

Need for Greater Scrutiny of the Constitution

Mains: GS II - Indian Constitution — Amendments.

Why in News?

Recently, the central government introduced the Constitution (One Hundred and Thirtieth Amendment) Bill in Parliament.

What is the bill about?

- **Removal of ministers** – The Bill provides that in case a Minister is arrested and detained in custody for 30 consecutive days, for an alleged offence punishable with imprisonment which may extend up to 5 years or more:
 - He shall be removed from office by the President, on the advice of the Prime Minister, which is to be tendered by the 31st day of such custody.
 - Or, he shall cease to be a Minister in case such advice is not tendered by then.
- A similar provision is provided for Ministers in State Assemblies, who shall be removed by the Governor on the advice of the Chief Minister.
- **Removal of PM/CM** – In the case of the Prime Minister and Chief Minister of a State, they are required either to tender their resignation by the 31st day or else shall (automatically) cease to be the Prime Minister or Chief Minister of a State.
- **Articles to be amended** – The following articles are to be amended to give effect to the bill
 - **Article 75** – Union Council of Ministers
 - **Article 164** – State Council of Ministers
 - **Article 239AA** – The special administrative provisions for Delhi.

What are the issues and concerns raised by the opposition parties?

- **The argumentative issues** – The 2 contentious issues that forced the Opposition to come together against the Bill were:
 - Arrest by the police
 - Authorizing 'detention' by a court.
- Since, wide discretion lies with both, there needs to be scrutiny of the Bill to ensure that it is not misused.
- **Arrest** – The first parameter to remove a Minister is arrest, which is discretionary and in the hands of the enforcement agencies.
- **Provision of Bharatiya Nagarik Suraksha Sanhita (BNSS)** – It provides for the enforcement of some conditions before there is an arrest for offences that are punishable for up to 7 years of imprisonment.

- For instance, A police officer doesn't have to automatically arrest someone accused of a cognizable offence, even if it is punishable with more than 7 years in jail.
- **Deenan vs Jayalalitha (1989)** - The Madras High Court, refused to interfere in the police investigation when the petitioner pleaded before the High Court to use its inherent powers to direct the Commissioner of Police to arrest the respondent, Jayalalithaa.
- The High Court said that the words 'may arrest' under Section 41 showed that the power of arrest is discretionary and that a police officer is not always bound to make an arrest for cognisable offences.
- Though he has the power to arrest, he can refrain from arresting persons, depending upon the nature of the offence and the circumstances unfurled not only in the complaint but also during the course of investigation.
- The authorised power of arrest of an offender by a private person is restricted to cases of commission of non-bailable and cognisable offences in his presence and to the case of the proclaimed offender, not otherwise.
- **Joginder Kumar vs State of U.P. (1994)** - The Supreme Court observed that no arrest can be made only because a police officer is authorised to do so.
- The police officer must be able to justify the arrest.
- Arrest and detention in a police lock-up of a person can cause incalculable harm to the reputation and self-esteem of a person, the Court said.
- **Amarawati and Anr. (Smt.) vs State Of U.P. (2004)** - The Allahabad High Court, held that the Legislature has consciously used the words 'may arrest' and it was not mandatory for the police to make an arrest in a cognisable offence.
- It carefully examined the definition of 'cognisable offence', provisions of Section 41 and Section 157 of the Code of Criminal Procedure (CrPC).
 - **Section 157 of the CrPC** - It empowers the police to investigate a cognisable offence and arrest the accused, if required.
- In 2009, in an amendment of Section 41 of the CrPC, some distinction was made for arrest in offences punishable with imprisonment extendable up to 7 years and offences punishable with over seven years of imprisonment.
 - **Section 41A of the CrPC** - It provides for issuing notice of appearance (when arrest of a person is not required).
 - But it does not make a differentiation between offences based on their term of imprisonment.
- **Satender Kumar Antil vs CBI and Anr. (2022)** - The Supreme Court, held that the investigating agencies are bound to comply with the provisions of Section 41 and Section 41A CrPC. Section 35 of the BNSS is pari materia to Sections 41 and 41A of the CrPC, read together.

What could be the situations of misuse?

- **Misuse of arrest** - The misuse of this discretionary power of arrest by the police to target leaders of the Opposition parties is a serious issues.
 - **Objection from courts** - High Courts have repeatedly taken objection for not following the directions issued in *Arnesh Kumar vs State of Bihar and Another* (2014).

- The direction mandated that the investigating officer record reasons and material which necessitated the arrest.
- **Police commission report** – The National Police Commission (1977) in its 3rd report observed that nearly 60% of the arrests were unnecessary or unjustified.
- **Arrest as a political tool** – The police could be alleged to be amenable to political pressure.
- The ‘arrest’ may be used as a political tool to initiate the unseating of Ministers in Opposition parties.
- **Misuse of detention** – The 2nd parameter is continuous detention in custody for “30 consecutive days”, which signifies the importance of bail.
 - **Exemption** – If a Minister is able to obtain bail within this period, disqualification under Article 75(5A) would not operate.
- Though the Supreme Court has repeatedly reaffirmed the principle that ‘bail is the rule, jail is the exception’, bail is often rejected for factors other than the triple test — i.e., flight risk, possibility of tampering with evidence, and threatening of witnesses.
 - **For instance**, the gravity or seriousness of an offence is considered to be an important fourth factor, despite its conflict with the presumption of innocence of the accused.
- So, while bail may be granted in early stages in economic offences, it is extremely difficult in heinous offences unless the accused has undergone considerable incarceration.

What are the main issues?

- **Default bail** – The new Amendment does not account for default bail under Section 167(2) CrPC (Section 187, BNSS).

***Default bail** is the right of an accused person when the investigation is not completed within 60 days to 90 days (depending on the gravity of the offence) of his custody.*

- Since the cumulative period of police and judicial remand itself exceeds 30 days, the restriction under Article 75(5A) does not seem to be rational.
- It is true that remand is not mandatory jail time and needs to be extended by the court at intervals, but courts readily grant this extension within the outer limits of 60 days to 90 days.
- **Twin conditions of bail** – The phrase ‘an offence under any law for the time being in force’ includes complaints filed under special statutes such as PMLA (money laundering), NDPS (narcotics), and UAPA (unlawful activity).
- This is even more dangerous since all special statutes have the infamous twin conditions of bail that are not present in the CrPC/BNSS.
 - **1st condition** – The accused must prove that he is not guilty of the offence.
 - **2nd condition** – He would not commit an offence while on bail.
- As opposed to trial, these conditions must be satisfied at the stage of bail itself.
- They are often termed onerous and reverse the burden of proof from the prosecution to the accused.

- **For instance**, The Manish Sisodia case, where he was accused in the liquor policy scam, is a case in point — bail was granted 17 months after his incarceration under the PMLA.
- This being the norm for special statutes, the threshold of “thirty consecutive days” under the new Amendment Bill would be an abysmally low benchmark to cross.
- Removal from office would be extremely damaging.
- **Influencing the witnesses** - The factor which may hinder bail to a Minister is their ability to influence witnesses due to their position of power, which is considered significant to an investigation and trial.
- **Hobson’s choice** - A Minister either continue or get bail.
 - Staying on as a Minister would jeopardise bail and therefore mean removal under the amended provisions,
 - While resigning would prevent him from carrying out ministerial duties even if bail was granted.
- **Position of Judge** - A factor that makes bail uncertain and vulnerable is whether the judge concerned has a pro or ante liberty stance under Article 21.
- Leaving aside the objective facts of a case, this brings about enormous subjectivity and discretion in granting bail.

Reference

[The Hindu| Constitution \(One Hundred And Thirtieth Amendment\) Bill](#)

