

Civil rights infringed by 41 A Cr.P.C

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ABSTRACTS

in recent amendment to criminal procedure law the section 41 A Cr.P.C added to the existing criminal procedure of law. That it is become harmful to the civil society. That the law makers think positively and amended this section to unnecessary arrests and harassments. But it is ultimately became a cruel weapon in the hands of Police department. That in so many cases if the Police thinks they give notice instead of arrest. If the police wants arrest in any case they are arresting the people. That means arresting a person is become the choice of the police. There is no mandatory provision for not to arrest any person under section 41 A Cr.p.c. Police people are misusing the exceptions to the 41 a Cr.P.c.

Introduction: The Code of Criminal Procedure (Amendment) Bill, 2008 was passed in both the Houses of the parliament hurriedly without any meaningful debate and has been given assent by the Hon'ble the President of India. The Code of Criminal Procedure (Amendment) Bill, 2008 has been seriously opposed by the legal fraternity and some law enforcement officers on the ground that amendment to Section 41 Cr.P.C. is unwarranted and uncalled for. The amendment to the Cr.P.C. follows the 177th report of the National Law Commission wherein it was suggested that certain changes in the provision related to power of arrest be made to check sanctity of Fundamental rights of the citizens in the country.

The enactment and enforcement of the Criminal Law Amendment Act:- Under Section 41 Cr.P.C., as it originally stood, a police officer is vested with the power to arrest a person without warrant or without order from magistrate when a person has committed a cognizable offence. However, the amendment to Section 41 Cr.P.C. has put fetters on the power of police to arrest the accused persons involved in offences punishable with imprisonment up to seven years. As per the amendment, the Police Officer is empowered to arrest a person in all cases of cognizable offences only when it is committed in his presence, in all other situations, if the offence is punishable with imprisonment less than 7 years, the amendment requires the police officer to record reasons in writing prior to effecting arrest and the reasons may be: The arrest of accused is necessary to prevent commission of further crime. The arrest of accused is necessary for proper investigation. To prevent the tampering of evidence To prevent the

accused from making any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to the police officer. To ensure the presence of the accused in court. If there are no such reasons mentioned above, the police officer can require the accused person to appear before it for investigation through issuing a notice to him. It shall be incumbent on the accused persons on whom the said notice has been issued to comply with the terms of the notice. If the accused persons commits breach of the notice and doesn't appear before the police officer, it shall be lawful for the police officer to arrest him for the offence mentioned in the notice, subject to such orders as may have been passed in this behalf by a competent Court. (Newly inserted Section 41A) The recent amendments proposed have seriously diluted the powers of the police to arrest to great extent and would seriously hamper the law and order situation in the country and graph of the crime would move upwards. By looking at the amendments proposed, one can easily conclude that the amendment gives discretion to the police which can be grossly abused by the already corrupt police force. In one case, the police may require the appearance of the accused person through notice, while in similar case subject another identically situated person to arrest. Hon'ble Justice B.N. Aggarwal, senior judge in the Supreme Court, had observed, Discretion will amount to give the police a handle. Thus, there is every likelihood that the police will misuse this provision for ulterior reasons. In India, more than 75 per cent of the offences that mostly take place under the Indian Penal Code and other special and local laws are punishable with imprisonment of up

to 7 years. Thus, the amendment would be cheered by most criminals and potential criminals and it would encourage them to commit crime with impunity because Police cannot affect arrest and can only serve notice of appearance. Those powerful and having connections would evade the process of law in complicity with the police. The enactment and enforcement of the Criminal Law Amendment Act will have a far-reaching effect on the public peace, law and order and the crime situation in the country in general, and State in particular. It needs no emphasis to say that when the crime goes unpunished, the criminals are encouraged and the society suffers. The aforesaid amendment diluting the power of the police to arrest does not make sense as already numerous guidelines have been laid down by the Supreme Court of India, National Human Rights Commission, imposing guidelines which are required to be followed in the investigation of criminal cases in general and the arrested person in particular. The existing guidelines and instructions imposed by Hon'ble Supreme Court, NHRC, and National Police Commission are more than adequate to ensure that the provisions regarding arrest in the CrPC are not abused by any police officer. The Third Report of the National Police Commission in India has made following suggestions with respect to the arrests: "..... An arrest during the investigation of a cognizable case may be considered justified in one or other of the following circumstances: 1) The case involves a grave offence like murder, dacoity, robbery, rape etc., and it is necessary to arrest the accused and bring his movements under restraint to infuse confidence among the terror-stricken victims. 2) The accused is likely to abscond and evade the processes of law. 3) The accused is given to violent behavior and is likely to commit further offences unless his movements are brought under restraint. 4) The accused is a habitual offender and unless kept in custody he is likely to commit similar offences again. It would be desirable to insist through departmental instructions that a police officer making an arrest should also record in the case diary the reasons for making the arrest, thereby clarifying his conformity to the specified guidelines" The Hon'ble Supreme Court in the case of *Joginder Kumar v. State of U.P.* [(1994) 4 SCC 260 : 1994 SCC (Cri) 1172] the dynamics of misuse of police power of arrest and opined : (SCC p. 267, para 20) "*No arrest can be made because it is lawful for the police officer to do so. The existence of the power to arrest is one thing. The justification for the exercise of it is quite another No arrest should be made without a reasonable satisfaction reached after some investigation as to the genuineness and bona fides of a complaint and a reasonable belief both as the person's complicity*

and even so as to the need to effect arrest. Denying a person of his liberty is a serious matter." Further, the Hon'ble Apex Court in the celebrated case of *D.K BASU V STATE OF WEST BENGAL AIR 1997 SC 610* laid down the procedure with respect to the arrest and laid down the following guidelines: (1) The police personnel carrying out the arrest and handling the interrogation of the arrestee should bear accurate, visible and clear identification and name tags with their designations. The particulars of all such police personnel who handle interrogation of the arrestee must be recorded in a register. (2) That the police officer carrying out the arrest of the arrestee shall prepare a memo of arrest at the time of arrest and such memo shall be attested by at least one witness, who may either be a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. It shall also be countersigned by the arrestee and shall contain the time and date of arrest. (3) A person who has been arrested or detained and is being held in custody in a police station or interrogation center or other lock-up, shall be entitled to have one friend or relative or other person known to him or having interest in his welfare being informed, as soon as practicable, that he has been arrested and is being detained at the particular place, unless the attesting witness of the memo of arrest is himself such a friend or a relative of the arrestee. (4) The time, place of arrest and venue of custody of an arrestee must be notified by the police where the next friend or relative of the arrestee lives outside the district or town through the Legal Aid Organisation in the District and the police station of the area concerned telegraphically within a period of 8 to 12 hours after the arrest. (5) The person arrested must be made aware of this right to have someone informed of his arrest or detention as soon as he is put under arrest or is detained. (6) An entry must be made in the diary at the place of detention regarding the arrest of the person which shall also disclose the name of the next friend of the person who has been informed of the arrest and the names and particulars of the police officials in whose custody the arrestee is. (7) The arrestee should, where he so requests, be also examined at the time of his arrest and major and minor injuries, if any present on his/her body, must be recorded at that time. The "Inspection Memo" must be signed both by the arrestee and the police officer effecting the arrest and its copy provided to the arrestee. (8) The arrestee should be subjected to medical examination by a trained doctor every 48 hours during his detention in custody by a doctor on the panel of approved doctors appointed by Director, Health Services of the State or Union Territory concerned. Director, Health Services should prepare such a panel for all tehsils and districts as

well. (9) Copies of all the documents including the memo of arrest, referred to above, should be sent to the Illaqa Magistrate for his record. (10) The arrestee may be permitted to meet his lawyer during interrogation, though not throughout the interrogation. (11) A police control room should be provided at all district and State headquarters, where information regarding the arrest and the place of custody of the arrestee shall be communicated by the officer causing the arrest, within 12 hours of effecting the arrest and at the police control room it should be displayed on a conspicuous notice board. Failure to comply with the requirements hereinabove mentioned shall apart from rendering the official concerned liable for departmental action, also render him liable to be punished for contempt of court and the proceedings for contempt of court may be instituted in any High Court of the country, having territorial jurisdiction over the matter, the apex court noted.

The National Human Right Commission has also come up with detailed guidelines regarding the arrest which is available on its website. The need of the hour is to implement those guidelines or instructions of Hon'ble Supreme Court rather than to put fetters on the power of the police to the cheer of the criminals by enacting a legislation. The Supreme Court in DK Basu case (supra) has for instance suggested in following words in order to check the abuse of police power: Transparency of action and accountability perhaps are two possible safeguards which this Court must insist upon. Attention is also required to be paid to properly develop work culture, training and orientation of the police force consistent with basic human values. Training methodology of the police needs restructuring. The force needs to be infused with basic human values and made sensitive to the constitutional ethos. Efforts must be made to change the attitude and approach of the police personnel handling investigations. Noting the difficult and delicate task of the police, the Supreme Court in D.K. Basu Case (supra) observed in the following words: We are conscious of the fact that the police in India have to perform a difficult and delicate task, particularly in view of the deteriorating law and order situation, communal riots, political turmoil, student unrest, terrorist activities, and among other the increasing number of underworld and armed gangs and criminals. Many hardcore criminals like extremists, terrorists, drug peddlers, smugglers who have organised gangs, have taken strong roots in the society. It is being said in certain quarters that with more and more liberalisation and enforcement of fundamental rights, it would lead to difficulties in the detection of crimes committed by such categories of hardened criminals by soft peddling

interrogation. It is felt in those quarters that if we lay too much of emphasis on protection of their fundamental rights and human rights, such criminals may go scot-free without exposing any element or iota of criminality with the result, the crime would go unpunished and in the ultimate analysis the society would suffer. The concern is genuine and the problem is real. To deal with such a situation, a balanced approach is needed to meet the ends of justice. This is all the more so, in view of the expectation of the society that police must deal with the criminals in an efficient and effective manner and bring to book those who are involved in the crime. Thus, there should be proper balance between the individual liberty and security of the state and the former should not transgress the latter. The freedom of an individual an individual must yield to the security of the state. The right of preventive detention of individuals in the interest of security of the state in various situations prescribed under different statutes has been upheld by the courts. The right to interrogate the detenus, culprits or arrestees in the interest of the nation, must take precedence over an individual's right to personal liberty. Thus, the need is to implement the existing guidelines and instructions imposed by Hon'ble Apex Court, NHRC which are more than adequate to take care that the provisions regarding arrest in the Cr.PC. are not abused by any police officer.

Supreme Court Judgments : The Apex Court recently delivered a historical judgment over 41 a cr.p.c The Supreme Court of India ("**Supreme Court**") in its recent judgment of Arnesh Kumar ("**Petitioner**") vs. State of Bihar and Ors.¹ ("**Ruling**") ruled on the principles for making arrest and detention under the Code of Criminal Procedure, 1973 ("**Cr.P.C.**"). The Supreme Court, in its Ruling, has issued certain directions to be followed by the police authorities and the Magistrates while making arrest and/or authorizing detention of an accused. Over the years, India Inc. has witnessed a rampant increase in white collar crimes. Police in India has almost set a trend of effecting immediate arrests with a view to come down heavily on white collar criminals. Even worse is a growing trend of the investors, promoters, directors, senior management and other officers of companies being indicted in criminal cases so as to bring the corporate to the negotiating table. Though the Ruling deals with the issue of misuse of anti-dowry provisions under the Indian Penal Code, 1860 ("**I.P.C.**"), it carves out certain parameters for making arrests and/or authorizing detentions and the role of police authorities as well as the Magistrate involved in order to prevent automatic arrests and detention under the criminal law framework of India, which may be applied to the other offences including the alleged white collar crimes which ordinarily comprise of offences

such as cheating, fraud, criminal breach of trust, forgery, falsification of accounts etc. and other offences punishable with imprisonment for a term which may extend to seven years or less. The Petitioner had preferred a Special Leave Petition before the Supreme Court after having failed to secure anticipatory bail before the Sessions Judge and thereafter, the High Court of Bihar in a matrimonial dispute. The allegation levelled against the Petitioner involved making illicit demands for dowry, an offence punishable under [Section 498 A of I.P.C.](#) and [Section 4 of the Dowry Prohibition Act, 1961](#). The Supreme Court, in its Ruling, emphasized on the need of caution while exercising the drastic power of arrest, which has for years, been treated as a tool of harassment, oppression in the hands of the police authorities and has greatly contributed to police corruption in India. Citing statistics to demonstrate the misuse of the power of arrest by the police authorities, the Supreme Court proceeded to set out certain objective criteria to be applied before making arrest under the Cr.P.C. The Supreme Court held that no arrest should be made only because the offence is non-bailable and cognizable. Neither should arrest be made in a routine, casual and cavalier manner or on a mere allegation of commission of an offence made against a person. Arrest should only be made after reasonable satisfaction reached after due investigation as to the genuineness of the allegation. Dealing with [Section 41 \(1\) of the Cr.P.C.](#) which provides for conditions precedents for making arrest, the Supreme Court emphasized that for making arrest, the police must be satisfied that all the conditions set out in the provision are met viz.,: Arrest is necessary; to prevent such person from committing any further offence; or for proper investigation of the case; or to prevent destruction of tampering with evidence by the accused; or to prevent such person from influencing the witnesses; or to ensure presence of the accused in the court. Police must, in any case, record reasons for making, or not making the arrest in a particular case. Further, the Supreme Court laid down the circumstances in which the Magistrate might authorize detention of the accused. As per [Article 22\(2\) of the Constitution of India](#) and [Section 57 of the Cr.P.C.](#), an accused must be produced before the Magistrate without unnecessary delay and in no circumstances beyond 24 hours, excluding the time necessary for the journey. An accused may be kept in detention beyond 24 hours of his arrest, only when authorized by the Magistrate². The Supreme Court held that when an accused is produced before the Magistrate, the police officer effecting the arrest must furnish the facts, the reasons and the conclusions for arrest and the Magistrate, only upon being satisfied that the conditions of Section 41 of Cr.P.C. are met and after recording its

satisfaction in writing, may proceed to authorize the detention of an accused. The Supreme Court, further, clarified that even in terms of [Section 41 A of the Cr.P.C.](#) where arrest of accused is not required, the condition precedents for arrest as envisaged under [Section 41 of Cr.P.C.](#) must be complied with and shall be subject to the same scrutiny by the Magistrate. The Supreme Court, in its Ruling, further condemned the practice of police mechanically reproducing reasons contained in [Section 41 Cr.P.C.](#) for effecting arrest in case diaries being maintained by the police officers. In light of the above, the Supreme Court has issued the following directions to all the State Governments:- To instruct the police officers to not mechanically arrest the accused under [Section 498 A of I.P.C.](#) without satisfying themselves that the conditions of arrest are met; All police officers to be provided with the check-list of condition precedents prescribed under [Section 41 of Cr.P.C.](#), to be duly filed and forwarded to the Magistrate while producing the accused for further detention; The Magistrate shall then peruse the report provided by the police officer and only after recording its satisfaction in writing, may authorize detention; The decision to not arrest the accused should be forwarded to the Magistrate within two weeks from the date of institution of the case, the period may be extended by the Superintendent of police for reasons to be recorded in writing; The notice of appearance in terms of [Section 41 A Cr.P.C.](#) should be served on the accused within two weeks from the date of institution of the case, the same may be extended by the Superintendent of police for reasons to be recorded in writing. Failure to comply with the directives set out above may render police officers/Magistrates liable for departmental action and proceedings for contempt of court to be instituted before the High Court having territorial jurisdiction.

Present situation and practical problem:

But unfortunately the 41 A Cr.P.C. is being misused by the Police Officers. That the full of its powers solely transferred to Police people. That in most of the cases Police Officer not arresting the white collar accused. And the used to arresting and producing before the Court to send them Judicial custody. That they have creating all the documents by showing to the court that they have issued 41A Cr.P.c to thee accused and they have not attended and not co operated to the Investigation agency. And creating all the documents with past dates that they have already issued 41 A notices. In fact in no cases the Police were issuing 41 A Cr.P.c notices. But they are creating all the documents when they arrest the accused. That the court believing the documents prepared by the Police with past dates. And sending the accused to judicial custody even

the offences punishable under 7 years. That which seems the Police powers becomes more and more. And the arresting power solely vested with the police. That the Police even some cases neither issuing notice nor arresting. But harassing the accused people calling to police station every day. The law makers intention is not arrest the innocents in the crimes punishable up to 7 years. But the law executors misusing and taking advantage and loop holes in the above said act. And thereby harassing the innocent people.

Conclusion: the law makers has to re think about the 41 A Cr.P.C and its misusing . That the 41 A Cr.P.C must be repealed. Or amended. That if they intendeds amend the 41 A Cr.P.C some of the offences must be excluded from the provision of 41 A Cr.p.C. That the amendment should not give any vested and discretionary powers to Police officers. That if it really meant for the innocent people the exceptions of 41 A Cr.P.C must be excluded from it.

Reference:

1. <http://www.mondaq.com/india>
2. Special Leave Petition (Crl.) No.9127 Of 2013, Order dated July 01, 2014, available on <http://judis.nic.in/supremecourt/imgs1.aspx?filename=41736>
3. 2 [Section 167 of the Code of Criminal Procedure, 1973](#)
4. 3 Seventh edition of Kroll's Global Fraud Report, prepared in conjunction with the Economist Intelligence Unit, available at http://www.kroll.com/media/krl_fraudreport2013-14_usletterpress_revised_10182013.pdf