



Judicial Control Over Executive Discretion In Arrest: A Doctrinal Analysis Of Section 41 Of The Code Of Criminal Procedure In The Light Of The Article 21 Of The Constitution Of India

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ABSTRACT:

The power of arresting a person is exercised by the State that comes under the criminal justice system, is one of the most crucial coercive powers of the state. Such authority is being exercised by the state to maintain the law and public order, to ensure safety of its citizens and to ensure effective enforcement of law but on the other hand it poses a serious threat to individual liberty if exercised arbitrarily by the State. The Section 41 of the Code of Criminal Procedure (CrPC), 1973 empowers the police officers by the authority to arrest a person without a warrant under special or specified circumstances¹. However, historically when this kind of power is being exercised without any limit it often causes a lot of problems, arguments and controversies. Mostly, this power is being misused, widely at the time of election periods without any valid reason for arrest, abasement in police custody and most importantly the infringement of the fundamental right under Article 21 of the Constitution of India². Through the judicial interpretation of The Hon'ble Supreme Court of India, the arbitrary nature of this power is being checked which prevents the state from misusing this power, thus safeguarding the personal liberty of the individuals. The Hon'ble Supreme Court of India has delivered certain landmark judgements for upholding the fundamental rights of the individuals. Such landmark judgements are *Maneka Gandhi v Union of India*³, *D.K. Basu v State of West Bengal*⁴, *Armesh Kumar v State of Bihar*⁵ and *Joginder Kumar v State of Uttar Pradesh*⁶. Henceforth, this journal examines the legal framework of Section 41 of the CrPC and highlights the crucial role of judicial interventions.

KEYWORDS: Arrest, Criminal Justice System, Public order, Section 41 of CrPC, Personal Liberty, Article 21 of the Constitution of India, The Supreme Court of India.

INTRODUCTION

¹ Code of Criminal Procedure, 1973, s 41.

² Constitution of India, 1950, art 21.

³ *Maneka Gandhi v Union of India* AIR 1978 SC 597.

⁴ *D.K. Basu v State of West Bengal* AIR 1997 SC 610.

⁵ *Armesh Kumar v State of Bihar* (2014) 8 SCC 273.

⁶ *Joginder Kumar v State of Uttar Pradesh* (1994) 4 SCC 260.

In a constitutional democratic country like India, is governed by the Rule of Law⁷ and henceforth, the protection of the personal liberty is one of the most vital fundamental obligations. The Constitution of India clearly guarantees the Right to Life and Personal Liberty under Article 21 of the Constitution that provides that no person irrespective of their caste, creed, race, religion and sex shall be deprived of their own personal liberties except according to procedure established by law. Judicial interpretations have meticulously shaped this provision to reflect the very core principles of equity, fairness, rationality and due process of laws. Hence, if any action of the state is deemed to be encroaching on individual liberty, then the state must adhere to these constitutional mandates.

The state is being vested with various coercive powers to ensure law and order but the power of arrest through Section 41 of the CrPC holds a very sensitive stance. Arresting a person not only infringes the freedom and liberty of the individual but also unnecessarily subjects the individual under the oversight and jurisdiction of the framework of criminal justice. Many serious instances of arbitrary arrests, violence in police custody and abuse of police authorities have repeatedly raised sharp concerns regarding the urgent need for strict judicial supervision over this matter.

By figuring out the dangers posed by arbitrary arrest, the judiciary has played a crucial and proactive role in balancing the exercise of executive discretion. By interpreting Section 41 of the CrPC and Article 21 of the Indian Constitution, the Hon'ble Supreme Court of India and other High Courts have positively established constitutional limitations on the powers of arrest under the Section 41 of the CrPC. Through a series of landmark judgements, the Supreme Court has underscored that arrest cannot be an inevitable outcome of mere accusations, but it must constitute a meticulously valid legal measure, only warranted by exceptional cases and matters.

Therefore, this paper seeks attention to examine and analyses the evolving jurisprudence surrounding executive discretion in arrest and the role of the judiciary in protecting the personal liberty and freedom of an individual. Through this doctrinal analysis of the statutory provisions and the judicial precedents, it reveals that how the constitutional values and constitutional morality have reshaped the arrest powers under Section 41 of the CrPC in the criminal justice procedure of India.

STATUTORY FRAMEWORK OF ARREST UNDER SECTION 41 OF THE CODE OF CRIMINAL PROCEDURE, 1973

In India, the law which is related to arrest is primarily governed by the Code of Criminal Procedure, 1973⁹. Arrest is a coercive measure which is exercised by the state to ensure the presence of the accused person during trial, investigation and to prevent any further criminal offence. However, the power of such provision must adhere to the constitutional frameworks, particularly the protection of personal liberty under Article 21 of the Constitution. Section 41 of the Code of Criminal Procedure empowers the police officers to arrest a person or persons without a warrant under specified and special circumstances. The aim of introducing such provisions are to enable the police officers to arrest individual(s) upon reasonable and valid suspicion of their involvement in cognizable and serious offences. This provision was mainly introduced for national security and safety purposes. Although this was enacted to ensure fast and swift criminal investigations but in broader aspect with the course of time it led to excessive and unnecessary arrests.

Before 2009 Amendments¹⁰, arrests were being routinely executed as a standard and hallmark procedure but not an exceptional step backed by necessity. Often people accused of minor offences faced unlawful detention and even their detention was not required for investigative purposes. Such unlawful practices generated widespread arguments and strong criticisms from judicial authorities, Human Right Commission¹¹ and civil right organizations. In 2008, the legislature had attempted to address these concerns as a serious matter by amending the Criminal Procedure Code, as it was directly hampering the fundamental rights of the citizens. Those amendments introduced

⁷ Constitution of India, 1950, Preamble.

⁸ Constitution of India, 1950, art 21.

⁹ Code of Criminal Procedure, 1973.

¹⁰ Code of Criminal Procedure (Amendment) Act, 2008.

¹¹ National Human Rights Commission, Annual Report (2008 - 2009).

significant and sharp modifications to Section 41. The amendments were endeavored to restrict the arbitrary arrests of the police officers without a warrant by satisfying the conditions which were being introduced through the amendment. In the amendment, it is clearly mentioned that the police officers must have valid and legal grounds to use this power of arrest for necessary purposes such as preventing the accused for committing further offences, to ensure smooth and proper investigation, prevention from tampering of the evidences or to make sure of the presence of the accused before the Court during or before trial through Section 41 of the CrPC.

In addition, the amendment also introduced Section 41A of the CrPC¹² that provides the issuance of a prior notice of appearance in cases where arrest is not necessary. In this case, the police officer may order an issuance of the notice to appear before the court or the investigating agency instead of arresting the accused. The amendment and the introduction of this provision judiciously shaped the structure of the criminal procedure and clearly represents that arrest should be the last and final measure rather than the default course of action.

Despite reforming this provision, the effectiveness and importances of these reforms depends on the proper and efficient execution of these reforms holistically. In many cases, the police officers still exercise those arbitrary arrest powers without evaluating the need and purpose of arrest and does not examine the reasons properly. Consequently, the intervention of judiciary has played a vital role in ensuring the proper execution of the legislative reform of this provision of the CrPC. Judicial intervention also safeguards the fundamental rights of the accused.

CONSTITUTIONAL SPECTRUM OF ARREST: ARTICLE 21 AND RIGHT TO LIFE AND PERSONAL LIBERTY

Article 21 of the Constitution of India clearly states that no person shall be deprived of his or her life or personal liberty except according to “procedure established by law”¹³. The phrase “procedure established by law” was initially interpreted narrowly, in the famous *A.K. Gopalan v State of Madras Case*¹⁴, the Hon’ble Supreme Court has taken a narrow interpretation of Article 21. It held that the protection under the Article 21 of Constitution of India is only available against arbitrary executive actions and not from arbitrary legislative actions. This means that the state can deprive the right to life and personal liberty of a person based on a law. This is because of the expression “procedure established by law” in the Article 21 which is different from the expression “due process of law” and it is enshrined in the American Constitution.

However, in the *Maneka Gandhi v Union of India Case*, the Supreme Court overruled its judgement in the *A.K. Gopalan Case*, by taking a wider interpretation and more purposive approach of the Article 21. Therefore, it has been ruled that the right to life and personal liberty of a person can be deprived by a law provided the procedure prescribed by the law is reasonable, fair and just and not arbitrary, fanciful or oppressive. It further emphasized the procedure should conform to the principles of “natural justice”¹⁵. In effect, the protection under Article 21 should be available not only against the executive actions but also against the legislative actions. Hence, this widely interpretation has a direct impact and executions on the law of arrest under Section 41 of the CrPC. And moreover, this expanded interpretation has laid the foundation stone for a more robust and broader constitutional safeguard of individual liberty.

Similarly, a landmark judgement has come in the *Sunil Batra v Delhi Administration Case*¹⁶, the Supreme Court has established the fact that prisoners and detainees do not forfeit their fundamental rights upon arrest. The Hon’ble Court held that prisoners and detainees must be treated according to constitutional standards and cannot be projected with arbitrary or inhuman treatments towards them. This judgement has expanded the scope of right to life to incorporate the right to live with dignity even behind the bars.

From the above judicial interpretations, it is very clear that Article 21 has evolved into one of the crucial remedies against arbitrary state actions in the form of arrest. The judiciary has repeatedly emphasized that the deprivation of liberty from individuals must be justified and accompanied by fair and constitutionally prescribed procedures. In

¹² Code of Criminal Procedure, 1973, s 41A

¹³ Constitution of India, 1950, art 21.

¹⁴ *A.K. Gopalan v State of Madras* AIR 1950 SC 27.

¹⁵ *Maneka Gandhi v Union of India* AIR 1978 SC 597.

¹⁶ *Sunil Batra v Delhi Administration* AIR 1978 SC 1675.

the light of arrest, the power which is enshrined in the Section 41 of the CrPC cannot be exercised as a matter of routine or arbitrarily. Instead, it must be exercised and guided by following the constitutional principles of accountability and fairness.

Thus, the constitutional spectrum of arrest reflects the fine and sensitive balance between the protection of individual liberty and Article 21, and the effective enforcement of Section 41 of the CrPC. Therefore, judicial interpretation has played a vital and groundbreaking role in ensuring that the executive discretion should be exercised within the constitutional limits and thereby it safeguards the fundamental rights of the individuals in a just and democratic nation.

LANDMARK JUDGMENTS THAT SHAPED THE CONSTITUTIONAL FRAMEWORK OF ARREST

JOGINDER KUMAR V STATE OF UTTAR PRADESH

In the year 1994, the judgment that came in the *Joginder Kumar v State of Uttar Pradesh* case, has marked an impactful and significant development in the constitutional jurisprudence that is related to the arrest and personal liberty, and at the same time this judgment has also reinforced the principles of constitutional morality¹⁷ by safeguarding the fundamental rights of individuals. Through this case the Hon'ble Supreme Court has established mandatory guidelines for arrest to prevent custodial torture and misuse of the arrest powers.

The case arose when the petitioner who was an advocate was detained by the police by misusing the power backed by the Section 41 of the CrPC for interrogation. Hence, serious issues were raised regarding the arbitrary exercise of the Section 41 of the CrPC. By addressing the issue, the Supreme Court has clearly stated that the power of arrest cannot be exercised as a routine manner. It is observed that just because a police officer has the legal rights to arrest that does not mean they will use it according to their will. There must be a valid, legal and justiciable reasons behind every arrest. Arrest should not be the immediate response. The Supreme Court further emphasized that if any action deprived the personal liberty must conform to the mandate of the Article 21. The Court has recognized that unnecessary arrest and detention not only violates the personal liberty and the Article 21 but also it seriously harms the dignity and reputation of the individual. Therefore, the Court has laid down the rules and procedural safeguards by holding that the accused person has the fundamental right to inform his or her relatives or other person about the arrest and place of detention. The police officer shall inform the arrested person when he or she is brought to the police station. And an entry must be made in the police diary detailing who was informed of the arrest.

The decision in *Joginder Kumar v State of Uttar Pradesh, 1994* played a crucial role in advancing the safeguarding of personal liberty. The Court has underscored the importance of due process of law and accountability within law enforcement. The guidelines laid down by the Hon'ble Supreme Court not only reinforce the constitutional rights enshrined in the Article 21 and Article 22¹⁸ but also provide a framework for the police to follow, aiming to prevent arbitrary detention and protect individual rights by shaping the Section 41 of CrPC.

D.K. BASU V STATE OF WEST BENGAL

Another landmark judgement was delivered in the case of *D.K. Basu v State of West Bengal, 1997*. It is widely regarded as a cornerstone judgment in the criminal jurisprudence. One of the very basics of the criminal justice jurisprudence is that a person is assumed to be innocent until he or she is proven guilty. But in most of the cases, it has been observed that as soon as the police officer gets hold of an individual based on the First Information Report (FIR)¹⁹ or complaint, inhumane harassment is inflicted on the person till the date of judgement. But however, in practice, it is observed that the individuals who are not proven to be guilty at the end get suffered from unnecessary harassment. The physical and psychological trauma that they face become a permanent scar in their lives. Custodial violence is considered one of the gravest violations of the very human rights in a civilized society.

The case was initiated through a public interest litigation that addresses the increasing number of harassments and deaths in the police custody which raised a serious concern threatening the fundamental rights under Article 21 of

¹⁷ Constituent Assembly Debates, vol VII, 4 November 1948 (Speech of Dr B.R. Ambedkar).

¹⁸ Constitution of India, 1950, art 22.

¹⁹ Code of Criminal Procedure, 1973, s 154.

the Constitution. Recognizing the seriousness of the issue, the Hon'ble Supreme Court of India gave stress on the fact that custodial violence and abuse are incompatible with the rule of law and infringe the right to life and personal liberty. In order to curb such inhumane practices, the Court has laid down the robust guidelines and constructed the framework for governing arrest procedures, the right of the accused person to inform a person of known or friends, mandatory medical examinations, proper documentations and validity of detention, every details regarding the place and time of arrest and venue of custody of the arrestee must be documented, must have the transparency and accountability in the police actions and interrogations must be conducted through scientific and humane principles. And the Court further held that non-compliance with these set of guidelines would attract legal consequences and it will be observed as the contempt of court.

Therefore, this case has significantly strengthened the judicial oversight over executive discretion, thereby it ensures that the exercise of arrest powers remain consistent with constitutional principles of human dignity, morality, fairness, transparency and accountability.

ARNESH KUMAR V STATE OF BIHAR

Arnesh Kumar v State of Bihar, 2014 is one of the most significant judgements in the history of arrest jurisprudence in India. This case directly deals with the misuse of the arrest and detention powers of the police officers under the Section 41 of the Code of Criminal Procedure. The Hon'ble Supreme Court delivered a strong ruling in favor of personal liberty and protection of the fundamental rights under the Article 21 of the Indian Constitution. The Court laid down strict guidelines for arrests under Section 41 of the CrPC. The concerned police officer must conduct a preliminary inquiry before arresting an individual. Arrest should not be routine mannered. Only in exceptional circumstances the police officer should warrant an arrest if the offense carries a sentence of less than seven years in prison. The Court further highlighted that before making an arrest, the accused must receive a notice of appearance. And, before taking the accused into custody, the accused should be given a chance to explain their position. Failure to comply with Section 41A of CrPC can make the arrest illegal and invite disciplinary action against the concerned police officer and could also amount to the contempt of court.

Furthermore, the Court reaffirmed that magistrates must provide proper justification before authorizing custodial detention of an accused, as arbitrary arrests violate Article 21 and bail should be granted liberally in cases where arrest is not justified. By making the pre-arrest investigation mandatory, the judgement sharply ensured that the police officers could not arrest individuals which are merely based on accusations. The requirement for documented reasons prior to arrest bolstered police accountability and prevented individuals from experiencing harassment because of police overreach.

Therefore, the judgement marked a crucial step in reshaping the arrest procedures and laid the foundation stone for further reforms. Arrest must conform to constitutional principles of fairness, accountability and morality.

CRITICAL ASSESSMENT OF THE CONSTITUTIONAL SAFEGAURDS IN THE JURISPRUDENCE OF ARREST

The arrest jurisprudence in India has been evolved through a series of landmark Supreme Court's judgements like the *Joginder Kumar v State of Uttar Pradesh, D.K. Basu v State of West Bengal and Arnesh Kumar v State of Bihar*. This clearly reflects the constant efforts of the Supreme Court to maintain the sensitive balance between the individual liberty and the executive law enforcements. Whenever the exercise of arrest by the executive challenged the individual liberty, the Court intervened and significantly curtailed the arbitrary arrest powers and implemented the rule of law by upholding the constitutional mandate of Article 21. These landmark judgements has holistically transformed the arrest powers used as an immediate routine action of the executive to an action which is regulated and backed by the constitution where the principles of constitutional morality, accountability, fairness and transparency, is being maintained and governed. However, despite of the progressive development in arrest jurisprudence and the strong legal safeguards but the practical implementation of these principles on the ground level still is a matter of concern.

One of the key difficulties lies in the gap between the law and in practicing it. Although the judiciary has clearly laid down the rules and procedure for conducting an arrest and detention, still now there are many instances of custodial abuse and arbitrary arrests are to be reported. This raises serious concerns regarding the effectiveness of the guidelines and procedure prescribed by the judiciary. The lack of strict monitoring, accountability and transparency within the police system further aggravates this issue. Furthermore, the role of the magistrates raise

serious questions regarding their effectiveness and transparency as they are the safeguards against unlawful detention and arbitrary arrests.

Another sensitive issue relates to the routine use of arrest powers in cases where arrest is not necessary. Arrest is often used as a tool of coercion instead of the investigation process which is backed by the constitutional frameworks. This not only infringes the Article 21 of the constitution but also leads to unnecessary pressure on the criminal justice system, and in most cases the investigation is compromised.

The judiciary has undoubtedly played a progressive role in strengthening constitutional safeguards and in curbing the arbitrary actions of the police, but the effectiveness of these safeguards ultimately depends on their strict execution. Hence, there is an urgent need for institutional reforms in the police system, including inclusive training of police officers, rigorous enforcement of constitutional mandates and strict judicial vigilance, to ensure that the procedure and mechanisms laid down by the judiciary are strictly to be followed and practiced. The true meaning of arrest jurisprudence lies in the proper and transparent implications of the legal principles and procedures by upholding the constitutional morals and values.

CONCLUSION

The power of arrest is one of the most crucial intersections between the state authority and the individual personal liberty within the criminal justice system. Such powers are too important for maintaining the law and order of the state but at the same time its heavy misuse poses a serious threat to the personal liberty guaranteed under the Article 21 of the Constitution of India. In India, the evolution of arrest jurisprudence has evolved significantly through the judicial interpretation of the Hon'ble Courts.

Through the watershed decisions such as *Maneka Gandhi v Union of India*, *Joginder Kumar vs State of Uttar Pradesh*, *D K Basu v State of West Bengal*, and *Arnesh Kumar v State of Bihar*, the Supreme Court of India has widely expanded the scope of the Article 21 and arrest jurisprudence. And at the same, it has also introduced the crucial safeguards against arbitrary arrests. However, despite of a robust and meticulous constitutional framework, arbitrary detentions and custodial violences are still exposing the acute gap between the law and its actual implications.

Thus, the true essence of constitutional governance lies in ensuring the exercise of arrest powers should be used as a tool of justice not merely as an immediate response by arresting arbitrarily. The arrest powers should remain within the constitutional limits. The protection of fundamental rights should be paramount over arbitrary state actions.

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