreme Court decisions that developed safeguards around the exercise of police power and the protection of personal liberty. These decisions pre-date the BNSS, but their underlying principles remain relevant wherever the statutory framework permits interference with liberty.

⁸ Id. § 35(4)–(6).

The three decisions of *Joginder Kumar v State of Uttar Pradesh*, *D.K. Basu v State of West Bengal*, and *Arnesh Kumar v State of Bihar* are particularly significant because each addresses a different dimension of arrest. Read together, they demonstrate that the legality of arrest involves not merely the existence of statutory authority, but also the justification for its exercise, the manner in which custody is carried out, and the necessity for continued detention.

Joginder Kumar: Power is not the Same as Justification

In *Joginder Kumar v State of Uttar Pradesh*⁹ The Supreme Court examined the manner in which the power of arrest should be exercised and drew attention to the consequences that arrest may have for an individual beyond the immediate loss of physical freedom. The Court recognised that an arrest can have significant effects upon a person's dignity, reputation and social standing and therefore cannot be approached as a purely routine step in every investigation.¹⁴

The importance of *Joginder Kumar* lies in the distinction it helps establish between possessing the authority to arrest and having sufficient justification to exercise that authority. The police may be legally empowered to arrest in a given situation, but the existence of that power does not remove the need for judgment. The circumstances of the particular case must still be considered before liberty is restricted.

This principle is important because arrest is one of the most direct forms of State intervention in an individual's liberty. If the availability of arrest were treated as sufficient justification for its exercise, the distinction between a permissible power and a necessary intervention would largely disappear. *Joginder Kumar* therefore provides an important conceptual foundation for examining arrest through the lens of necessity.

The decision also helps shift the focus from a purely authority-based approach to a more reason-based approach. The question is no longer confined to whether the police possess the legal power to arrest; it also involves consideration of whether the circumstances provide a proper reason for using that power against the particular individual.

D.K. Basu: Procedural Safeguards Accompany Arrest

While *Joginder Kumar* is primarily relevant to the justification for arrest, *D.K. Basu v State of West Bengal*¹⁰ addresses a different aspect of the problem: what happens once a person has been taken into custody. In this decision, the Supreme Court developed procedural safeguards intended to protect persons during arrest and detention. These included requirements

⁹ *Joginder Kumar*, (1994) 4 SCC 260.

¹⁰ *D.K. Basu v. State of West Bengal*, (1997) 1 SCC 416 (India).

concerning the identification of police personnel, preparation of arrest records, communication of the arrest to relatives or other persons, medical examination and related safeguards concerning custody.¹⁵

The significance of D.K. Basu lies in its recognition that the protection of liberty does not end once an arrest has been lawfully made. Custody creates a situation of considerable dependence upon State authorities, making procedural safeguards particularly important. Such safeguards provide a framework within which police custody is subject to documentation, communication and external scrutiny.

The decision therefore complements the principle established in Joginder Kumar. A lawful power of arrest must first be exercised on a proper basis; once exercised, the person in custody must then be protected through procedures designed to prevent abuse and ensure accountability. The legality of arrest and the treatment of the arrested person are consequently related but distinct questions.

This distinction is particularly relevant to the broader understanding of criminal procedure. Protection of personal liberty cannot be secured solely by asking whether an arrest was technically authorised. The manner in which the arrested person is treated, the information provided to others, the maintenance of proper records and the availability of safeguards against custodial abuse are equally important components of a rights-conscious arrest procedure.

Arnesh Kumar: Necessity and Judicial Application of Mind

The decision in *Arnesh Kumar v State of Bihar*¹¹ further developed the principle of necessity, particularly in cases involving offences punishable with imprisonment of up to seven years. The Supreme Court emphasised that the police should examine whether arrest is actually required in the circumstances and whether the statutory conditions governing arrest are satisfied. It also stressed the responsibility of Magistrates to independently consider the basis for detention rather than treating the production of an arrested person as sufficient justification for authorising custody.¹⁶

The significance of *Arnesh Kumar* lies in connecting the decision to arrest with the subsequent decision to detain. Arrest and detention are not necessarily one continuous and unquestioned process. The initial decision is made by the investigating authority, while continued custody is subject to judicial consideration. This creates two points at which the necessity of restricting liberty can be examined.

¹¹ *Arnesh Kumar*, (2014) 8 SCC 273.

The decision therefore adds an important procedural dimension to the principle identified in *Joginder Kumar*. It is not enough for the police to possess the statutory authority to arrest; the circumstances must justify its exercise. Similarly, once a person is produced before a Magistrate, continued detention requires judicial consideration rather than automatic approval.

Siddharth: Cooperation and Custodial Investigation

A particularly relevant development in the jurisprudence on arrest is the decision in *Siddharth v State of Uttar Pradesh*. The Supreme Court reaffirmed the importance of personal liberty and recognised that the mere availability of the power to arrest does not, by itself, make arrest necessary in every case. The Court's reasoning draws attention to the circumstances in which custody may actually be required, including the needs of the investigation, the possibility of the accused interfering with witnesses or evading the process, and the extent to which the accused has been cooperating with the investigation¹².

The significance of *Siddharth* lies in the practical dimension it adds to the principle of necessity. The decision moves the inquiry beyond the abstract question of whether the police possess the authority to arrest and towards the more concrete question of what purpose custody would serve in the particular case. The conduct of the accused, the progress of the investigation and the availability of other means of securing the person's participation may all become relevant to this assessment.

The decision is particularly useful in understanding that custody is not necessarily a prerequisite for an effective investigation. Where an accused has remained available to the investigating agency and there is no concrete circumstance indicating that custodial intervention is required, the justification for arrest may be considerably weaker. Conversely, where the circumstances demonstrate that the investigation or the integrity of the criminal process cannot reasonably be protected without custody, arrest may acquire a stronger justification.

Thus, *Siddharth* helps develop the distinction between “arrest being legally possible” and “arrest being factually necessary.” It reinforces an approach in which the decision to arrest is connected to the actual requirements of the investigation rather than being determined solely by the nature of the accusation or the maximum punishment prescribed for the offence.

¹² *Siddharth v. State of Uttar Pradesh*, (2022) 1 SCC 676 (India).

Satender Kumar Antil: Notice and the Continuing Importance of Liberty

The jurisprudence on the necessity of arrest was further strengthened in *Satender Kumar Antil v Central Bureau of Investigation*¹³. The Supreme Court reaffirmed that the decision to arrest involves more than forming a belief that a person has committed an offence. The investigating authority must also consider whether the circumstances justify taking that person into custody and whether the requirements governing arrest have been satisfied. The judgment therefore reinforces the distinction between the existence of grounds for suspicion or belief and the separate justification required for custodial intervention.

The decision is particularly relevant to the present discussion because it brings together several principles that had developed through earlier cases. It places the question of necessity alongside the statutory mechanism of notice, emphasises adherence to the procedural requirements governing arrest, and recognises the importance of judicial scrutiny in matters concerning continued custody. Rather than treating these safeguards as isolated requirements, the judgment can be understood as part of a broader approach in which each stage of the arrest process is expected to remain connected with the protection of personal liberty.

Another important aspect of *Satender Kumar Antil* is its emphasis on following the statutory procedure before resorting to custody. The decision reinforces the idea that procedural safeguards are not merely technical requirements to be complied with after the substantive decision to arrest has already been made. They form part of the legal framework within which the decision itself must be evaluated.

For the purposes of this paper, *Satender Kumar Antil* is therefore significant because it helps connect the earlier judicial development with the contemporary statutory framework. Necessity determines whether arrest is warranted, notice provides an alternative where immediate custody is not required, procedural safeguards regulate the exercise of arrest powers, and judicial scrutiny provides an additional check on deprivation of liberty. Read together, these principles strengthen the proposition that arrest should be treated as a justified procedural intervention rather than an automatic consequence of criminal accusation.

Pankaj Bansal: Grounds of Arrest and Communication

The question of arrest extends beyond the decision of the State to restrict an individual's liberty. It also concerns whether the person subjected to that restriction is made aware of why such deprivation of liberty has occurred. An arrest may have a lawful basis, but the protection of

¹³ *Satender Kumar Antil*, (2022) 10 SCC 51.

personal liberty also requires that the arrested person be informed of the grounds on which the State has taken such action. The requirement of communication therefore forms an important part of the procedural protection surrounding arrest.

This aspect received significant attention in *Pankaj Bansal v Union of India*¹⁴, where the Supreme Court examined the requirement of communicating the grounds of arrest in the context of the statutory framework applicable to the case. The Court treated communication of the grounds as an important safeguard because an individual cannot meaningfully challenge or seek legal protection against a deprivation of liberty without knowing the basis upon which that deprivation has been imposed.⁷

The significance of this principle extends beyond the formal act of informing an arrested person that he or she has been arrested. There is a distinction between communicating the fact of arrest and communicating the grounds for arrest. The former merely conveys that custody has occurred; the latter enables the person to understand the reasons underlying the State's action. This information can become particularly important when the arrested person seeks legal assistance, considers the legality of the arrest, or seeks appropriate judicial relief.

The requirement also introduces an element of transparency into the exercise of arrest powers. The decision to arrest should not remain entirely within the internal reasoning of the investigating authority. Where the law requires communication of the grounds, the person affected by the decision must be placed in a position to understand the basis of the restriction. This transforms the justification for arrest from something existing solely within the decision-maker's reasoning into something capable of being communicated and, where necessary, challenged.

The principle is therefore closely connected with the broader relationship between arrest, liberty and procedural fairness. If the State is permitted to deprive a person of liberty, the person must have access to the procedural information necessary to understand and contest that deprivation. Communication of the grounds of arrest consequently strengthens the accountability of the arresting authority and enables the arrested person to meaningfully exercise the legal protections available to them.

This adds another dimension to the distinction developed throughout this paper. The legitimacy of arrest is not exhausted by the existence of statutory authority or even by the presence of circumstances justifying custody. The procedural manner in which that decision is communicated to the person concerned is also significant.

¹⁴ *Pankaj Bansal v. Union of India*, (2024) 7 SCC 576 (India).

The principle may therefore be expressed as follows:

A lawful arrest requires not only a legally sustainable justification for restricting liberty, but also compliance with the procedural requirement of meaningfully communicating the basis of that restriction to the person arrested.

Prabir Purkayastha: Arrest, Grounds and Remand

The importance of communicating the grounds of arrest was further reinforced by the Supreme Court in *Prabir Purkayastha v State (NCT of Delhi)*¹⁵. The Court examined the requirement in the context of the constitutional protection guaranteed under Article 22(1), which seeks to ensure that a person arrested is made aware of the basis of the deprivation of liberty. The decision underscores that informing the arrested person of the grounds of arrest is not merely a matter of administrative procedure but forms part of the constitutional safeguards accompanying arrest.

The significance of *Prabir Purkayastha* extends to the relationship between the validity of arrest and subsequent detention. The decision demonstrates that compliance with arrest safeguards must be considered at the point when the deprivation of liberty occurs. A subsequent order authorising remand does not necessarily cure every defect that may have affected the legality of the initial arrest. The validity of the arrest and the legality of subsequent custody are therefore connected, but they cannot simply be treated as interchangeable stages of the criminal process. This principle is important because arrest sets the process of custodial deprivation in motion. If the initial exercise of State power does not comply with a constitutionally or statutorily mandated safeguard, the consequences may extend beyond the moment of apprehension. Judicial scrutiny of subsequent custody must take into account the legality of the process through which the person was brought before the Court.

The decision therefore adds another layer to the concept of procedural accountability developed in this paper. The State's responsibility does not end with identifying a lawful basis for arrest. It must also comply with the procedural requirements that protect the arrested person's ability to understand and challenge the deprivation of liberty. These requirements become particularly significant because a person in custody is ordinarily in a position of considerable disadvantage when compared with the authority exercising the power of arrest.

¹⁵ *Prabir Purkayastha v. State (NCT of Delhi)*, (2024) 7 SCC 576 (India).

POLICE DISCRETION AND THE NEED FOR CASE-SPECIFIC ASSESSMENT

Any meaningful examination of arrest must recognise that police discretion is an inherent feature of criminal investigation. Investigating officers are required to make decisions in circumstances that are often uncertain, fact-dependent and continuously developing. The need for arrest cannot, therefore, be determined entirely through a rigid formula applicable uniformly to every investigation.

Criminal cases may differ significantly in their factual circumstances. The nature and seriousness of the alleged offence, the material already collected, the conduct of the person under investigation, the likelihood of evasion, the possibility of interference with evidence or witnesses, and the stage at which the investigation has reached may all influence the decision concerning custody. What may justify arrest in one investigation may have little relevance in another. A case-specific assessment is consequently necessary if the power of arrest is to respond effectively to genuine investigative requirements.

A completely inflexible approach could create its own difficulties. Criminal investigations do not always develop according to predictable patterns, and circumstances may emerge that require immediate intervention. Restricting investigators through an approach that mechanically excludes arrest could, in appropriate cases, compromise the preservation of evidence, the identification of the persons involved, or the integrity of the investigation.

The opposite approach, however, presents an equally serious concern. If the decision to arrest is left entirely to unrestricted discretion, there is a risk that personal liberty may depend excessively upon individual judgment without sufficiently clear standards. Such an approach could produce inconsistency, make the exercise of arrest powers difficult to scrutinise and create opportunities for unnecessary or disproportionate interference with liberty.

The appropriate solution, therefore, is not to eliminate police discretion but to structure and discipline it. Discretion is legitimate when it operates within identifiable legal boundaries. The investigating officer should be able to respond to the circumstances of the investigation, but the decision must remain capable of being explained in terms of the statutory requirements and the facts of the particular case.

Section 35 of the BNSS provides an important statutory framework in this regard. In circumstances covered by the provision, the officer is required to consider not merely whether there is a basis for believing that the person has committed the alleged offence, but also whether arrest is necessary for one or more purposes recognised by law.¹⁷ This introduces a degree of

structure into what might otherwise become an unrestricted exercise of police power.

Judicial decisions supplement this statutory framework by providing principles for understanding how arrest powers should be exercised. The jurisprudence beginning with Joginder Kumar and developed through decisions such as Arnesh Kumar, Siddharth and Satender Kumar Antil has consistently contributed to the distinction between the existence of arrest power and the justification for its exercise.¹⁸ These decisions do not remove the investigative judgment of police officers; rather, they place that judgment within a framework of necessity, reason and accountability.

Procedural safeguards provide another layer of control. Requirements relating to the documentation of arrest, communication with the arrested person and others, production before the Magistrate and other safeguards ensure that the exercise of custody does not remain entirely within the control of the investigating agency. Judicial supervision consequently acts as an external check upon the initial decision of the police.

The resulting framework may therefore be viewed as operating through four interconnected safeguards:

- A. statutory conditions determine when arrest may be exercised;
- B. judicial principles guide the assessment of necessity;
- C. procedural requirements regulate the manner in which arrest and custody are carried out; and
- D. judicial scrutiny provides an independent check upon the deprivation of liberty.

This approach is important because the protection of personal liberty does not require the criminal justice system to treat police authority as inherently suspect or illegitimate. Police officers must possess effective powers if criminal investigation is to function meaningfully. The constitutional concern arises not from the existence of police power itself, but from unstructured, unexplained or excessive use of that power.

Ultimately, the legitimacy of police discretion depends upon the reasons supporting its exercise. A decision to arrest should be capable of being connected to the facts of the investigation and to a purpose recognised by law. This makes discretion reviewable rather than arbitrary. The officer retains the ability to respond to the individual circumstances of the case, while the statutory and judicial framework ensures that such judgment remains within the boundaries of legality.

CONSTITUTIONAL SAFEGUARDS AND PERSONAL LIBERTY

The constitutional framework provides the broader normative foundation within which the power of arrest must operate. The BNSS may prescribe the circumstances and procedure governing arrest, but those statutory powers cannot be understood independently of the fundamental rights guaranteed by the Constitution. Since arrest involves a direct interference with personal liberty, its exercise must remain consistent with the constitutional principles of equality, non-arbitrariness, fairness and procedural protection.

Article 14: Protection Against Arbitrary State Action

Article 14 guarantees equality before the law and equal protection of the laws. In the context of arrest, its relevance extends to the manner in which State authorities exercise discretionary powers. The existence of discretion does not permit decisions to be made on irrelevant, irrational or arbitrary considerations.

Arrest involves a significant exercise of State authority and therefore requires a rational connection between the circumstances of the case and the decision to restrict liberty. An approach in which similarly situated persons are subjected to substantially different treatment without a legally relevant basis would raise concerns of arbitrariness.

Article 14 therefore contributes to the broader principle that police discretion must be structured rather than uncontrolled. The requirement of reasoned and legally relevant decision-making becomes particularly important where the consequence of that decision is the physical deprivation of liberty¹⁶.

Article 21: Personal Liberty and Procedural Fairness

Article 21 provides that no person shall be deprived of life or personal liberty except according to procedure established by law¹⁷. Arrest falls directly within the sphere of this constitutional protection because it involves an immediate restriction upon personal freedom.

The significance of Article 21, however, is not that it creates an absolute prohibition against arrest. Criminal law necessarily permits the State to restrict liberty in circumstances recognised by law. The constitutional requirement is that such deprivation must have a lawful basis and must be carried out through a procedure that meets the standards of fairness and reasonableness developed by constitutional jurisprudence.

¹⁶ Constitution of India 1950, art 14; *E P Royappa v State of Tamil Nadu* (1974) 4 SCC 3 (India).

¹⁷ Constitution of India 1950, art 21.

The understanding of Article 21 has consequently moved beyond the narrow idea that any procedure enacted by law is automatically sufficient. The procedure affecting personal liberty must satisfy substantive constitutional standards of fairness. The Supreme Court's decision in *Maneka Gandhi v Union of India* is particularly significant in establishing this broader understanding of procedural fairness¹⁸.

In the context of arrest, this means that statutory authority alone cannot be treated as the complete answer. The exercise of arrest power must also respect the procedural protections surrounding the individual. This provides the constitutional foundation for examining questions of necessity, proportionality, procedural compliance and judicial oversight.

Article 22: Specific Protection for Arrested Persons

Article 22 provides safeguards specifically directed towards persons who have been arrested. These include the right to be informed of the grounds of arrest, the right to consult and be defended by a legal practitioner of one's choice, and the requirement of production before the nearest Magistrate within the constitutionally prescribed period¹⁹.

These safeguards are significant because they recognise that an arrested person occupies a particularly vulnerable position in relation to the State. Once custody has been imposed, the individual may have limited ability to independently challenge the circumstances in which liberty has been restricted. Constitutional safeguards therefore seek to ensure that the arresting authority does not exercise unchecked control over the person in custody.

Similarly, the right to legal representation and the requirement of prompt production before a Magistrate introduce external safeguards into the custodial process. They ensure that the arrested person's position is not determined exclusively by the investigating authority and that judicial supervision enters the process at an early stage.

Constitutional Protection as a Continuing Process

The constitutional regulation of arrest should therefore not be viewed as a safeguard operating at only one particular moment. Protection of liberty begins with the decision whether arrest is necessary, continues through the manner in which the arrest is carried out, and extends to the treatment and legal position of the person in custody.

The constitutional framework can consequently be understood as operating across several

¹⁸ *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248 (India).

¹⁹ Constitution of India 1950, art 22(1)–(2).

interconnected stages:

- A. Decision to arrest
- B. Communication of grounds
- C. Access to legal assistance
- D. Safeguards during custody
- E. Production before Magistrate
- F. Judicial consideration of detention.

Each stage serves a different purpose. The first seeks to prevent unnecessary deprivation of liberty; the second enables the person to understand the basis of the State's action; the third facilitates access to legal protection; the fourth regulates the exercise of custodial power; and the final stages introduce judicial oversight.

This layered structure is important because no single safeguard can, by itself, adequately protect personal liberty. Even where the initial arrest is legally justified, subsequent procedural violations may create independent concerns. Conversely, procedural compliance cannot substitute for the basic requirement that the arrest itself have a lawful and sufficient basis.

The constitutional framework therefore supports a rights-conscious model of arrest in which police powers and individual liberty are not treated as mutually exclusive. The State retains the authority necessary to investigate and prosecute offences, but the exercise of that authority remains subject to constitutional limitations. The legitimacy of arrest consequently depends upon the combined operation of lawful authority, necessity, procedural fairness and judicial oversight.

PROCEDURAL SAFEGUARDS: ENSURING ACCOUNTABILITY

AFTER ARREST

The legal regulation of arrest does not come to an end merely because a person has been taken into custody. In fact, the commencement of custody creates a further set of legal responsibilities for the authorities exercising control over the arrested person. Once liberty has been restricted, the law must ensure that the individual is not left without information, assistance or meaningful safeguards against misuse of custodial power.

The BNSS contains various provisions governing the treatment of an arrested person, including safeguards relating to communication of the arrest, access to legal assistance, medical examination and informing persons connected with the arrested individual.²⁰ These statutory

protections operate alongside the constitutional guarantees available to arrested persons and the safeguards developed through judicial decisions, particularly *D.K. Basu v State of West Bengal*²⁰.

The importance of these safeguards can be understood through three interconnected functions.

- A. They promote awareness and understanding. An arrested person should be placed in a position to understand the fact and basis of the State's intervention. Information regarding the arrest and access to legal assistance enable the individual to understand the legal situation and take appropriate steps to protect their rights.
- B. They promote transparency. Arrest places considerable authority in the hands of the police. Requirements relating to documentation, communication and medical examination create a record of the circumstances surrounding custody and reduce the possibility that the exercise of police power remains entirely undocumented or beyond scrutiny.
- C. They facilitate external oversight. An arrested person should not remain dependent exclusively upon the authority that has imposed custody. Communication with relatives or other appropriate persons, access to legal assistance, medical examination and eventual production before a Magistrate introduces persons and institutions outside the immediate investigating agency into the custodial process. These mechanisms provide opportunities for the legality and treatment of the arrested person to be examined.

These safeguards are therefore more than administrative requirements. They represent the accountability dimension of arrest. When the State exercises coercive power over an individual, the exercise of that power should leave a legally recognisable trail through which compliance can subsequently be examined. Documentation and communication consequently serve not only the immediate interests of the arrested person but also the integrity of the criminal justice system.

The principle established in *D.K. Basu* is particularly relevant in this context. The Supreme Court recognised the need for safeguards governing arrest and detention in order to reduce the possibility of custodial abuse and ensure greater accountability in the exercise of police power²¹. The decision therefore complements the jurisprudence concerning the necessity of arrest: while cases such as *Joginder Kumar* and *Arnesh Kumar* are particularly relevant to whether custody should be imposed, *D.K. Basu* is concerned substantially with how the person

²⁰ *D.K. Basu*, (1997) 1 SCC 416.

²¹ BNSS, §§ 47–49, 53, 56.

is to be treated once custody has begun.

At the same time, procedural compliance must not be confused with substantive justification. The completion of an arrest memo, communication with relatives, medical examination or compliance with other procedural requirements does not, by itself, establish that the arrest was necessary in the first place. Procedural safeguards regulate the exercise of custody; they do not create the substantive justification for imposing it.

Conversely, the existence of a genuine investigative purpose cannot excuse disregard of mandatory procedural protections. An investigation may require custody in a particular case, but the authority exercising that power must still comply with the legal safeguards attached to arrest and detention. Necessity and procedure therefore operate cumulatively rather than alternatively.

This distinction is important to prevent two different forms of error. The first would be to assume that an arrest is justified simply because the prescribed procedural steps have been followed. The second would be to assume that a legitimate investigative objective gives the police freedom to disregard procedural safeguards. Neither approach adequately protects the rule of law.

The broader significance of this principle is that accountability in arrest operates at both the substantive and procedural levels. At the substantive level, the authority must be able to explain why arrest was required. At the procedural level, it must demonstrate that the arrest and subsequent custody were conducted in accordance with the safeguards prescribed by law. Together, these requirements ensure that the deprivation of liberty is not merely authorised in theory but is also exercised responsibly in practice.

Accordingly, procedural safeguards should be understood as an integral part of the architecture of arrest rather than as secondary formalities. They provide the mechanisms through which the exercise of State power becomes transparent, reviewable and accountable, thereby strengthening the protection of personal liberty within the criminal process.

PROPOSED ANALYTICAL FRAMEWORK: FROM AUTHORITY TO JUDICIAL OVERSIGHT

The preceding discussion provides a basis for developing a structured approach to analysing the exercise of arrest power under the contemporary criminal procedure framework. The question of arrest cannot be answered solely by asking whether the police possess the legal authority to take a person into custody. A more complete analysis requires consideration of

why the power is being exercised, whether custody is actually necessary, whether the prescribed safeguards have been followed, and whether continued detention can withstand judicial scrutiny.

The following framework is proposed by the author as an analytical model derived from the statutory provisions and judicial principles examined in this paper. It is not presented as a new statutory test, nor is it suggested that the Supreme Court has expressly formulated arrest law in these five stages.

A. Authority: Is There a Legal Basis for Arrest?

The starting point is authority. The first question must be whether the law permits arrest in the circumstances of the particular case. The power of arrest must have a recognised statutory or legal foundation; an arrest cannot be justified merely because the investigating officer considers custody convenient or desirable. Section 35 of the BNSS provides the principal framework for arrest without warrant in the circumstances specified by the provision.

However, establishing legal authority only answers the question of whether arrest may legally be available. It does not, by itself, establish that arrest should actually be exercised.

B. Purpose: What Would Arrest Achieve?

The second inquiry concerns purpose. Once the existence of legal authority is established, it becomes necessary to identify the legitimate investigative or procedural objective that arrest is intended to achieve. The purpose should have a clear connection with a purpose recognised by law.

This distinction is important because custody should not be treated as an objective in itself. Arrest is a coercive means employed in the course of criminal procedure; its justification must therefore arise from what the custody is expected to accomplish. This may involve preventing interference with the investigation, protecting evidence, securing the person's presence or addressing another circumstance recognised by the statutory framework.

C. Necessity: Is Physical Custody Actually Required?

The third stage is the central part of the proposed framework necessity. The question is not merely whether arrest can serve a legitimate purpose, but whether physical custody

is actually required to achieve that purpose.

This requires a case-specific assessment. The nature of the alleged offence, the material available to the investigating agency, the conduct of the person concerned, the possibility of interference with evidence or witnesses, the likelihood of evasion and the availability of less restrictive alternatives may all become relevant. The principles developed in Joginder Kumar, Arnesh Kumar, Siddharth and Satender Kumar Antil are particularly significant in this regard.

The necessity inquiry therefore creates an important distinction between “arrest is legally permissible” and “arrest is necessary in the circumstances.” The existence of the former does not automatically establish the latter.

D. Safeguards: How Has the Power Been Exercised?

Even where arrest is supported by legal authority and justified by an identifiable purpose, the analysis cannot end there. The fourth stage concerns procedural safeguards.

The relevant question is whether the arrest and subsequent custody have been carried out in accordance with the constitutional and statutory protections available to the arrested person. These include safeguards relating to communication of the grounds of arrest, access to legal assistance, documentation, medical examination, information to appropriate persons and production before the Magistrate.

This stage is particularly important because the legality of the purpose behind an arrest does not excuse procedural non-compliance. At the same time, compliance with procedural requirements cannot itself establish that the arrest was necessary. Substantive justification and procedural compliance are therefore complementary requirements.

E. Judicial Oversight: Can Continued Custody Withstand Scrutiny?

The final stage is judicial oversight. Once an individual is produced before a Magistrate, the question of continued custody enters a different institutional setting. The justification offered by the investigating agency becomes subject to independent judicial consideration.

Judicial scrutiny is significant because the initial decision to arrest is made by the investigating authority, whereas continued detention involves an additional deprivation of liberty that requires judicial consideration. The Magistrate therefore performs an

important checking function within the arrest process. The principle that detention should not be authorised mechanically, emphasised in *Arnesh Kumar*, is particularly relevant at this stage.

Judicial oversight consequently ensures that the initial exercise of police power does not automatically determine the continued deprivation of liberty.

The Proposed Five-Stage Framework

The framework can therefore be expressed as:

- A. Authority
- B. Purpose
- C. Necessity
- D. Safeguards
- E. Judicial Oversight

The significance of this sequence lies in the fact that each stage addresses a different question. Authority asks whether the State possesses the legal power to arrest. Purpose asks why that power is being exercised. Necessity asks whether physical custody is actually required. Safeguards examine whether the power has been exercised in accordance with constitutional and statutory requirements. Judicial oversight finally asks whether continued custody can withstand independent scrutiny.

The framework also demonstrates that arrest should not be understood as a single, isolated event occurring at the moment a person is physically taken into custody. It is better understood as a continuing legal process, beginning with the decision to exercise State power and extending through custody, procedural protection and judicial consideration.

Importantly, failure at one stage cannot automatically be compensated for by compliance at another. The existence of statutory authority cannot substitute for necessity; a legitimate investigative purpose cannot excuse disregard of mandatory safeguards; and procedural compliance cannot, by itself, validate an arrest that lacked a lawful foundation.

The proposed framework therefore seeks to bring together principles that are often considered separately. It does not attempt to eliminate police discretion or create an inflexible formula for every arrest. Instead, it provides a method of examining whether the exercise of discretion remains connected to lawful authority, legitimate purpose, actual necessity, procedural fairness and independent oversight.

In this sense, the framework captures the broader movement identified throughout this paper:

from understanding arrest merely as a power available to the State towards understanding it as a legally controlled intervention in personal liberty. The central inquiry is consequently not simply whether the police can arrest, but whether the arrest is legally authorised, purpose-driven, necessary, procedurally compliant and capable of surviving judicial scrutiny.

CRPC TO BNSS: CONTINUITY AND CHANGE

The replacement of the Code of Criminal Procedure, 1973 by the Bharatiya Nagarik Suraksha Sanhita, 2023 should not be understood merely as a change in statutory terminology or section numbering. The transition represents a restructuring of the criminal procedural framework, while several principles governing the exercise of arrest power continue to derive from constitutional guarantees and judicial interpretation developed under the earlier regime.

Under the CrPC, Section 41 dealt with circumstances in which a police officer could arrest without warrant, while Section 41A provided for a notice of appearance where arrest was not required. Under the BNSS, these matters have been brought together within Section 35, which contains provisions concerning arrest without warrant as well as the issuance and consequences of a notice to appear²².

This reorganisation is significant for the present analysis because the relationship between arrest and notice remains central to the question of necessity. The shift from the earlier framework to Section 35 of the BNSS does not eliminate the underlying question of whether immediate custody is actually required. Instead, the new statutory arrangement provides the contemporary legislative context within which that question must be examined.

At the same time, the replacement of the CrPC does not mean that the constitutional principles developed through decades of judicial interpretation become irrelevant. The protection of personal liberty under Articles 14 and 21, together with the specific safeguards for arrested persons under Article 22, continues to operate independently of the name or numbering of the procedural statute. The BNSS therefore functions within an existing constitutional framework rather than creating an entirely new legal starting point.

Judicial precedent provides the third component of this relationship. Decisions such as *Joginder Kumar*, *D.K. Basu*, *Arnesh Kumar*, *Siddharth*, *Satender Kumar Antil*, *Pankaj Bansal* and *Prabir Purkayastha* developed principles concerning necessity of arrest, procedural safeguards, communication of grounds and judicial scrutiny. These decisions were delivered under different statutory and factual circumstances, but the constitutional principles underlying them

²² *Code of Criminal Procedure*, No. 2 of 1974, §§ 41, 41A (India); BNSS, § 35.

remain relevant when interpreting provisions that similarly regulate State interference with personal liberty.

The transition from the CrPC to the BNSS should therefore be viewed as involving both continuity and change. There is change at the legislative level, including the restructuring and renumbering of provisions. There is continuity at the constitutional level, because the fundamental protection of personal liberty remains. There is also continuing judicial development, as courts interpret the new statutory framework in light of constitutional principles and the experience accumulated under the previous regime.

For the purposes of this paper, this distinction is particularly significant. The central question is not simply whether the BNSS has changed the location of the power to arrest, but whether the new framework changes the relationship between arrest power and arrest necessity. Section 35 must therefore be examined not only as a new statutory provision but as part of a continuing legal conversation concerning the legitimate limits of State power.

The transition from CrPC to BNSS consequently provides an opportunity to reassess whether the contemporary framework sufficiently balances effective investigation with the constitutional commitment to personal liberty. The real measure of change lies not merely in whether the sections have been renumbered, but in how the statutory power is interpreted and exercised in practice.

PRACTICAL CHALLENGES IN APPLYING THE NECESSITY STANDARD

Although the requirement of necessity provides an important safeguard against unnecessary deprivation of liberty, its application in practice is not entirely straightforward. Unlike a purely mechanical statutory condition, necessity requires the investigating authority to evaluate the circumstances of the particular case and exercise judgment. The effectiveness of the standard therefore depends not only upon its formulation in law but also upon the manner in which it is understood, recorded and reviewed by the institutions responsible for its implementation.

- A. Necessity is inherently contextual- The circumstances that make arrest necessary in one investigation may have little relevance in another. The nature of the alleged offence, the material available to the investigating agency, the conduct of the person concerned, the possibility of interference with evidence or witnesses, and the likelihood of evasion may vary considerably. Consequently, the necessity inquiry cannot be reduced to a single formula applicable uniformly to every case. This is also why the existence of a

statutory power to arrest cannot, by itself, determine whether that power should be exercised.

- B. Necessity may change as an investigation develops- An arrest that does not appear necessary at the initial stage may acquire justification later if circumstances materially change. New evidence may emerge, the conduct of the person under investigation may alter, or circumstances may arise creating a genuine concern regarding interference with the investigation or evasion of the criminal process. Conversely, if the circumstances that initially supported custody cease to exist, continued detention may require reconsideration. Necessity is therefore not necessarily a one-time determination; it may require reassessment as the factual position develops.
- C. The standard necessarily involves an element of professional judgment- Different investigating officers may interpret similar circumstances differently, particularly where the facts are uncertain or developing. While some degree of discretion is unavoidable in criminal investigation, inconsistent application can weaken the predictability of the arrest framework. This makes appropriate police training particularly important. Officers must understand that the question is not merely whether they possess the power to arrest, but whether the facts provide a legally sustainable basis for exercising that power in the circumstances of the case.
- D. The recording of reasons assumes considerable importance- A requirement of necessity becomes difficult to evaluate retrospectively if the circumstances and reasoning that led to arrest have not been adequately documented. Proper recording can assist the investigating agency itself by requiring a conscious assessment before custody is imposed, while also enabling subsequent judicial authorities to understand the basis upon which the decision was made. Documentation therefore serves both an internal decision-making function and an external accountability function. This becomes particularly important because judicial scrutiny is necessarily dependent upon the material placed before the court. Judicial supervision cannot operate effectively in an informational vacuum. If the circumstances said to justify arrest are not clearly placed before the Magistrate, meaningful assessment of the necessity of continued custody becomes more difficult. The requirement of proper documentation is therefore closely connected with the broader principle of judicial application of mind developed in arrest jurisprudence.
- E. Implementation may present a gap between formal law and actual practice- A statutory requirement may be clearly expressed, yet its protective value depends upon whether

the officials applying it understand and consistently follow it. This is especially relevant to arrest because the decision is often made at an early and sometimes uncertain stage of investigation. The effectiveness of the necessity standard therefore depends upon institutional practices, training, supervision, documentation and meaningful judicial scrutiny.

These challenges, however, do not necessarily demonstrate a defect in the statutory framework itself. Rather, they illustrate a broader feature of procedural law: a legal standard acquires practical meaning only through institutional implementation. The requirement of necessity can function as an effective safeguard only when investigating officers apply it consciously, record the relevant considerations, and remain subject to meaningful judicial review.

The practical challenge, therefore, is not to eliminate discretion altogether but to ensure that discretion operates within a framework of reasoned decision-making, proper documentation and institutional accountability. If these elements function together, the necessity requirement can serve as more than a formal statutory expression; it can become a practical limitation upon unnecessary custodial intervention.

FINDINGS

The preceding analysis leads to a number of findings concerning the relationship between the power to arrest and the necessity to arrest under the BNSS. These findings are not intended to suggest that arrest is inherently undesirable or that police discretion should be eliminated. Rather, they identify the conditions under which the exercise of arrest power can remain consistent with effective investigation and the constitutional protection of personal liberty.

- A. Arrest continues to be a legitimate and, in appropriate circumstances, necessary instrument of criminal investigation. The investigation of offences may sometimes require the State to exercise coercive powers, particularly where circumstances demonstrate a genuine need for custody. The protection of personal liberty should therefore not be understood as requiring the complete absence of arrest.
- B. The existence of statutory authority and the necessity of exercising that authority are conceptually distinct. The fact that the law permits an arrest does not, by itself, establish that arrest is required in every individual case. This distinction forms one of the central principles emerging from the judicial development examined in this study.²¹
- C. Section 35 of the BNSS incorporates a necessity-based inquiry in the circumstances covered by its relevant provisions. The provision requires consideration of whether

arrest is necessary for specified purposes, thereby placing an additional consideration beyond the mere existence of grounds to believe that a person has committed an offence.²²

- D. The notice mechanism under Section 35 provides an important alternative to immediate custodial intervention. Where the statutory conditions for arrest do not require immediate custody, notice enables the investigating authority to secure the person's appearance and continue the investigative process without automatically depriving the individual of physical liberty.²³
- E. The judicial development preceding the BNSS remains important to the interpretation of arrest. Joginder Kumar, D.K. Basu and Arnesh Kumar contributed different dimensions to the protection of persons subjected to State custody: justification for arrest, procedural safeguards during custody, and the necessity of arrest and judicial application of mind respectively.²⁴ These decisions therefore provide important constitutional and procedural context for understanding the contemporary framework.
- F. Subsequent decisions have further developed these principles. Siddharth emphasised that the mere permissibility of arrest does not necessarily make custody indispensable, while Satender Kumar Antil brought together questions concerning arrest, notice, procedural compliance and judicial consideration.²⁵ These decisions demonstrate the continuing judicial emphasis on examining the circumstances surrounding the actual need for custody.
- G. Constitutional safeguards should not be viewed as obstacles to legitimate investigation. Articles 14, 21 and 22 establish the constitutional conditions within which State power must operate. Their purpose is not to prevent the State from investigating offences, but to ensure that investigative authority is exercised through a framework that respects equality, personal liberty and procedural protection.²⁶
- H. Judicial supervision remains an important institutional safeguard. The production of an arrested person before a Magistrate introduces an independent decision-maker into the custodial process and provides an opportunity to examine whether continued detention is legally justified. Judicial oversight therefore prevents the initial police decision from automatically determining the continuation of custody.
- I. Police discretion remains an unavoidable component of criminal investigation, but its legitimacy depends upon the manner in which it is exercised. Discretion is most consistent with constitutional governance when it remains structured by statutory

purposes, informed by the circumstances of the individual case, supported by recorded reasons and accompanied by procedural safeguards.

CONCLUSION

Arrest occupies a distinctive position within criminal procedure because it combines two realities that must be accommodated simultaneously. On one hand, the State requires effective investigative powers to investigate offences and protect the integrity of the criminal justice process. On the other, arrest represents a direct restriction upon personal liberty and therefore attracts constitutional protection.

The BNSS does not eliminate this tension. Instead, it provides a statutory framework within which the tension must be managed.

The development of Indian arrest jurisprudence demonstrates that the law has progressively moved beyond treating statutory authority as sufficient justification for every arrest. Joginder Kumar highlighted the distinction between the power to arrest and the justification for exercising it. D.K. Basu established safeguards governing the manner in which arrest and detention are carried out. Arnesh Kumar further emphasised the importance of necessity and judicial application of mind, particularly in relation to offences punishable with imprisonment up to seven years.

The contemporary interpretation of Section 35 under Satender Kumar Antil further demonstrates that the question of arrest must be examined within the statutory relationship between notice, necessity and investigative requirements.

The central argument of this paper is therefore that arrest should not be understood through a binary choice between police power and individual liberty. Both are legitimate components of the criminal justice system. The more appropriate approach is to examine the conditions under which they can coexist.

The analytical framework proposed in this paper offers one way of understanding that relationship.

The first stage asks whether the law permits arrest. The second asks what legitimate purpose arrest would serve. The third asks whether custody is actually necessary to achieve that purpose. The fourth ensures that the person's constitutional and statutory protections are respected. The fifth provides independent judicial scrutiny of continued custody.

This framework does not seek to replace existing law or create an additional legal test. Its purpose is to bring together the various principles already operating within the statutory and

constitutional framework and to understand them as parts of a single decision-making process. Ultimately, the legitimacy of arrest should not be measured simply by the extent of police power or by the number of restrictions imposed upon that power. It should be assessed by whether the exercise of arrest authority is legally authorised, connected to a legitimate purpose, necessary in the circumstances, procedurally safeguarded and capable of withstanding judicial scrutiny.

The BNSS therefore provides an opportunity not merely to reconsider the provisions governing arrest, but to reconsider the manner in which arrest itself is understood: not as an automatic consequence of accusation, and not as an inherently undesirable exercise of police power, but as a legally regulated decision in which investigative necessity and personal liberty must remain in balance.

