

---

# CHALLENGES OF ILLEGAL ARREST IN INDIA: A COMPARATIVE ANALYSIS WITH THE U.S. STANDARDS

---

Arihana Gohain, National Law School of India University, Bengaluru

## ABSTRACT

This paper examines the legal framework surrounding illegal arrests in India and compares it with the standards set in the United States. By analyzing landmark cases such as *D.K. Basu vs. State of West Bengal* and *Joginder Kumar vs. State of U.P.*, it uncovers the gap between India's legal safeguards on paper and their real-world enforcement.<sup>1</sup>

One of the key differences highlighted is the procedural threshold for arrests—while India follows a "reasonable suspicion" standard, the U.S. requires the stricter "probable cause" benchmark. Additionally, India's legal system lacks enforcement mechanisms like the exclusionary rule and the Brady rule, which play a crucial role in ensuring fair trials in the U.S. This absence often results in a system that prioritizes swift convictions over procedural fairness.

Although India's Constitution provides protections against arbitrary detention, the lack of codified remedies and consistent enforcement weakens these safeguards in practice. The study ultimately calls for a reassessment of India's approach to illegal arrests, emphasizing the need to strike a better balance between law enforcement efficiency and stronger protections for personal liberty.

---

<sup>1</sup> *D.K. Basu vs. State of West Bengal*, AIR 1997 SC 610; *Joginder Kumar*, AIR 1994 SC 1349.

## INTRODUCTION

The power to arrest is a fundamental aspect in law enforcement, yet it is a double-edged sword that can potentially infringe upon individual rights if not wielded within the bounds of the law. One such issue is of illegal arrests which remains a pressing concern in India. This paper delves into the aspects of illegal arrests in India, examining the legal standards and comparatively analyzing with other jurisdictions, particularly the United States.

The Indian legal system has established guidelines to prevent arbitrary detentions and protect citizens' rights. Cases such as *D.K. Basu vs. State of West Bengal* and *Joginder Kumar vs. State of U.P.* have been instrumental in defining the guidelines within which law enforcement must operate when making arrests.<sup>2</sup> However, the gap between legal provisions and their practical implementation often leads to violations of individual rights and instances of illegal arrests.

This study aims to critically evaluate the existing legal framework surrounding arrests in India. It examines whether the current standards adequately protect the rights of the accused or if they are too permissive, potentially allowing for undue violations of individual liberties. A significant portion of this study is dedicated to comparing the Indian legal safeguards against illegal arrests with those in the United States. By juxtaposing these with Indian legal standards, the paper aims to shed light on the current state of the standards of illegal arrest.

To examine the aforementioned, the paper will delve into the following questions: What are the legal standards governing illegal arrest in India and what are its consequences and how do India's legal standards for illegal arrest compare to those of the United States of America?

To examine the aforementioned, the paper will follow the following structure:

**Firstly**, it will examine the guidelines which are followed in India to determine whether the arrest is illegal or is otherwise. It will analyze whether there are any standards to determine when an arrest becomes illegal and its consequences.

**Secondly**, the procedural leeway in regards of illegal arrest will be analyzed. Furthermore, the threshold of the procedural code for arrest and how it affects in determining the validity and

---

<sup>2</sup> *Id.*

admissibility of arrests in India will be examined. It will also compare the threshold present in the U.S. legal system with the Indian legal standards.

*Thirdly*, it will examine the exclusionary rule and the *Brady* rule of the U.S. and analyze equivalent standards in the Indian legal system. This section will analyze where does Indian standards stand in comparison to American standards when it comes to safeguarding the rights of the accused.

## THE STANDARDS OF ILLEGAL ARREST IN INDIA

The power to arrest must be executed in the utmost legal manner and it is imperative that proper checks and balances are put into action when it comes to exercising this power.<sup>3</sup> In India, arrests must adhere to judicial standards set by constitutional provisions and laws such as the Criminal Procedure Code, 1974 (CrPC) and now Bharatiya Nagarika Suraksha Sanhita, 2023 (BNSS).<sup>4</sup> According to D.C. Pandey, two possible consequences of illegal arrest are: it may either ensue a criminal action against the defaulting officer or it may completely vitiate the trial.<sup>5</sup> The Supreme Court of India has issued guidelines, for instance, the landmark case *D.K. Basu vs. State of West Bengal*, that outline the proper arrest procedures to prevent arbitrary detentions.<sup>6</sup> These judgements are referred to when cases of illegal arrests are addressed by courts. One landmark case which speaks about the sanctity that lies in the power of arrest is *Joginder Kumar Vs State of U.P. and Ors*<sup>7</sup>. The *Joginder Kumar* case established that arrests cannot be made solely on suspicion. There must be a thorough investigation to ensure the complaint is genuine and the person is likely involved in the crime.<sup>8</sup> While police officers have the power to arrest, they must justify their actions. Arrests can damage a person's reputation and self-esteem, so police should only proceed when there is strong evidence, and the arrest is necessary.<sup>9</sup>

A police officer can arrest only if he has sufficient grounds against a person against whom he is legally authorized to take action. An illegal arrest by a police officer is an unwarranted attack on the liberty of a person and such an act is primarily a contravention of duty of the officer,

---

<sup>3</sup> D.C. Pandey, *SEARCH FOR AN ACTION AGAINST ILLEGAL ARREST* 3 J. Indian L. Inst. 329, (1980).

<sup>4</sup> Code Crim. Proc. No. 2 of 1974, § 41 (India); Bharatiya Nagarika Suraksha Sanhita, No. 45 of 2023, § 35 (India)

<sup>5</sup> D.C. Pandey, *supra* note 3, at 328.

<sup>6</sup> *D.K. Basu vs. State of West Bengal*, AIR 1997 SC 610.

<sup>7</sup> *Joginder Kumar Vs State of U.P. and Ors*, AIR 1994 SC 1349.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

who is required “to obey and execute all orders and warrants lawfully issued to him by any competent” and can therefore be subject to disciplinary treatment under the Police Act, 1861 for breach of the same.<sup>10</sup> Additionally, the case of *Arnesh Kumar vs. State of Bihar* lays down that before making an arrest, police must ask themselves the following questions: “(i) Why is the arrest required? (ii) What purpose will it serve? (iii) What objective will it achieve?”<sup>11</sup> Moreover the police must have reason to believe, based on information and material, that the accused has committed the offense.<sup>12</sup>

However, while many arrests may technically comply with these legal standards, it is essential to critically evaluate whether these standards adequately protect the rights of the accused. Merely adhering to available standards does not necessarily exonerate the system from scrutiny. If the standards are too permissive, the system could allow undue violations of individual rights, even if they are along the lines with the existing guidelines. There is also a lack of standards which define how illegal arrest is supposed to be determined. A referral standard ensures consistency in the system. If there are no standards, the system is problematic on two possible grounds – firstly, it will be easier to violate, as police officers may exploit permissive standards to make arbitrary arrests, often leading to misuse of power. Secondly, many police officers, for instance in rural areas, may not be fully aware of the legal requirements for arrest, leading to violations without malicious intent. Moreover, uncertainty in the system itself would lead to unintentional violations.

One of the possible consequences of illegal arrest is compensation for the accused. Unlike other countries, compensation for illegal arrest is not codified in India. In contrast, other judicial systems do have codified remedies like such. For example, Article 5 of the European Equality and Human Rights Commission compensates when one has been unlawfully detained.<sup>13</sup> Certain judgements do justify giving compensation for illegal detention. These judgements show how these compensations are justified as a policy decision where the executive and the judicial come together to justify them. Moreover, these happen on a state level. One such case is the *Shiv Kumar Verma v. State of U. P* case.<sup>14</sup> Shiv Kumar Verma filed a writ petition in the

---

<sup>10</sup> The Police Act, § 23 1861 (India).

<sup>11</sup> *Arnesh Kumar vs. State of Bihar*, AIR 2014 SC 2756.

<sup>12</sup> *Id.*

<sup>13</sup> Equality and Human Rights Commission, *Article 5: Right to Liberty and Security*, EQUALITY & HUM. RTS. COMM’N (May 4, 2016), <https://www.equalityhumanrights.com/human-rights/human-rights-act/article-5-right-liberty-and-security> (last visited 10 Sept 2024).

<sup>14</sup> *Shiv Kumar Verma v. State of U. P* (2021) 116 ACC 202.

Allahabad High Court seeking compensation for illegal detention. The case led to the State of Uttar Pradesh issuing a Twelve Point Policy, in which Point 2 of the policy included provisions for departmental disciplinary action against officers for illegal arrests and a compensation of ₹25,000 for illegal detention. Hence, Verma was awarded compensation by the State Government for breach of their fundamental rights under Article 21 of the Constitution of India.<sup>15</sup> The case highlights a new approach where the executive and judiciary worked together to address issues of illegal arrest.<sup>16</sup> However, it is important to note that this state-level policy, while progressive, also highlights the disparities that can exist across different states in India. The lack of a uniform national policy on compensation for illegal arrests means that citizens in different parts of the country may have varying levels of protection and recourse. This situation highlights the need for a nationwide approach to addressing illegal arrests and providing compensation to victims.

## PROCEDURAL THRESHOLD OF ILLEGAL ARREST

Illegal arrest is an institutional problem which extends beyond acts of police officers and other state actors. To examine this problem, it requires scrutiny of the procedural leeway which leads to illegal arrest. It plays a crucial role in how strictly or loosely a legal system values the protection of the accused's rights. One way to assess the validity of the legal standards to safeguard individuals' rights is by evaluating the threshold that must be met for an arrest to be considered valid. For instance, a high threshold, which requires strong and verifiable evidence before an arrest can take place indicates that the system is designed to protect individual rights, hence favouring a wrongfully accused person. On the other hand, a low threshold implies a greater risk of arbitrary arrests and infringements on personal rights. In a system where the threshold for a valid arrest is low, the number of illegal arrests may appear reduced, not because of better compliance, but because the legal definition of a valid arrest is more permissive. This suggests that while the system might seem to operate efficiently on paper, it may still fail to protect the rights of individuals. Such leeway can result in more frequent lawful arrests according to technical definitions, but this can also mean that the rights of the accused are less protected. For example, if an arrest is considered lawful as long as the police officer genuinely believes the person is guilty, this opens the door to numerous questionable arrests, as personal belief may not always align with objective legal standards. Therefore, making the standard a

---

<sup>15</sup> INDIA CONST. art. 21

<sup>16</sup> BB PANDE, *Criminal Law and Criminal Justice: Advanced Legal Writings* 244 (Eastern Book Co 2022).

subjective one, without a consistent referral point.

When evaluating arrest procedures, it is important to consider how different legal systems prioritize the protection of individual rights. For instance, the U.S. places a heavy emphasis on consequences for illegal arrests, which acts as an enforcement mechanism for adherence to procedural rules. The exclusionary rule, for example, prohibits the use of illegally obtained evidence in court, thereby attempting to leave the least, if any possibility, of encouraging improper arrests. In the U.S., arrest procedures are bound by strict constitutional protections. Moreover, The Fourth Amendment requires that arrests must be based on "probable cause", sets a high threshold for legal arrests, making it difficult for arbitrary or unlawful arrests to occur without consequence.<sup>17</sup>

However, the threshold for a lawful arrest in India is based on "reasonable suspicion" under the Section 35(b) Bharatiya Nagarika Suraksha Sanhita, 2023 (BNSS), which is lower than the "probable cause" standard in the U.S.<sup>18</sup> While it may reduce the number of technically "illegal" arrests, it can also lead to a higher number of arrests on insufficient grounds, infringing on individual rights. This standard gives police more leeway to act on mere suspicions or incomplete information, which can lead to a higher number of arrests, but also increases the risk of arbitrary or wrongful arrests. In the US, the "probable cause" standard sets a higher bar for arrest, requiring more substantial evidence that a crime has been committed. This protects individuals from arbitrary arrests and ensures that law enforcement officers are more accountable for the arrests they make. The US system, therefore, places greater emphasis on individual rights at the prior to the arrest stage compared to India.

## **BRADY RULE AND EXCLUSIONARY RULE: COMPARISON WITH U.S. STANDARDS**

In comparison to other countries like the US, India's legal safeguards may appear robust on paper but can be lacking when it comes to implementation. India's legal system has formal protections and procedures in place that, when viewed solely based on their written form or official statutes, may seem strong and comprehensive. However, there is a gap between these written protections and how they are applied or enforced in practice. This part will compare the procedural safeguards for arrests in India with those in the US, where protections against

---

<sup>17</sup> U.S. Const. amend. XIV.

<sup>18</sup> *Bharatiya Nagarika Suraksha Sanhita*, No. 45 of 2023, § 35 (b) (India)

illegal arrests are enforced through the exclusionary rule, the *Brady* rule and other stringent requirements of following the due process clause.

The Fourteen Amendment's Due Process Clause guarantees that no individual can be deprived of life, liberty, or property without "due process of law", i.e. following fair legal procedures.<sup>19</sup> This protection is deeply embedded in American jurisprudence, ensuring that both procedural and civil rights are respected while implementing criminal procedures. As a part of the framework, the Supreme Court's decision in *Brady v Maryland* laid down the rules for *Brady rule*, which held that the prosecutor is violating the rights of the accused when he fails to disclose material evidence favourable to him, thus preventing miscarriage of justice arising from the suppression of exculpatory evidence.<sup>20</sup> In the case, the prosecutor failed to disclose the statement of Brady's companion who had admitted strangling the victim in the murder for which they both were convicted. This statement, the court found, was material to determining whether Brady should receive the death penalty. Because material evidence had been withheld, the court ordered that Brady be resentenced. The court ruling was based on the premise that suppressing such evidence violates the defendant's right to due process under the Fourteenth Amendment.<sup>21</sup> The *Brady* rule rests on the notion that a criminal trial is a search for the truth, and any suppression of material evidence violates this fundamental principle.<sup>22</sup>

In India, while Article 21 of the Constitution of India provides for the rights to life and personal liberty, the protection of an individual during a criminal procedure has not been developed as rigorously as in the U.S.<sup>23</sup> Therefore, prosecutorial misconduct such as withholding material evidence is not typically treated with the same graveness as it is under the *Brady* rule.

The doctrine of "the exclusionary rule" in the United States has been developed with a view to keeping the executive actions within the bounds of law. According to the "exclusionary rule", the courts do not permit the use of any evidence, howsoever material bearing it may have on the charge, if it has been obtained as a result of illegal arrest or search of the defendant.<sup>24</sup> In the immediate circumstances, this rule serves as a protection to the person who has been a victim of illegal enforcement of the legal procedure. This doctrine is grounded in the idea that

---

<sup>19</sup> U.S. Const. amend. XIV.

<sup>20</sup> *Brady v Maryland* 373 U.S. 83 (1963).

<sup>21</sup> U.S. Const. amend. XIV.

<sup>22</sup> Robert Hochman, *Brady v Maryland and the Search for Truth in Criminal Trials*, 63, no. 4 The University of Chicago Law Review 1673–1705 (1996), <https://doi.org/10.2307/1600284>.

<sup>23</sup> INDIA CONST. art. 21.

<sup>24</sup> D.C. Pandey, *supra* note 3, at 338.

courts should not condone illegal actions by law enforcement, which act as a deterrent against police misconduct. It reinforces that evidence obtained in the violation of due process cannot be administered, even if it is critical in proving guilt. In the US, tools such as the exclusionary rule and the *Brady rule* are designed to ensure that the rights of the accused are protected at all stages of the criminal process. By enforcing strict rules around the admissibility of evidence and high standards prosecutorial conduct, the US legal system emphasizes the importance of fairness and just compliance of constitutional values. These protections create a high burden on the prosecution to ensure that the entire procedure, from investigation to trial, is conducted within the bounds of the law. Moreover, violations of these rights often result in consequences, such as vitiating the trial, which in turn provides a strong incentive for law enforcement and prosecutors to adhere to legal standards.

However, that is not the case in India. As established in the case of *R. M. Malkani vs State of Maharashtra*, it was held that when evidence is collected illegally, it did not render it inadmissible as long as it was not obtained under duress or compulsion.<sup>25</sup> Therefore, this suggests that the Indian legal standards do not prioritize fair application of criminal procedure as compared to the American standards. This reflects the compromise the Indian courts make in the sanctity of law and shows how courts in India favour quicker conclusions instead of procedural thoroughness. This difference between the U.S. and Indian approaches highlights a fundamental divergence on how both view procedural fairness. The lack of stringent consequences for procedural violations often leads to a more lenient approach toward law enforcement abuses, which affects the rights of individuals. The Indian system, by allowing illegally obtained evidence to be admissible, places a greater emphasis on achieving conviction rather than ensuring that the process respects individual rights. This approach reflects a compromise of procedural fairness and the often at the cost of undermining the constitutional guarantee of personal liberty under Article 21.<sup>26</sup>

## CONCLUSION

The examination of illegal arrests in India reveals the dynamic interaction between legal provisions and their practical implementation. While India has established a framework to protect individuals from arbitrary arrests through constitutional guarantees and landmark

---

<sup>25</sup> *R. M. Malkani vs State of Maharashtra*, (1973) 1 SCC 471.

<sup>26</sup> INDIA CONST. art. 21.

judgments, significant challenges remain in translating these legal safeguards into practice.

The comparison with the United States highlights stark differences in approach. The U.S. system, with its higher threshold for arrests and robust mechanisms like the *Brady* rule and exclusionary rule, demonstrates a stronger emphasis on protecting individual rights throughout the criminal justice process. In contrast, India's standard follows a more lenient approach which suggests that it prioritizes law enforcement over safeguards the rights of the accused.

This paper emphasizes the need for India to reevaluate its legal standards and procedural thresholds for arrests. The current system, while appearing robust on paper, often falls short in practical application, leading to instances of illegal arrests and violations of individual liberties. The lack of codified remedies for illegal arrests and the absence of strict consequences for procedural violations further enhances this issue. By addressing these loopholes and implementing more stringent safeguards, India can work towards a justice system that better balances public safety with the protection of fundamental rights, strengthening its judicial system.