# LAW OF ARREST : SOME PROBLEMS AND INCONGRUITIES

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## Meaning and importance of arrest

THE WORD 'arrest' implies deprivation of personal liberty under some real or assumed legal authority. A kidn-apper or abductor restraining and confining a person is not 'arresting' him; but when a police officer in the apparent exercise of his powers takes another person into his custody he is said to arrest that person although that arrest might not necessarily be a lawful one.

The law of arrest deals with the authorities by whom, and the manner and circumstances in which, a person may be arrested, *i.e.*, may be deprived of his personal liberty. The right to personal liberty is a basic human right and a corner-stone of our social structure. Its deprivation is a matter of grave concern. Therefore, law should permit an arrest only in such cases where it is absolutely necessary. On the other hand, if a person by his conduct has proved to be a danger or a grave risk to the society should not be allowed to misuse his personal freedom and to inflict more harm on the society. The state agencies should be adequately empowered by law to arrest such a person promptly so that he is adequately dealt with according to law. The law of arrest has to dovetail two conflicting demands, namely, it should not as far as possible interfere with the individual's right to personal liberty on the one hand; and it should give enough powers to the state authorities to make prompt arrests of persons creating dangers or serious risks to the society on the other. The balancing of these conflicting demands of individual liberty and societal safety is for from easy but all the same important.

## Re-examination of the constitutionality of arrest laws—a sequel to *Maneka* decision

The right to personal liberty is a fundamental right recognised by our Constitution. Article 21 of the Constitution says : "No person shall be deprived of his life or personal liberty except according to procedure established by law."

Since the decision of the Supreme Court in *A.K. Gopalan's* case[1], the article had received a somewhat narrow literal interpretation. There the court held that the impugned preventive detention law was not violative of article 21 and would not be unconstitutional when it satisfied the

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1. See *A.K. Gopalan* v. *State of Madras*, A I.R. 1950 S.C. 27 : 1950 Cri. L.J. 1383.

requirements of article 22. According to the view taken by the Supreme Court in that case, the right to personal liberty guaranteed by article 21 was not violated if the deprivation of personal liberty was permissible by "procedure established by law" and it was immaterial and of no consequence whether that law was just or unjust, fair or unfair, reasonable or unreasonable.

This interpretation of article 21 continued to hold ground till it was reviewed and radically altered by the Supreme Court in its decision in the *Maneka Gandhi* case.[2] In this case the Supreme Court, while distinguishing *A.K. Gopalan's* case, has taken the view that the sweep of article 21 is much wider than was supposed to be earlier. According to the new dispensation, the right to personal liberty guaranteed by article 21 can only be abridged by a law which satisfies the test of reasonableness. In the words of Justice V.R. Krishna Iyer :

> The significance and sweep of Art. 21 make the deprivation of liberty a matter of grave concern and permissible only when the law authorising it is reasonable, even handed and geared to the goals of community good and state necessity....[3]

The procedure contemplated by article 21 must be 'right and just and fair' and not arbitrary, fanciful or oppressive; otherwise it would be no procedure at all and the requirement of article 21 would not be satisfied.[4] Procedure in article 21 means fair procedure, not formal procedure; and the 'law' referred to in that article is reasonable law, not any enacted legislation.[5]

In view of the wider interpretation of article 21 as expounded by the Supreme Court in the *Maneka Gandhi* case,[6] it has now become imperative to examine and test the constitutional ambit and validity of our laws relating to arrest. To what extent can they stand the test of reasonableness? Are they all "right and just and fair"? Such questions would be raised time and again in the coming years and would call upon the law-courts, lawyers and legislators to provide viable solutions to the problems indicated therein.

**Objectives in making arrest**

Arrest means deprivation of personal liberty; and, therefore, it should be permitted by law only in such cases where it necessarily serves a public

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2. See *Maneka Gandhi* v. *Union of India*, A.I R. 1978 S.C. 597 : (1978) 1 S.C.C. 248.

3. See *G. Narasimhulu* v. *Public Prosecutor, A.P.*, A.I.R. 1978 S.C. 429 : 1978 Cri L.J. 502, 505.

4. *Supra* note 2 at 624.

5. See *Madhav H. Hoskote* v. *State of Maharashtra*, A.I.R. 1978 S.C. 1548 : 1978 Cri. L.J. 1678, 1684.

6. *Supra* note 2.

purpose but not otherwise. The provisions of the Code of Criminal Procedure, 1973 suggest that arrest may be made for any one or more of the following four objectives.

(1) The first and foremost objective of arrest is to make the investigations into offences effective and fruitful. Arrest would facilitate the interrogation of the accused person and to an extent useful in obtaining his confession of crime. It would help in arranging a test identification parade, in getting specimen handwritings and finger-prints, *etc.*, of the suspect, in making search of his person, and in obtaining evidence by subjecting him to medical examination. A question might, however, arise: Is arrest absolutely necessary for these purposes ? Are there no other alternatives? May be that such alternative methods are not equally effective in all cases. But when they are, why resort to arrest? In any case, authorising arrest by police in respect of *all* cognizable offences[7] and requiring the police to apprehend all persons whom they are legally authorised to apprehend[8] seem to make law the of arrest over-reach its objective.

(2) The second major objective in making arrest is to ensure the presence of the accused at the *time of his trial.* Arrest is undoubtedly the surest way of ensuring such presence. But in many cases a summons or notice to the accused requiring his attendance in court serves this purpose, and this is, as a matter of policy, aimed at by the provisions contained in sections 204 and 87 of the Code of Criminal Procedure. However, it would be seen that the decision to issue a summons or a warrant of arrest in a case *largely* depends upon whether the case is a summons case or a warrant case, which in turn means that it depends upon whether the offence is punishable with imprisonment upto two years or with more. Should, this be the predominant consideration in making arrest decision? Is it quite reasonable to rely on such classification of cases?

(3) The third objective of arrest is preventive only. It is to prevent the commission of serious (cognizable) offences,[9] and to maintain peace and ensure public safety.[10] This objective would necessitate giving wide powers to the police in respect of making arrests. Wider the power, greater are the chances of its abuse. The misuse of these police powers during the emergency, and for that matter even in normal conditions, is widely known and hardly needs any elaboration. However, in relation to this objective the problem is not one of excessive conferment of powers to make arrest but is essentially one of providing adequate safeguards against the misuse of such powers. Further, the classification of offences into

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7. See s. 41 (1) (a) of the Code of Criminal Procedure, 1973.
8. See ss. 23 and 29 of the Police Act, 1861.
9. See s. 151 of the Code of Criminal Procedure, 1973.
10. See *id.*, s. 41 (2).

cognizable and non-cognizable is somewhat irrational and arbitrary. When this classification is pressed into service for making thereshold decisions for preventive arrests, can it be justified in all cases as "right and just and fair"?

(4) The fourth objective of arrest is to enable the police to discharge their duties more effectively. The law permits the police to arrest persons who obstruct them in the execution of their duties.[11] Here the law assummes every police duty, irrespective of its nature, as of paramount importance and envisages immediate execution of such duty by removing all obstructions. Considering the wide range of multifarious police duties is it just and reasonable to make this assumption? Is it fair to give powers of arrest in such all and sundry cases of obstruction of police duties? Will it not be proper to classify police duties for the purposes of this branch of arrest law?

**Arrest-decision by whom?**

The Code of Criminal Procedure, 1973 contemplates two types of arrests (*i*) arrest made under a warrant of arrest, and (*ii*) arrest made without such a warrant. A warrant of arrest is a written order issued and signed by a magistrate, directed to a police officer or some other person specially named, and commanding him to arrest the body of a person named in it, who is accused of an offence.[12] It will thus be seen that the arrest-decisions as envisaged by the code are made either by judicial officers or by others. Wayne R. LaFave stated :

> It is usually assumed that judicial participation in decision-making is desirable in a criminal justice system in order to insure a fair balance between the interests of society and of the individual. This balancing of interests is thought best served if there is a "disinterested determination" by a "neutral and detached" judicial officer... .
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> At the arrest stage, it is often assumed that in the absence of any need for immediate action the normal and desirable method for determining whom to arrest is by the police presenting the facts to a magistrate, who is removed from the competitive task of detecting crime and bringing about the arrest of offenders.[13]

Whatever may be the propriety and desirability in having the arrest-decision made by a judicial magistrate, the law as it stands today does not empower a judicial magistrate to issue a warrant of arrest in the cases where immediate arrest is not necessary and there is ample time for the police to approach the judicial magistrate for getting a warrant of arrest. The

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11. *Id.*, see s. 41 (1) (e).
12. See *Black's Law Dictionary*, 141 (Revised IVth. ed., 1968).
13. Wayne R.LaFave, *Arrest* 8 (1965).

magistrate can issue process *i.e.* a summon's or a warrant of arrest, only after taking cognizance of an offence. Cognizance of an offence can be taken only (*a*) upon receiving a complaint of facts constituting an offence; or (*b*) upon a police report of such facts; or (*c*) upon information received from any person other than a police officer; or upon his own knowledge, that such offence has been committed.[14] It is, therefore, clear that a judicial magistrate cannot issue a warrant of arrest during investigations and before taking cognizance of an offence.

In this connection, the opinion expressed by the Law Commission of India is quite pertinent. The commission observed.

> Taking cognizance of an offence must precede the issue of warrant. There may be provisions to the contrary which usually appear in special laws. But, in the absence of such special provisions, the scheme of the Code seems to contemplate cognizance as a step prior to the issue of a warrant by a magistrate.
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> We are aware, that there is a decision to the contrary,[15] but we regret that we are with great respect, unable to agree with the view that a Magistrate can issue a warrant [for the arrest of the person who could be arrested without warrant under...(s 41)] without taking cognizance.[16]

Moreover though the wording of section 41—"Any police officer may without an order from a Magistrate and without a warrant, arrest any person" suggests that a police officer has a discretion in making an arrest—decision in respect of cases falling under section 41, but the discretion becomes illusory when one looks to sections 23 and 29 of the Police Act of 1861.[17] Under these circumstances it would be unrealistic to expect a police-officer to approach a minister for obtaining an arrest-warrant before

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14. See s. 190 of the Code of Criminal Procedure, 1973.

15. *L. Ram Narain Singh* v. *A. Sen*, A.I.R. 1958, 760.

16. The Law Commission of India, *Thirty Seventh Report on the Code of Criminal Procedure*, 1898, 59-60 (1967).

17. Section 23 of the Police Act, 1861 provides:

> 23. *Duties of police officers*—It shall be the duty of every police-officer promptly to obey and execute all orders and warrants lawfully issued to him by any competent authority; ...to detect and bring offenders to justice, and to apprehend all persons whom he is legally authorised to apprehend, and for whose apprehension sufficient ground exists. . .
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> *Section 29 of the Police Act provides* —
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> 29. *Penalties for neglect of duty etc.* Every police-officer who shall be guilty of any violation of duty or. . . who shall withdraw from the duties of his office without permission . . . shall be liable on conviction before a Magistrate, to a penalty not exceeding three months pay, or to imprisonment, with or without hard labour, for a period not exceeding three months or to both.

arresting a person in respect of any of the conditions mentioned in section 41.

It is, therefore, suggested that a clearp rovision be made in the Code of Criminal Procedure empowering judicial magistrates to issue arrest-warrants before taking cognizance of an offence and in respect of cases falling under section 41. Such a ppovision should also direct the police-officers not to arrest a person without a warrant unless it becomes absolutely necessary due to the exigencies of particular situations.

**Arrest-decision and the division of offences into cognizable and non-cognizable offences**

Most of the cases of arrest without warrant are in relation to cognizable offences. Section 41 (1) of the Code of Criminal Procedure empowers a police-officer to arrest without a warrant any person "who has been concerned in any cognizable offence, or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists, of his having been so concerned". Further any police-officer knowing of a design to commit any cognizable offence may, in order to take preventive action, arrest without a warrant the person so designing.[18] The police has the power and also the duty to prevent cognizable offences. Every police-officer may interpose for the purpose of preventing, and shall, to the best of his ability, prevent, the commission of any cognizable offence.[19] The division of offences into cognizable and non-cognizable offences has another inportant consequence. If the offence is cognizable it can bc investigated into by a police-officer without any order or direction from a judicial magistrate; but if the offence is non-cognizable the police-officer cannot investigate without any order from a magistrate.[20]

The Code of Criminal Procedure, 1973 has not given any test or criterion to determine whether an offence is to be considered as cognizable or non-cognizable. According to the code, a "cognizable offence" means an offence for which, and "cognizable case" means a case in which, a police officer may, in accordance with the First Schedule or under any other law for the time being in force, arrest without warrant,[21] and a "non-cognizable offence" means an offence for which, and "non cognizable case" means a case for which, a police-officer has no authority to arrest without warrant.[22] Again, the explanatory note (2) in the first schedule says "In this schedule...(*ii*) the word "cognizable" stands for "a police officer may arrest without warrant"; and (*iii*) the word "non-cognizable"

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18. See s. 151 of the Code of Criminal Procedure, 1973.
19. *Id.*, s. 149.
20. *Id.*, s. 156 and 155 (2).
21. See *id.*, s. 2 (c).
22. See *id.*, s. 2 (l)

stands for "a police officer shall not arrest without warrant." The first schedule of the code refers to all the offences under the Indian Penal Code and puts them into cognizable and non-cognizable categories. The analysis of the relevant provisions of the first schedule would show that the basis of this categorization rests on diverse considerations and no uniform criterion has been followed.[23] As it could not be possible in the first schedule to list all the offences under all the laws other than the penal code, the schedule provides that all offences punishable with imprisonment for three years or more shall be considered as cognizable and others as non-cognizable. This general categorisation in respect of offences under laws other than the penal code can be altered in respect of specific offences by making a special provision in that law.

The 'cognizable'-'non-cognizable' classification as given in the first schedule of the code either presupposes the need of immediate arrest in respect of *every* cognizable offence, or otherwise considers it unnecessary in all cognizable cases to have the arrest-decision be made by a "neutral and detached" judicial officer. In either case it is not quite fully defensible. Moreover, the present arrangement presupposes that every police-officer knows by heart the provisions of the first schedule and the provisions of other laws that make hundreds of offences as cognizable or otherwise. This is obviously assuming too much.[24]

The present 'cognizable'-'non-cognizable' classification of offences is essentially and apparently based on considerations related to making arrest-decisions. But the same classification has been pressed into service to determine whether the police should or should not have the power to initiate investigation without any order from the magistrate or to take preventive action. This has unwittingly led to some undesirable consequences. In respect of many social reform legislations where the offences are mostly punishable with less than three years' imprisonment and, therefore, non-cognizable, there is practically no enforcenent of the laws as the police are not supposed to take any initiative in such cases. If the classification is, therefore, modified in such cases for making it suitable for investigation or prevention purposes, such changes would further contribute to the confusion and irrationality prevailing in the classification in its present form.

A new innovation has now been attempted to improve the present position by making certain offences cognizable but without allowing the police the power to arrest without a warrant. This has been done in the recent amendment to the Child Marriage Restraint Act, 1929. Section 3 of the Child Marriage Restraint (Amendment) Act, 1978 provides as follows :

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23. For detailed analysis see Kelkar, *Outlines of Criminal Procedure* 26-27 (1977).
24. *Id.* at 28,

*3. Insertion of new section 7*

After section 6 of the principal Act [i.e. the Child Marriage Restraint Act, 1929] the following section shall be inserted, namely:

*7. Offences to be cognizable for certain purposes*

The Code of Criminal Procedure, 1973, shall apply to offences under this Act as if they were cognizable offences—

(*a*) for the purpose of investigation of such offences; and

(*b*) for the purposes of matters other than (*i*) matters referred to in section 42 of that Code, and (*ii*) the arrest of a person without a warrant or without an order of a Magistrate.

The modification in the existing cognizable-non-cognizable categorisation is somewhat clumsy in its form; even then it is a refreshing welcome change and it is to be hoped that it might stimulate thought and action for a better classification of offences.

The present classification of offences into cognizable and non-cognizable is functionally less suitable and cannot possibly be defended as 'right and just and fair'. It is high time now that either the classification is completely scrapped and arrest-decisions are made according to the necessity in each case in accordance with the broad basic principles, or it is recast into two or more different categorisations enabling sound arrest-decisions, and demarcating properly the sphere of police initiative in the prevention and investigation of crimes.