

Comparative Criminal Procedure

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Abstract: *Most nations today follow one of two major legal systems - common law system or civil law system. Countries like India, U. S, follow common law system. India's legal system has been inspired from U. K legal system. Both countries follow the same legal system, but they are still different from each other. Indian law is codified in nature while U. K law is uncoded in nature, which is actual nature of common law. Common law relies on scattered statutes. In common law, judicial precedents are prevalent. The judges play a very important role in shaping the Indian law, American law, British law. Common law functions as an adversarial system, a contest between two opposing parties before a judge who moderates. A jury of ordinary people without legal training decides on the facts of the case. The judge then determines the law. The criminal justice system is the system of law enforcement, which is directly involved in prosecuting, defending, and punishing those who are convicted of crimes. The system of the three countries follows common law system but there are certain differences. As India, U. S follows the same legal tradition with certain differences between the three, the paper briefly discusses about differences in Criminal procedure followed in trials held in court of two countries with the help of cases. The paper shows the difference in the procedure by discussing how the provisions of procedure code of respective countries (India & U. S) deals with matters of search and seizure with the help of cases.*

Keywords: Common law, civil law, adversarial system, arrest, search and seizure, criminal justice system, police, reasonable suspicion

1. Introduction

During the time of the revolution of America, first criminal justice system was created by the British. They used hanging system to punish the offenders and criminals of their country. At that time, there has some divided area called the district, and the head of the district was a magistrate. In the modern age, that magistrate is known as a judge who was in charge of collecting pieces of evidence (on behalf of the British government) against a criminal and hung him or her for his or her crimes.

Exile has become a common form of punishment in America, meaning being away from home. If someone wanted to go home, they were denied entry or threatened with jail upon returning. Wergild is another common form of punishment, also known as human cost. This method is established based on a person's life being paid as a fine.

Mutilation is a method of punishment when a part of the body is amputated, left permanently damaged or separated from the body. These methods of punishment are very dangerous.

The police department was founded in 1829 by Sir Robert Peel in London. Then the criminal justice system is evolving day by day. After a long time, the criminal justice system was replaced by today's criminal justice system, which consists of three components, respectively, the police, the courts, and the correctional department.

In the modern criminal justice system, correction is new probation, imprisonment, imprisonment, parole, and many other new penalties. The main function of correctional agencies is to punish criminals and ensure public safety through the rehabilitation of prisoners. So we can say that these correctional institutions mainly deal with people who have been convicted of crimes.

There are so many concepts in the criminal justice system, sometimes it's retributive, sometimes it's deterrent, sometimes it's corrective and sometimes it's remedial. But the nature of justice depends on the nature of the crime and its discovery during the investigation. But in cases of serious crime, the dominant policy is that the offender is seen as an "iron fist of the law", which in turn acts as a deterrent to other potential offenders, thus making reduce crime. So, in a diabolical crime like the Nirbhaya gang rape, the courts must quickly bring to justice by conducting the trial in an fast track court. Since this is one of the rarest cases, it should be punishable by death. Punishment should have a deterrent effect on other criminals. But the duty of the court is not only to punish the guilty, but also to protect the innocent and bring justice to the victims of crime. The law is both remedial and punitive, but swift justice is also required in the rarest of cases where rehabilitation is unlikely.

It is the duty of Police to prevent crime, to combat crime, to control crime, to preserve peace, to maintain and enforce public order and for that police does perform search, seizure, and arrest. Search, seizure, and arrest have to be performed by the officials by following the procedural law established of the respective country. The paper discusses about the laws and judicial judgments which guides the police of India and U. S. A to perform search, seizure and arrest.

India's procedural law on search, seizure and arrest

To understand provisions of the search, seizure, arrest of India, first we need to understand how police work in India and how they are been governed. Although the state force of the respective states work differently in terms of equipment and resources, the investigation of crime is governed by the criminal procedure code 1973. Section 154 of CrPc talks about the information which is to be given to the police officer. The term first information report is not defined Indian Penal Code, code of criminal procedure, or in any other law but in police regulation or rules information which

is to be recorded under section 154 of CrPc is known as first information report.

Section 156 in the code of criminal procedure gives police a power to investigate cognizable case cognizable offence are those offences in which police can arrest the offender without the warrant. Under the section 157 of criminal procedure code, it is the duty of the officer in charge where police station to send a report to the magistrate having a jurisdiction and then to proceed for an investigation. The report is known as concurrence report. The report consists of occurrences of the events or circumstances described by the reporter of the information.

Section 173 of the criminal procedure code talks about the report of the police officer on the completion of the investigation which in otherwise talks about that charge sheet. Section 41 of CrPc talks about arrest open individual without the warrant and section 437 CrPc talks about bail on the matters of non bailable offences. Section 436 CrPc talks about the bill on the matters of bailable offences. Section 102 of criminal procedure code 1973 talks about power of the police officer to seize certain property. The section 165 and 166 of criminal procedure code collectively says that the police during the time of investigation can search and seize.

Referring to **State Of Maharashtra vs Tapas D. Neogy 1999 case** [1], an issue was raised whether freezing or attachment of bank account can be made by the police while exercising the power under the section 102 of CrPc. In this case the defendant was an architect and town planner in the department of town planning in the union territory of daman and diu. The central Bureau of Investigation and anti-corruption Bureau registered a FIR against the defendant under section 120B, 467, 468, 471, 420 of Indian Penal Code and section 13 Clause 2 and section 13 clause 1 sub clause d of prevention of corruption act 1988. It was held that the defendant committed the offence while being on duty. There were 3 different accounts in different places. The account in Calcutta which was mother of defendant (who was the accused) was freezed on the order of police. Mother then filed a petition to trial court. The magistrate then held that the matter doesn't come under its jurisdiction. An appeal was made before the Bombay High Court where the Court said that bank account doesn't come under the definition of property. Then an appeal was made to SC where it was held that bank account does come under the definition of property under Sec 102 of Code of criminal procedure 1973.

Referring to **D. K Basu vs. State of West Bengal** [2], Supreme Court gave certain guidelines on the matters referring to matters of arrest. Increase in crime against a person in custody and the arbitrariness of Policemen in arresting a person were the key issues raised in this case.

The court referring to **Nilabatibehera vs. State of Orrisa** (1993) [3], stated that "any form of torture does falls within the ambit of article 21, whether it occurs during investigation, interrogation or otherwise. The rights guaranteed by article 21 cannot be denied to under trials, convicts, detenus and other prisoners in custody, except

according to the procedure established by law by placing such reasonable restrictions on the right as are permitted by law".

Few of the important guidelines are as follows:

- 1) "The officer carrying out the arrest shall bear an accurate, visible mark for his identification to the arrestee and the particulars of the person arresting shall be recorded in the station diary.
- 2) A memo of the arrest shall be prepared at the time of arrest and it shall be attested by at least one person related to the arrestee or a respectable person of the locality. It shall also be countersigned by the arrestee.
- 3) The particulars of the arrestee and the place of detention shall be communicated to a friend or relative of the arrestee as he may communicate unless the attesting witness of the memo of arrest is himself such a friend or a relative of the arrestee.
- 4) The time, place of arrest and venue of custody of an arrestee shall be notified by the police where the next friend or relative of the arrestee lives outside the district or town through the Legal Aid Organisation in the District and the police station of the area concerned telegraphically within a period of 8 to 12 hours after the arrest.
- 5) The arrestee shall be made aware of his right to get a friend or relative informed about his arrest.
- 6) The diary entry of the arrest, the person informed of the arrest and particulars of the arrest shall be updated in the station diary.
- 7) The arrestee, if he wants, shall be medically examined and a memo must be prepared which shall be signed by the arrestee and police officer and the copy shall be provided to the arrestee.
- 8) The arrestee should be subjected to a medical examination by a trained doctor every 48 hours during his detention in custody by a doctor on the panel of approved doctors appointed by the Director, Health Services of the State or Union Territory concerned.
- 9) Copies of everything including the arrest memo and memo of medical examination shall be sent to the concerned magistrate.
- 10) The arrestee has the right to meet the lawyer of his choice during interrogation.
- 11) The particulars of the arrest shall be communicated to the police control room provided in every district and it shall be displayed on the notice board of every district". [4]

U. S procedural law on search, seizure and arrest

The 4th amendment [5] and 14th amendment [6] of Constitution of U. S together gives certain guidelines about the validity of search and seizure done by the police officer. The Constitution of United States of America is federal in nature. This means that each state has their own Supreme Court while the Supreme Court of United States deals only on the matters of constitution. The 4th amendment of the constitution is the part of Bill of Rights.

The 4th amendment of U. S states "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable

cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized". It means state shall not cease the Persons property or things on reasonably. The court must issue warrant for a probable cause

The 14th amendment of U. S states that state shall not deprive any person of life, liberty and property without the due process of law and not to deny equal protection of law.

As per the U. S Constitution, search and seizure of anything has to be done with warrant and probable cause. As per U. S Constitution, Search and seizure can be made by police a) with valid arrest warrant b) without arrest warrant if it is made with probable cause.

"The probable cause "is very factual in nature. It is to be from standpoint of the police officer who believes that accused person has committed a crime or is about to commit a crime or crime has been committed where search is to be made. Search and seizure cannot be made on grounds of suspicion.

Referring to case **Terry v. Ohio, 392 U. S. 1 (1968)**, [7] Court held that it is constitutional for American police to stop *and frisk* a person they reasonably suspect to be armed and involved in crime.

On October 31, 1963, Martin McFadden (police officer) was on duty in downtown Cleveland, Ohio. He notices a man named John W. Terry (accused), walks down the street, looks out of some store window, then keeps going forward, back, and back to the starting point., stopped on the way back to look at the store window. . Richard Chilton (co-accuser), echoed Terry's move. Then a third man joined Terry and Chilton and the three walked together down the street toward the store. McFadden suspected that the men had "locked down" the store with the intent of robbing it, so he tracked them down and confronted them. He asked for the names of the men, but they gave some muttering answers. McFadden then grabbed Terry and Chilton, patted their outer garments, and discovered that both had guns in their coat pockets.

They were charged in the Cuyahoga County Court of Common Pleas with illegally carrying concealed weapons.

At trial, the defendant's attorney filed a motion to dismiss the evidence about the discovered firearm, arguing that the "frisk" violated the Fourth Amendment and that the gun was therefore discovered by McFadden during that time should have been excluded from the evidence under the exclusion rule.

The trial judge denied his motion on the basis that the "stop-and-frisk" is generally legal, and Terry was convicted. He appealed to the Ohio District Court of Appeals, which upheld the verdict, then appealed to the Ohio Supreme Court, which dismissed his appeal. He then appealed to the Supreme Court of the United States, which agreed to hear his case and issue a certiorari. The Supreme Court ruled 8-1 against Terry and upheld the constitutionality of the stop-and

frisk procedure as long as the police officer conducting it had "reasonable suspicion".

As per the Supreme Court, there should be reasonable suspicion even if not probable cause to "stop and frisk", "Search and seizure". Here evidence was not made exclusionary under 4th and 14th amendment. Frisk is made for the protection of police officer, if the concerned police officer thinks that frisk is necessary. In this case, court relied upon the experience of police officer. So, the evidence collected in this case by officer does not get excluded on the grounds of reasonable suspicion directed by 4th and 14th amendment of U. S Constitution.

Referring to case, **Palko v. Connecticut [8]**, it was held that due process of law is not incorporated in the original idea of Bill of Rights. Therefore it was held that 14th amendment is not applicable to all the state courts and hence they have their own rights.

In the case of **Wick vs U. S. A**, it was argued that for the prosecution in the state court for state crimes, 14th amendment is not applicable for recognition of evidence obtained illegally by the way of unreasonable search and seizure.

In the case of **Mapp vs Ohio [9]**, it was held that if the exclusionary rule (arrest of an individual or collection of evidence is done without proper search warrant on the grounds of reasonable suspicion not on probable cause) is upheld then the police can be kept on check. And hence exclusionary rule was made applicable to both state and federal government.

2. Conclusion

Hence it is clear from the above discussion that doesn't matter whether the evidence is relevant to the case or not but if the evidence has been collected by violating the 4th and 14th amendment of the U. S constitution, such evidence will not be taken into consideration. The reasonable suspicion is an exception to this as it permits arrest, search, seizure can be done without the warrant on the grounds of reasonable suspicion.

On the other hand, evidences can be admissible in the court if it has any kind of relevancy with case. As per the article 21 of Indian constitution, an illegal Caesar violates constitutional rights under the article 301A which is enforceable through writ jurisdictions.

In U. S Supreme Court, only the constitutionality of the procedure followed while conducting a particular search and seizer is been checked as U. S Supreme Court deals only with the constitutional matters. While in India one can appeal to the Supreme Court of India (Highest appellate court and apex body of Indian judiciary) as the Supreme Court of India deals not only the constitutional matters but also criminal, civil matters.

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