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ARREST, DETENTION IN CUSTODY, & REMOVAL IN LIGHT OF THE 130TH CONSTITUTIONAL AMENDMENT

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ABSTRACT

This paper discusses the new amendments presented in the Lok Sabha in 2025, introduced by the Union Home Minister Amit Shah, regarding the 130th constitutional amendment[3]. The amendment proposal aims at amending three articles of the Constitution: Article 75(at the central level), Article 164(atthe state level) and Article 239AA (at the Union Territories)[4]. One bill, named the Jammu and Kashmir Reorganisation Act, 2019, was introduced with the introduction of a subsection (5) to Section 54.[5]

The amendment particularly deals with three issues, such as arrest on charges of allegations, a custody term of 30 consecutive days and that it is only applicable to crimes that are punishable by five years or above. This paper will legally examine these provisions, including a review of their implication under the principle of presumption of innocence in the criminal jurisprudence setting, where every person is presumed innocent until proven guilty. One of the legal questions that can be raised is whether the threshold of 30 consecutive days of custody is interrupted in case of a bail secured by an accused minister. The case of bail treatment is also under discussion.

In addition, the paper also measures the extent to which the immediate removal of a Prime Minister, Chief Minister or Minister can just be based on allegations breaching the basic constitutional protection and the concept of natural justice. It puts emphasis on the fact that there is no provision if such ministers who could later beproved innocent at the end of the trial. The abuse that may occur because of false accusations that cause the removal of ministers to cause wrongful dismissal is addressed in detail, and issues of balance between

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[3]The Constitution (One Hundred Thirteenth Amendment) Bill, 2025, Bill No. 111(India).
[4]The Government of Union Territories (Amendment) Bill, 2025, Bill No. 113 (India).
[5]The Jammu and Kashmir Reorganisation (Amendment) Bill, 2025, Bill No. 112 (India).

law and politics are questioned. This article stresses that only custody should not result in guilt or innocence when it is the role ofthe judiciary and the law. Lastly, the article indicates the need to follow constitutional principles when it comes to political accountability, focused on due process.

Introduction

On 29 August 2025, the central level amendment proposal introduced by the Home Minister Amit Shah in the Bill No. 111 of 2025 in the Lok Sabha concerns the amendment of Article 75, and the state level amendment proposal concerns the amendment of Article 164, and the Union Territories amendment proposal concerns the amendment of Article 239AA of the Constitution of India. In Bill No. 112 of 2025, the Union minister also proposed another bill, the Jammu and Kashmir Reorganisation (Amendment) Bill, 2025, by making an addition of sub-section (5) to Section 54 in the J&K Reorganisation Act, 2019. This is the proposed Lok Sabha amendment concerning the removal of the PM, CM and the ministers. Before plunging into the proposed amendment, we should simply plunge into the process of making the amendment in the Constitution of India. The amendment provision to this constitution has been borrowed from South Africa. There have been 106 amendments to our Constitution[6],which is enumerated under Article 368 of the Indian Constitution, which provides three methods of changing the Indian Constitution.Firstly, by a Simple majority whereby a majority of 50% members of both houses are attending and voting, secondly, by a Special majority which embraces a total majority of 50%of both houses and 2/3 members majority from both houses attending and voting.

What is this new Amendment?

In this new proposed amendment, any minister of union government or state government or union territory can be dismissed on getting arrested and held in custody, at any time, on allegations of any offence, in any law, which is punishable with an imprisonment term five years or more, extending to thirty consecutive days, in that event, they can be removed by the President or Governor or the Lt. Governor, by the advice of the PM or CM to be tendered within thirty-one days of the arrest or of detention in custody. In case the PM, CM or minister commits the same offence and is arrested, detained in custody, on suspicion of having committed an offence, punishable by imprisonment of a term which may in any case exceed

[6]Amendment Acts (102 Onwards), Legislative Department, Ministry of Law & Justice, Government of India, available at, https://legislative.gov.in/document-category/amendment-acts-102-to-onwards/

five years or more, under any law, in such an event they shall be obliged to provide their resignation by 31st day; otherwise, he shall start losing his respective office with effect the next day.

Ministers whose involvement was in the allegation of serious offences

On 21st March, 2024, the Enforcement Directorate arrested former Delhi's Chief Minister Arvind Kejriwal on charges of being involved in the Delhi Liquor Excise Policy scam. As per the planned amendment of 2025, the time frame of arrest and custodial detention is provided as 30 consecutive days. In the case of Mr Kejriwal,a case was registered against him by the Central Bureau of Investigationon 17th Aug 2022, and on 16th April 2023, Mr Kejriwal was interrogated but was not arrested by the CBI. He was arrested by ED on 21st March 2024 after multiple summonses. A special judge finally released him on bond on June 20, 2024, 92 days or over three months after months of imprisonment[7]. He still had not left the office at that time in spite of the fact that he felt immense political pressure from the opposition. With such an amendment in place, then, Mr Kejriwal would have been forced to resign from office on conviction regardless of his own desires. All the time that Mr Kejriwal spent over 30 days in custody is not the only example of arrests of politicians, although the prosecution itself has no cogent evidence against any politician. During the past decade, we have found major political apprehensions among the central agencies on the basis of defrauds, document forging, siphoning of funds, etc, as per our conviction on the issue, then it is much on the negative side.

Opinion

The provision specifically refers to 30 consecutive days in light of the newly set 130th Amendment. The issue is whether, on or after release of a Minister, Chief Minister or a Prime Minister in the said 30 days, he or she would still be subject to removal or resignation under this Amendment. The amendment refers to custody of arrest, and detention. The matter of fact, then, is this:what kind of custody is proposed by this, and how onward is to be analysed? As an example, section 167 of the CrPC[8],which used to offer the amount of 15 days under the earlier version, allowed the police to keep an alleged offender in their custody as they continued with remand provisions. Nevertheless, with the new Section 187 of the BNSS[9], the

[7]Advay Vora, *Arvind Kejriwal's Arrest: Story So Far*, Supreme Court Observer (Jul. 19, 2024)
[8]Code of Criminal Procedure, No. 2 of 1974, India Code (1974).
[9]Bharatiya Nagarik Suraksha Sanhita, 2023.

maximum period of police custody remains 15 days; however, the same is not required to be continuous, as long as it is disbursed in the interval of the first 40-60 days[10]. This results in a big question, whether under the amendment, having been remanded into the custody of the police, the alleged guilty Minister/Chief Minister/Prime Minister would not receive bail and be released periodically, such that the 30 consecutive days of detention under the amendment would not be met. As bail could possibly a remedy available to accused ministers so lets deep dive into bail provisions.

So, there are in general three types of bail, i.e. Default, Anticipatory, and Regular; all of them have their own procedure and meaning. In default bail, it is provided to an accused at the end of the statutory period of investigation when the accused is detained under judicial custody. Under Section 167(2) of the Code of Criminal Procedure(187 BNSS), it is either 60 days or 90 days, depending on the nature of the offence. Were it to apply in proposing the amendment here, that after 30 consecutive days of custody any Minister, Prime Minister, or Union Minister should automatically lose his office, the result is that the respective office-holder would automatically lose his position long before he could apply to be bailed against default. The recent case in which this principle was applied is the case of *Uday Mohanlal Acharya v. State of Maharashtra*[11]The apex court held that the right to default bail is an indefeasible right to the accused and, as such that must be given when the due process of time elapses, as long as the accused exercises his right at the right moment.

In Anticipatory Bail, it has been under Section 482 of BNSS(438 CrPC), which can be applied by an individual who fears being arrested. The presented amendment bases its implications on the reality of actual custody and the occurrence of anticipatory bail before arrest; this type of bail would not be applicable and could not be applied to avoid the implications projected by the amendment. The anticipatory bail is inapplicable by precondition in itself, arrest.

In Regular Bail(480 and 483 of BNSS), which can be availed by an accused at any stage of either custody, investigation or trial. Some landmark cases govern regular bail. Bail can be a remedy for a violation of 30 consecutive custody period in the proposed amendment. On this basis, some of the landmark cases are as follows: There are some of the landmark judgments

[10]Manu Sebastian, *Explainer: Judicial Custody and Police Custody*, LiveLaw (Sept. 4, 2019)
[11] 2001 SCC OnLine SC 599

in relation to regular bail, such as *Amarmani Tripathi vs State of U.P.*[12], where a young poetess was shot, and in an investigation, they found that this was because of a conspiracy between Amarmani Tripathi, a politician and his wife. The Hon'ble Supreme Court held thatwise decisions should be taken by the courts, under bail cases, especially in cases of serious charges, and by taking action by weighing some of the conditions; Prima facie evidence of the crime,nature and gravity of the offence, risk of the accused fleeing or tampering, conduct and antecedents of the accused, and likelihood of repeat offences and threats to witnesses.

In *Kalyan Chandra Sarkar vs Rajesh Ranjan @Pappu Yadav*[13]*there*was a politician by the name of Pappu Yadav who was accused of several crimes. He has applied for bail a few times (8 of the applications have been made), which were refused by the courts,stating that there was no prima facie case and evidence. A further bail application was made in the future,which was granted on the same reasons and on the same principles.

The Hon'ble Supreme Court held that, even though it is possible to seek a fresh bail on several occasions, a general rule of judicial discipline, as dictated by the judiciary, is that a fresh bail can be granted, unless there is a material dissimilarity in facts or law between applications. Otherwise, re-litigation on the same grounds cannot be permitted. It was also mentioned that the Existence of a prima facie case should be present to refuse bail, and the court should consider the nature of the offence, the likelihood of access to the witness, and past court rulings at most of the stages at which bail is considered.

The other pressing question that will come up is whether the period of thirty consecutive days will be maintained or it will be interrupted in case the alleged Minister is bailed out in the course of custody. This becomes especially significant because the grant of bail lies within the judicial discretion of the court and is also dependent upon various other legal considerations. In *Sanjay Chandra Vs CBI(2G Spectrum case),*[14] it was observed by Justice Krishna Iyer that "bail is a rule and jail is the exception".

Further, whether a Minister, Chief Minister, or the Prime Minister is legally entitled to file multiple bail applications, particularly in view of the 130th amendment, under which such a person would be required to resign from office on the 31st day of continued custody, or

[12] (2005) 8 SCC 21
[13] (2004) 7 SCC 528
[14] (2012) 1 SCC 40

would otherwise be deemed to have been removed. The question that arises is whether the provision relating to multiple bail applications is equally applicable to a Minister, Chief Minister, or Prime Minister when serious allegations are pending against them and they remain in custody.

An example would be, when X, a Minister, has been arrested in reference to a crime, the penalties of which include five years in jail, would the thirty-day tally go on despite the issuance of bail, or would the issuance of bail amount to a break in the thirty consecutive days required by the amendment?

However, in the scenario of judicial custody, this may not be the case, as judicial custody typically lasts 60-90 days. It can be prolonged up to 180 days under special legislations like the Unlawful Activities (Prevention) Act, 1967, and Narcotic Drugs and Psychotropic Substances Act, 1985, where in section 36A (4) of the NDPS Act, and section 43D (b) of the UAPA, the period is stated as one hundred and eighty days. No such discussion on a hundred and eighty days is given in PMLA cases. When one looks at the Scheduled Offences in the Prevention of Money laundering Act 2002, one can see that such legislations, like the Narcotic Drugs and Psychotropic Substances Act 1985 (NDPS) or the Unlawful Activities Prevention Act 1967, are not left out either. In case the provisions of the PMLA are interpreted together with such special legislations that, in turn, consider an extended date of detention of up to 180 days, the investigating agencies, such as the Enforcement Directorate, can request a similar extended date of custody up to 180 days. The amendment also brings in the act of an allegation committed of an offence under any then applicable law, which is punishable either with incarceration in the term of not less than five years or more. The issue with this is that just because an allegation has existed, it simply cannot, in and of itself, be used to provoke the removal or resignation of a Minister, Chief Minister or Prime Minister. They are constitutionally important offices, and it would be against the rule of law and fundamental fabric of the Constitution to deprive the holder of such an office of his or her office on mere unproven allegations without a finding on whether or not the person is guilty of the allegations (presumption of innocence)[15]. This would be akin to a breach of the principle of natural justice, especially the rule of Audi alteram partem, i.e. hear the other, which stipulates that no man shall be condemned without a hearing, and that would lead to a breach of Article 14, right to equality, and 21, right to life and personal liberty, of the

[15]Tripaksha Litigation, *Difference Between Police Custody and Judicial Custody* (Aug. 29, 2023)

Constitution. Besides, in case this kind of a Minister, Chief Minister or a Prime Minister is convicted of having followed an offence as also laid down in Section 8 of the Representation of the People Act, 1951 (RP Act, 1951), then he would automatically be disqualified in accordance with the provisions of Section 8 of the RP Act, 1951 which are already elaborate concerning the nature of a Member of Parliament (MP) or a Member of the Legislative Assembly (MLA) disqualification. Nonetheless, the belief and the whole legal procedure against the Minister, Chief Minister or Prime Minister will result in ignoring the 30 days brought about in the amendment bill. This is why the current amendment seems vulnerable to being manipulated as a tool of a political agenda, whereby one Minister, Chief Minister or Prime Minister may be victimised or even coerced simply because he/she may not share some political agenda.

Conclusion

With this amendment, a minister may lose his/her position on merely being accused, prior to the allegations being verified. The post, in case of the Minister being in custody for 30 days in a row before any demonstration of the accusations is carried out, is automatically lost. This flouts the rule of presumption of innocence as a main principle of criminal law;every person is innocent unless he is then found guilty. The amendment forces a Minister to resign simply on suspicion of an offence punishable by imprisonment of five years or above, which is a reversal of this foundationalprinciple.

Moreover, it is a heinous crime against constitutional principles, such as the doctrine of natural justice. The Minister has no chance to either establish or refute the charges; sacking can be done just by being in custody for 30 days without being charged or by being accused of having committed an offence of that kind. Another fairer course, that is, grant full trial to the Minister, with no removal now, except with conviction, is already implemented under the RP Act, 1951, as observed above. Without the hearing of the case, without the trial, the punishment of a person, without hearing his or her position on the case, is anoffence of his basic rights to be punished, breaking all the key principles of criminal jurisprudence. An individual is not supposed to be stripped of power on mere unsubstantiated accusations.