GOVERNMENT OF INDIA

LAW COMMISSION OF INDIA

ONE HUNDRED AND SEVENTY SEVENTH REPORT

ON

LAW RELATING TO ARREST

December 2001

D.O. No. 6(3)(63)/99-L.C.(LS)

December 14, 2001

Dear Shri Jaitley,

I am herewith forwarding the 177th Report on Law Relating to Arrest. This subject was taken up by the Law Commission suo motu with a view to clearly delineate and regulate the power of arrest without warrant vested in the Police by section 41 and other provisions of the Criminal Procedure Code. The said provisions were enacted before the judgment of the Supreme Court in Maneka Gandhi (1978). The law laid down in the said decision casts a cloud upon the validity of some of the provisions in section 41 and allied provisions.

With a view to ascertain the exact situation obtaining today, we had requested the National Human Rights Commission (NHRC) to collect the data from all the States with respect to the number of arrests in a given year, the number of arrests for bailable offences, the number of arrests under preventive provisions and other relevant particulars. Accordingly, NHRC wrote to Director Generals of Police of all the States, who were good enough to send the material as required by us. On the basis of material so forwarded, we had prepared an extract, which is now annexed to this Report as Annexure II. They establish that, overall, the arrests under the preventive provisions were more in number than the arrests for substantive offences and further that a large number of arrests were in respect of bailable offences which more often happen to be non-cognizable offences (wherein no arrest can be made without a warrant or order from a magistrate). The Law Commission accordingly prepared a Consultation Paper setting out its provisional views and issued a questionnaire to all concerned. Three seminars were held by the Law Commission at Delhi, Calcutta and Hyderabad respectively. A large volume of responses were also received from the concerned members of the public, organizations and associations. After duly considering all the said material, the Law Commission has prepared the accompanying Report.

We have suggested amendment of section 41 and in particular substitution of clauses (a) and (b) of sub-section (1) of section 41. We have also recommended deletion of the present sub-section (2) of section 41 and substitution of another provision in its place. Besides the amendment of section 41, amendments are recommended to several other provisions in the Code of Criminal Procedure.

The theme of our Report is to maintain a balance between the liberty of the citizens (the most precious of all fundamental rights) and the societal interest in maintenance of peace and law and order. This is no doubt a difficult balance but it has to be attempted, and achieved to the extent possible. We have also taken note of certain important decisions of the Supreme Court including the decisions in Joginder Kumar v. State of U.P. (1994) and D.K. Basu (1997). I am sure the Government will take these recommendations into consideration and take steps for implementing them.

With warm regards,

Yours sincerely,

(B.P. Jeevan Reddy)

Shri Arun Jaitley,
Union Minister for Law, Justice
And Company Affairs,
Government of India,
Shastri Bhawan,
NEW DELHI.

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Chapter One

Introduction

Liberty is the most precious of all the human rights. It has been the founding faith of the human race for more than 200 years. Both the American Declaration of Independence, 1776 and the French Declaration of the Rights of Man and the Citizen, 1789, spoke of liberty being one of the natural and inalienable rights of man. The Universal Declaration of Human Rights adopted by the General Assembly of the United Nations on December 10, 1948, contains several articles designed to protect and promote the liberty of individual. So does the International Covenant on Civil and Political Rights, 1966. Above all, Article 21 of the Constitution of India proclaims that no one shall be deprived of his liberty except in accordance with the procedure prescribed by law. Even Article 20 and clauses (1) and (2) of Article 22 are born out of a concern for human liberty. As it is often said, one realizes the value of liberty only when he is deprived of it. Verily, liberty along with equality is the most fundamental of human rights and the fundamental freedoms guaranteed by our Constitution.

Of equal importance is the maintenance of peace and law and order in the society. Unless there is peace, no real progress is possible. Societal peace lends stability and security to the polity. It provides the necessary conditions for growth, whether it is in the economic sphere or in scientific and technological spheres. Just as liberty is precious to an individual, so is the society interested in peace and maintenance of law and order in the society. Both are equally important. This fact was recognized about 2500 years ago by Heraclitus of Ephesus. He had observed "a major problem of human society is to combine that degree of liberty without which law is tyranny with that degree of law without which liberty becomes license". (Quoted by Arthur T. Vanderbilt in his article "United We Stand". A.B.A.J. (Aug 1938) page 639)

Whether it is for securing the liberty of an individual or for maintaining the peace and law and order in the society, law is essential. Not only should there be a proper law, there should also be proper implementation of law. In short, the society should be governed by the rule of law and not by the rule of an individual, however benevolent he may be. Failure of rule of law is a sure indication of the liberty of the individual coming into peril and so does the peace of the society. It is therefore required of law that it should try to promote both these contending concepts and to maintain a balance between them, viz., the balance between the necessity to protect and promote the liberty of the individual and the necessity to maintain peace and law and order in the society.

This aspect has been repeatedly emphasized by the Supreme Court in its various decisions to which a reference will be made at the appropriate stage. Indeed, the Court has enunciated several rules and guidelines which the executive should follow before interfering with the liberty of a citizen. Not only the Supreme Court, all the High Courts too have been emphasizing the inalienable and invaluable nature of liberty as also the societal interest in peace and law and order. Even so, a large number of complaints persist, complaining of unlawful deprivation of liberty of the citizens at the hands of Police and other enforcement authorities, of their resort to unlawful methods of investigation and of cruel and unusual treatment of the accused while in their custody. In view of these persisting and innumerable complaints appearing in the media and coming before the courts, the Law Commission of India thought it appropriate to examine the law relating to arrest in all its facets, to find out whether any improvements can be suggested in the relevant legal provisions. Accordingly, the Law Commission addressed the letter dated July 20, 1999 to the then Chairman of National Human Rights Commission, Shri Justice M.N. Venkatachaliah, pointing out the provisions in the Criminal Procedure Code relating to arrest, the awesome power vested by those provisions in one of the civil services of the State, namely, the Police - which indeed is the only armed civil service in our polity – the persisting complaints of police excesses and requesting the NHRC's help in the matter. The relevant portion of the letter reads as follows:

> "To enable us to arrive at a proper conclusion on the aforesaid question, we must have empirical data collected by an expert body. In the course of discussions which I had with you on Sunday, you had suggested that it would be possible for the Human Rights Commission to constitute a committee of high police officials (retired or working), who shall select four districts in the country as case studies and find out the number of arrests made by the police in that district in a given year without warrant, the number of arrests which were made without registering the crime, the number of cases in which the person arrested was released without filing a charge-sheet and the length of his detention, the number of cases in which charge-sheets were filed and the number of cases in which the prosecution resulted in conviction. It would also be necessary to categorize the offences in connection with which the persons were arrested, the period of the detention in police and in judicial custody, the time taken for concluding the prosecution against them and if a person is kept in detention, the number of occasions on which he was not produced before the court on the dates of hearing. It would also help us if any other relevant and incidental details and data, which the committee may think relevant, is also made available to us.
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> The Law Commission of India would be grateful if you can appoint an expert committee and make data collected by them and findings recorded by them available to us. We would also welcome any suggestions, ideas and recommendations which such expert body may record on the above subject keeping in view the recommendations contained in the Police Commission Reports."

Accordingly, the NHRC wrote to all the Director Generals of Police of various States in the country to provide the required information. The information so gathered was made available to the Law Commission. The information furnished by the DGPs of various States is reflected in an abstract prepared by the

Law Commission (which was appended to the Working Paper) and which is appended to this Report as Annexure II. The abstract contains 08 columns showing (1) Name of the State, (2) The total number of persons arrested under substantive offences, (3) The total number of persons arrested under preventive provisions, (4) The total number of persons chargesheeted in a year, (5) The total number of cases dropped without filing a chargesheet, (6) The total number of persons convicted in a year, (7) The percentage of persons arrested for bailable offences and (8) The percentage of persons arrested under preventive provisions and of the persons dropped without filing chargesheets. While we do not wish to repeat all the particulars in the said abstract – also because the abstract itself is annexed to this Report as stated above – it maybe necessary to point out a few revealing aspects. In Delhi, while the total number of persons arrested for substantive offence is 57,163, the total number of persons arrested under preventive provisions is 39,824. 50% of the persons arrested were arrested for bailable offences. If we take U.P., the number of arrests under the preventive provisions is far above the total number of arrests for substantive offences. While preventive arrests are 4,79,404, the number of arrests for substantive offences are 1,73,634. The percentage of persons arrested in bailable offences is 45.13. In Haryana, the percentage of arrests under bailable provisions is 94%, in Kerala it is 71%, in Assam it is 90%, in Karnataka it is 84.8%, in M.P. it is 89% and in Andhra Pradesh it is 36.59%. Indeed a perusal of the said abstract/Annexure II would disclose the unduly large number of arrests under preventive provisions as well as for bailable offences. It is difficult to believe that in all these arrests for bailable offences, warrants were issued by the magistrates. Indeed an overwhelming percentage of those arrests were by the Police without a warrant. This is equally disturbing even if some of them are preventive arrests, as was suggested by some police officers during one of the seminars. It is a matter of common knowledge that it is the poor who are at the receiving end of the excesses by law enforcement authorities. A man without property and without a regular income is always under suspicion of being a thief or a person out to commit some offence. In this sense, "poverty (itself) is crime" – a truism echoed by George Bernard Shaw.

The unnecessary incarceration of undertrials in jails is another disturbing feature of our criminal judicial system. The decisions of the Supreme Court and High Courts and the reports of the National Police Commission say that a majority of the inmates of jail are undertrials. Many of them languish in jails because they are not able to either move for bail or to furnish the bail prescribed by the court – again a consequence of poverty. Number of instances have been pointed out by courts where undertrials have been kept in jails for periods longer than the maximum period for which they could have been sentenced had they been found guilty of the offence with which they were charged.

In the light of the facts and figures furnished to us by the Director Generals of Police and in the light of the decisions of the courts and the Reports of the National Police Commission, the Law Commission prepared a Consultation Paper on the Law of Arrest. The said Consultation Paper is appended to this Report as Annexure III. Several proposals were put forward in the Consultation Paper which were meant to evoke a debate in the concerned sections of the society and to bring to their notice the facts and figures contained in Annexure II. Copies of the Consultation Paper were sent to all the Bar associations, Human Rights organizations, Director Generals of Police, State Governments, Union Ministry of Home Affairs and to all other persons interested in public affairs. The Law Commission conducted three seminars on the subject, at Delhi, Calcutta (in association with the West Bengal University for Juridical Sciences) and Hyderabad (in association with the National Academy for Legal Services and Research), whereat a large number of very high Police officials, Secretaries to Government, representatives of Human Rights organizations, leading members of the Bar and the society participated and offered their invaluable suggestions and criticism. We have also received a large number of responses from various sections of society and organizations, all of which have been collated and duly considered while preparing this Report.

Chapter Two

The relevant provisions of the Constitution of India, International Declarations/Covenants on Human Rights and their interpretation by the Supreme Court of India

Article 21 of the constitution of India declares that "no person shall be deprived of his life or personal liberty except according to procedure established by law". The heading of the said Article is "Protection of life and personal liberty". Article 20 contains three guarantees, namely, (a) not to be convicted of an offence which was not in force or punishable at the time of the commission of the offence, (b) not to be prosecuted or punished for the same offence more than once and (c) not to be compelled to be a witness against himself. These are all the rights guaranteed to a person accused of an offence. Clause (1) of Article 22 declares that "No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice". Clause (2) of Article 22 is indeed more fundamental. It says "Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of 24 hours of such arrest excluding the time necessary for the journey from the place of arrest to court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate".

Though Article 21 is worded in negative terms, it is well-established now that it has both a negative and an affirmative dimension. A Constitution Bench of the Supreme Court examined the content of the expression 'personal liberty' in Article 21 in Kharak Singh v. State of U.P. (1964 1 SCR 332 = AIR 1963 SC 1295). Rajagopala Ayyangar J., speaking for the majority, said:

> "We shall now proceed with the examination of the width, scope and content of the expression 'personal liberty' in Article 21…. We feel unable

> to hold that the term was intended to bear only this narrow interpretation but on the other hand consider that 'personal liberty' is used in the article as a compendious term to include within itself all the varieties of rights which go to make up the 'personal liberties' of man other than those dealt with in the several clauses of Article 19(1). In other words, while Article 19(1) deals with particular species or attributes of that freedom, 'personal liberty' in Article 21 takes in and comprises the residue."

The learned Judge quoted the dissenting opinion of Field, J. (one of those dissenting opinions which have outlived the majority pronouncements) in Munn v. Illinois ((1877) 94 US 113, 142) attributing a broader meaning to the word "life" in the fifth and fourteenth amendments to the US constitution, which correspond inter alia to Article 21 of our Constitution. The learned Judge held that the word 'personal liberty' would include the privacy and sanctity of a man's home as well as the dignity of the individual.

The minority opinion in the said decision, however, placed a more expansive interpretation on Article 21. They said:

> "No doubt the expression 'personal liberty' is a comprehensive one and the right to move freely is an attribute of personal liberty. It is said that the freedom to move freely is carved out of personal liberty and, therefore, the expression 'personal liberty' in Article 21 excludes that attribute. In our view, this is not a correct approach. Both are independent fundamental rights, though there is overlapping. There is no question of one being carved out of another. The fundamental right of life and personal liberty have many attributes and some of them are found in Article 19. If a person's fundamental right under Article 21 is infringed, the State can rely upon a law to sustain the action; but that cannot be a complete answer unless the said law satisfies the test laid down in Article 19(2) so far as the attributes covered by Article 19(1) are concerned."

In Maneka Gandhi v. Union of India (1978 (1) SCC 248 = AIR 1978 SC 597), Bhagwati J. held that the judgment in R.C. Cooper v. Union of India (AIR 1970 SC 564) has the effect of overruling the majority opinion and of approving the minority opinion in Kharak Singh.

In Bolling v. Sharpe, Warren, C.J. speaking for the U.S. Supreme Court observed:

> "Although the court has not assumed to define 'liberty' with any great precision, that term is not confined to mere freedom from bodily restraint. Liberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective."

These words, though spoken in the context of the US Bill of Rights, have yet been relied upon in various decisions of the Supreme Court of India.

In Maneka Gandhi v. UOI, a Constitution Bench of the Supreme Court went into the meaning of the expression "procedure established by law" in Article 21. The Court held that the procedure established by law does not mean any procedure but a procedure which is reasonable, just and fair. In fact Article 19 and Article 14 were both read into Article 21 for this purpose. The following dicta from the said decision bears reproduction:

> "the law must therefore now be taken to be well-settled that Article 21 does not exclude Article 19 and that even if there is a law prescribing a procedure for depriving a person of 'personal liberty' and there is consequently no infringement of the fundamental right conferred by Article 21, such law, insofar as it abridges or takes away any fundamental right under Article 19 would have to meet the challenge of that Article…. Now, if a law

depriving a person of 'personal liberty' and prescribing a procedure for that purpose within the meaning of Article 21 has to stand the test of one or more of the fundamental rights conferred under Article 19 which may be applicable in a given situation, ex-hypothesi it must also be liable to be tested with reference to Article 14…. There can be no doubt that it (Article 14) is a founding faith of the Constitution. It is indeed the pillar on which rests securely the foundation of our democratic republic…. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic, while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14. Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence and the procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Article 14. It 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."

(emphasis added)

Several jurists have opined, not without justification, that the effect of Maneka Gandhi is to practically import the concept of 'due process of law' from the American Constitution into our jurisprudence. Be that as it may, the fact remains that the procedure established by law which affects the liberty of a citizen must be right, just and fair and should not be arbitrary, fanciful or oppressive and that a procedure which does not satisfy the said test would be violative of Article 21. We have to examine the relevant provisions in the Criminal Procedure Code, 1973 (relating to arrest) from the above standpoint.

The concept of 'human rights' is not of recent origin. The expression was first employed in the Declaration of United Nations signed by the Allied Powers on January 1, 1942. The concept owes its origin, in western thought, to the Bill of Rights, 1689 which declared for the first time that "excessive bail ought not to be required nor excessive fine imposed, nor cruel and unusual punishment inflicted". The French Declaration on the Rights of Man and the Citizen also spoke of "freedom from arrest except in conformity with the law", in addition to "liberty, property, security and resistance to oppression" which were declared to be the natural and inalienable rights of man. The first ten amendments to U.S. Constitution effected in 1791, speak of all the above concepts and more. The Declaration of United nations dated January 1, 1942 stated, inter alia, "complete victory over their enemies is essential to defend life, liberty, independence and religious freedom and to preserve human rights and justice in their own lands as well as in other lands". The several articles of the UN Charter speak of respect for human rights and fundamental freedoms for all without distinction as to race, sex or religion. The Universal Declaration of Human Rights adopted by the General Assembly of the United Nations on December 10, 1948 declared that no one shall be subject to arbitrary arrest, detention or exile (Article 9). Article 12 provided that the privacy, reputation and honour of every individual shall be protected by the State. Article 9(1) of the International Covenant on Civil and Political Rights 1966 declares, inter alia, that "every one has the right to liberty and security of person (and that) no one shall be subject to arbitrary arrest or detention". Clause (3) of Article 9 declares further that "any one arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that the persons awaiting trial shall be detained in custody but release may be subject to guarantees to appear for trial at any stage of the judicial proceedings and, should occasion arise, for execution of the judgment". Article 10(1) of the Covenant declares that "all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person". Article 17 says that the privacy, honour and

reputation of an individual shall not be interfered with unlawfully. Article 2(2) of the Covenant creates an obligation upon the ratifying States to enact domestic legislation to give effect to the rights guaranteed by the Covenant. Article 3 creates a further obligation upon such States to ensure that the rights guaranteed by the Covenant are made available to all their citizens.

India ratified the 1966 Covenant on April 10, 1979.

A question may arise - what is the effect of the international covenants or agreements signed and ratified by India. Are they enforceable in Indian courts? Can the citizens of this country seek to found any rights on the provisions of, say, the ICCPR, 1966 and have them enforced through courts? The position in this behalf is this: Treaties, agreements and covenants signed and ratified by the Government of India do not automatically become a part of our domestic law. Unless and until the Parliament or the State Legislature undertakes legislation in terms of such agreements or covenants, no one can rely upon the provisions of the agreement/covenant to claim or found any rights thereon. But so far as human rights are concerned, the courts have been adopting a more progressive line and have declared that insofar as the rights declared in such international instruments are consistent with the fundamental rights guaranteed by Part Three of the Constitution, they can be read as facets of and to elucidate the content of the fundamental rights guaranteed by our Constitution vide PUCL v. UOI (1997 SC 1203) and Vishakha v. State of Rajasthan (1997 (6) SCC 241). In the first mentioned case, it is held: "For the present, it would suffice to state that the provisions of the covenant, which elucidate and go to effectuate the fundamental rights guaranteed by our Constitution, can certainly be relied upon by Courts as facets of those fundamental rights and hence, enforceable as such". To the same effect is the holding in the second case, where it is held: "Any international convention not inconsistent with the Fundamental Rights and in harmony with its spirit must be read into these provisions to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee".

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Chapter Three

Relevant provisions of the Cr.P.C. and their interpretation by the courts

Chapter five of the Code of Criminal Procedure, 1973 deals with the arrest of persons. Section 41 is the main section providing for situations when Police may arrest without warrant. It reads as follows:

> "41. When police may arrest without warrant.- (1) Any police officer may without an order from a Magistrate and without a warrant, arrest any person-
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> a) 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; or
> b) who has in his possession without lawful excuse, the burden of proving which excuse shall lie on such person, any implement of house-breaking; or
> c) who has been proclaimed as an offender either under this Code or by order of the State Government; or
> d) in whose possession anything is found which may reasonably be suspected to be stolen property and who may reasonably be suspected of having committed an offence with reference to such thing; or
> e) who obstructs a police officer while in the execution of his duty, or who has escaped, or attempts to escape, from lawful custody; or
> f) who is reasonably suspected of being a deserter from any of the Armed Forces of the Union; or
> g) who has been concerned in, or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists, of his having been concerned in, any act committed at

any place out of India which, if committed in India, would have been punishable as an offence, and for which he is, under any law relating to extradition, or otherwise, liable to be apprehended or detained in custody in India; or

h) who, being a released convict, commits a breach of any rule made under sub-section (5) of section 356; or

i) for whose arrest any requisition, whether written or oral, has been received from another police officer, provided that the requisition specifies the person to be arrested and the offence or other cause for which the arrest is to be made and it appears therefrom that the person might lawfully be arrested without a warrant by the officer who issued the requisition.

(2) Any officer in charge of a police station may, in like manner, arrest or cause to be arrested any person, belonging to one or more of the categories of persons specified in section 109 or section 110."

Section 42 specifies yet another situation where a police officer can arrest a person. According to this section if a person commits an offence in the presence of a police officer or where he has been accused of committing a non-cognizable offence and refuses, on demand being made by a police officer to give his name and residence or gives false name or residence, such person may be arrested but such arrest shall be only for the limited purpose of ascertaining his name and residence. After such ascertaining, he shall be released on executing a bond with or without sureties, to appear before a magistrate if so required. In case the name and residence of such person cannot be ascertained within 24 hours from the date of arrest or if such person fails to execute a bond as required, he shall be forwarded to the nearest magistrate having jurisdiction.

Section 43 speaks of a situation where an arrest can be made by a private person and the procedure to be followed on such arrest. Section 44 deals with arrest by a magistrate – whether judicial or executive – of a person who has

committed an offence in his presence; the magistrate can either arrest the person himself or direct another person to do so. Section 45 protects the members of the Armed Forces from being arrested under sections 41 to 44, except after obtaining the consent of the Central Government. Sub-section (2) of this section empowers the State Governments to apply the provision in sub-section (1) to such members of the Force charged with maintenance of law and order, as may be specified in the Notification. Section 46 sets out the manner in which the arrest should be made. It says that the arresting officer "shall actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by word or action". The section further says that if such person resists the arrest or attempts to evade the arrest, the police officer "may use all means necessary to effect the arrest". Section 47 enables the police officer to enter a place if he has reason to believe that the person to be arrested has entered into that place or is within that place. The owner/occupier of such place is placed under an obligation to provide all reasonable facilities for search. If necessary, the police officer can break open doors/windows etc. for obtaining entry even without a warrant. Section 48 empowers the police officers to pursue a person, whom they are authorized to arrest without warrant, into any place in India beyond their jurisdiction. Section 49 however provides that "the person arrested shall not be subjected to more restraint than is necessary to prevent his escape". Section 50 (which corresponds to clause (1) of Article 22 of the Constitution) creates an obligation upon the police officer to communicate to the person arrested full particulars of the offence for which he is arrested or other grounds for such arrest forthwith. It also provides that where a person is arrested for a bailable offence, without a warrant, the police officer shall inform the person arrested that he is entitled to be released on bail and that he may arrange for sureties on his behalf. This section (and section 436) recognize the power of the police to arrest a person without a warrant in case of bailable offence. Of course, it follows from the definition of "cognizable offence" and of "non-cognizable offence" in clauses (c) and (l) respectively of section 2 that such bailable offence has to be a cognizable offence. In other words, no arrest (without warrant) can be made by the police of a person accused of a bailable offence unless

it is a cognizable offence. Section 51 provides for search of arrested person, whether arrested under a warrant or otherwise, preparing a list of articles found on such person and giving a receipt to him therefor. Section 52 empowers the police officer to seize offensive weapons from the arrested person. The weapons seized shall be produced along with the person before the magistrate or other competent officer. Section 53 empowers the police officer to direct medical examination of an arrested person if he has reasonable grounds to believe that such examination will afford evidence as to commission of an offence. Such medical examination shall have to be made only by a "registered medical practioner"; in case of a woman, such examination has to be done only by a female registered medical practitioner. Section 54 gives a corresponding right to the arrested person to request the magistrate before whom he is produced to direct his medical examination, if such examination "will afford evidence which will disprove the commission by him of any offence or which will establish the commission by any other person of any offence against his body". (Evidently, this includes a request for medical examination of his body, by the accused, where he alleges ill-treatment at the hands of the police.) If such a request is made, the magistrate is bound to order such examination. Section 55 prescribes the procedure to be followed when a police officer deputes his subordinate to arrest a person without warrant. Sections 56 and 57 (which correspond to clause (2) of Article 22 of the Constitution), provides that the person arrested shall not be kept in the custody of a police officer for a longer period than is reasonable and that in any event such period shall not exceed 24 hours exclusive of the time necessary for the journey from the place of arrest to the magistrate's court. Of course if the magistrate permits the police officer to keep such person in his custody, he can do so beyond the period of 24 hours. Section 58 casts an obligation upon the officers in charge of police station to report to the District Magistrate of arrests made without warrant within their jurisdiction and of the fact whether such persons have been admitted to bail or not. Section 59 says that no person arrested by a police officer shall be discharged except on his own bond or bail or under the special order of a magistrate. Section 60, which is the last

section in the chapter, empowers the person having the lawful custody to pursue and retake the arrested person if he escapes or is rescued from his custody.

The other relevant and important provisions in this behalf are contained in Chapter Eleven – Preventive Action of the Police. Section 149 says that "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". Section 150 says that every police officer receiving information of a design to commit any cognizable offence shall communicate such information to the police officer to whom he is subordinate and to any other officer whose duty it is to prevent or to take cognizance of the commission of any such offence. Section 151 is an important provision and confers a very vast power upon the police officers. Sub-section (1) of section 151 says that "A police officer knowing of a design to commit any cognizable offence may arrest, without orders from a magistrate and without a warrant, the person so designing if it appears to such officer that the commission of the offence cannot be otherwise prevented". Sub-section (2) says that "no person arrested under sub-section (1) shall be detained in custody for a period exceeding 24 hours from the time of his arrest unless his further detention is required or authorized under any other provisions of this Code or of any other law for the time being in force". Section 152 is another important provision, particularly in the present-day context, where on the slightest pretext, people attack and damage public property like buses, railway property and other public properties. The section empowers a police officer to interpose, of his own authority, to prevent any injury attempted to be committed in his view to any public property, movable or immovable, or the removal or injury of any public landmark or buoy or other mark used for navigation. Section 153 confers power upon the police officers to inspect weights and measures and to take proper action in that behalf.

Chapter Twelve of the Code also contains certain provisions relevant in this behalf. Section 154 creates an obligation upon an officer in charge of a police

station to record every information received by him relating to the commission of a cognizable offence. If he refuses to so record, the person giving the information can send the same by post to the Suprintendent of Police who shall, if satisfied that such information discloses the commission of a cognizable offence, either investigate the case himself or direct an investigation to be made by a police officer subordinate to him. Section 155 deals with information regarding non-cognizable cases and the further steps to be taken by the police officer in that behalf. Section 156 deals with the police officer's power to investigate cognizable cases. Sub-section (1) says that "Any officer in charge of a police station may without the order of a magistrate, investigate any cognizable case which a court having jurisdiction over the local area within the limits of such station, would have power to inquire into or try under the provisions of chapter 13". Sub-section (2) says at the same time that "No proceeding of a police officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this section to investigate". Sub-section (3) empowers the magistrate empowered under section 190 to order investigation into a cognizable offence. Section 157 – 'Procedure for investigation' - prescribes the procedure which should be followed during the course of investigation. It says that if the officer in charge of a police station receives information of the commission of an offence which he is empowered to investigate under section 156 and if he has reason to believe the said information, he shall send a report of the same to the concerned magistrate and shall proceed to the spot to investigate the facts and circumstances of the case and "if necessary to take measures for the discovery and arrest of the offender". He is also empowered to depute one of his subordinate officers for the purpose instead of going himself.

Two other provisions of the Code of Criminal Procedure which require to be noticed, in view of the fact that they are referred to in sub-section (2) of section 41, are sections 109 and 110. Section 109 provides for an Executive Magistrate calling upon a person to show cause why he should not be directed to execute a bond with or without sureties for his good behaviour for a period not exceeding one

year, if he believes on the basis of information received by him, that the person is "taking precautions to conceal his presence…. with a view to committing a cognizable offence". Section 110 empowers the Executive Magistrate to call upon a person to show cause why he should not be ordered to execute a bond with sureties, for his good behaviour for a period not exceeding three years if he receives information that the person is a habitual offender. (Section 110 mentions the nature of offences as well.) After due inquiry, orders have to be passed under section 117.

In a number of sections referred to hereinabove, the expression "cognizable offence" occurs frequently. What is a "cognizable offence"? one may ask. The expression is defined in clause (c) of section 2 in the following words: " "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". A few more definitions may also be noted. "Bailable offence" and "non-cognizable offence" are defined in clauses (a) and (l), respectively as follows: "Bailable offence" means an offence which is shown as bailable in the First Schedule, or which is made bailable by any other law for the time being in force; and "non-bailable offence" means any other offence". ""Non-cognizable offence" means an offence for which, and "non-cognizable case" means a case in which, a police officer has no authority to arrest without warrant"". The Schedule to the Code contains a table indicating which of the several offences in the Indian Penal Code, 1860, are cognizable or non-cognizable and which of them are bailable or non-bailable.

Pausing here for a moment, we may notice the basis/criteria upon which the offences in IPC have been categorized into cognizable and non-cognizable. Cognizability in the Code is <u>not</u> premised upon the quantum of punishment prescribed or the gravity of the crime but upon the need to arrest the person immediately for one or the other relevant purposes viz., to prevent the person from committing further offences, the need to reassure the public that they can feel

reassured about the effectiveness of the law and order machinery, the need of investigation and may be, in some instances, the need to protect the offender from the wrath of public and so on. It is for this reason that a close nexus is maintained between cognizability and arrestability. So far as the other categorization viz., between bailable and non-bailable offences, is concerned, it appears by and large to be based upon the gravity of the offence (which necessarily means the quantum of punishment prescribed therefor) and the need to keep the offender incarcerated pending investigation and trial. This aspect has to be kept in mind in view of the oft-repeated criticism that the distinction between cognizable and non-cognizable offences as also the categorization between bailable and non-bailable offences is illogical and is not based upon any consistent or acceptable logic.

It may be mentioned at this stage that the CrPC is not the only enactment providing for arrest of an individual. There are other enactments too. But the main enactment is the CrPC and the principles underlying are applicable to other statutes as well, subject to such modifications or special rules as may be provided in that behalf by such other enactment.

The aforementioned review of the relevant provisions of the Code discloses conferment of a vast, sometimes absolute and on some other occasions, an unguided and arbitrary power of arrest upon police officers. Significantly, however, none of the provisions in the Code confers the power "to stop and search" a person (without arresting him first), which power is conferred upon them by enactments of some countries. Section 51 says that a police officer may search the person, after he is arrested and make a list of articles found upon him.

Arrest of a person without warrant and without an order from a magistrate seriously invades the liberty of a citizen and is indeed a grave matter. The normal protection which is available to a person when he is arrested under a warrant is not available in case of arrest without warrant. In case of arrest under a warrant, a judicial authority has applied his mind to the facts and circumstances of the case

and has thought it fit to direct that the person be arrested, whereas in the case of an arrest without warrant by the Police, the matter rests more in the realm of the police officer's subjective satisfaction. As far back as 1952, a Constitution Bench of the Supreme Court referred to this aspect in State of Punjab v. Ajaib Singh (AIR 1953 SC page 10). The following observations of the Supreme Court are relevant. (The reference in the judgment is to the provisions of the Code of Criminal Procedure, 1898, then in force.):

> "Broadly speaking, arrests may be classified into two categories, namely, arrests under warrants issued by a Court and arrests otherwise than under such warrants. As to the first category of arrest, Ss.75 to 86 collected under sub-heading "B-Warrant of Arrest" in chap.5, Criminal P.C., deal with arrests in execution of warrants issued by a Court under that Code. Section 75 prescribes that such a warrant must be in writing signed by the presiding officer…. Form No.2 of sch.5 to the Code is a form of warrant for the arrest of an accused person. The warrant quite clearly has to state that the person to be arrested stands charged with a certain offence. Form No.7 of that Schedule is used to bring up a witness. The warrant itself recites that the Court issuing it has good and sufficient reason to believe that the witness will not attend as a witness unless compelled to do so. The point to be noted is that in either case the warrant ex facie sets out the reason for the arrest, namely, that the person to be arrested has committed or is suspected to have committed or is likely to commit some offence. In short, the warrant contains a clear accusation against the person to be arrested."

The Court then referred to the provisions under sub-heading 'B-Arrest Without Warrant' in chapter five of the provisions of Code of 1898 and then made the following observations:

> "There can be no manner of doubt that arrests without warrants issued by a Court call for greater protection than do arrests under such warrants. The

provision that the arrested person should within 24 hours be produced before the nearest Magistrate is particularly desirable in the case of arrest otherwise than under a warrant issued by the Court, for it ensures the immediate application of a judicial mind to the legal authority of the person making the arrest and the regularity of the procedure adopted by him. In the case of arrest under a warrant issued by a Court, the judicial mind had already been applied to the case when the warrant was issued and, therefore, there is less reason for making such production in that case a matter of a substantive fundamental right. It is also perfectly plain that the language of Art.22 (2) has been practically copied from ss.60 and 61, Criminal P.C. which admittedly prescribe the procedure to be followed after a person has been arrested without warrant. The requirement of Art.22(1) that no person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest indicates that the clause really contemplates an arrest without a warrant of Court, for, as already noted, a person arrested under a Court's warrant is made acquainted with the grounds of his arrest before the arrest is actually effected." (emphasis added)

As a matter of fact, the wide and extensive power conferred upon the police officers to arrest a person without warrant by the provisions contained in the present Code and its predecessor has been troubling the courts for more than 100 years. The courts have been saying that before arresting a person without warrant, the police officer must form an opinion that the facts or information before him call for the exercise of the power under section 41(1)(a). They have been holding repeatedly that arrests under chapter five are not to be made capriciously and that the power must be governed by and must be exercised in accordance with the rules and principles of the Code and that there must be proper justification for every arrest. (It must be remembered that the expression "police officer" in chapter five includes even a police constable.) While saying that every arrest under this chapter must be justified and must be based upon a reasonable belief of the police

officer that in the light of the facts and information before him the arrest of the person is called for, the courts have said, at the same time, that it is the police officer who has to make this judgment.

The question is, whether any remedy is available to a person who has been subjected to an unjustified or unlawful arrest?

The answer is: Theoretically yes, but practically none. We may proceed to explain:

If a person is illegally arrested or is arrested without any justification whatsoever or where the arrest is proved to be mala fide or actuated by extraneous considerations, the police officer concerned can be prosecuted for wrongful confinement of that person which is an offence under section 342 of the Indian Penal Code; if the wrongful confinement is for three or more days it is section 343 and in case it is for ten days or more, it would be section 344. Sections 343 and 344 are aggravated forms of the offence specified in section 342. Here again if the police officer who arrested the person is an officer who is "not removable from his office save by or with the sanction of the government", he cannot be prosecuted for such act except with the previous sanction of the concerned government. The said protection is provided by section 197 of the Criminal Procedure Code. The protection no doubt applies where the offence is "alleged to have been committed by him (public servant) while acting or purporting to act in discharge of his official duty". The meaning and interpretation of these words have led to a good amount of controversy. On one hand the argument is that since committing an offence is no part of official duty of any public servant, previous sanction is not necessary for prosecuting a public servant, say a police officer, for the offence under sections 342/343/344. The contrary reasoning is that if the aforesaid interpretation is placed, the very protection provided by section 197 becomes meaningless and that therefore so long as the alleged offence is committed by the public servant while purporting to act in discharge of his official duty, the protection avails. Leaving

aside this legal controversy, the fact of the matter is that the government very rarely grants the previous sanction for prosecution of a police officer for the offence of wrongful confinement. In any event, the arrest is effected in a large majority of the cases by the police officers of lower ranks, who are removable from their office without the sanction of the government. In the case of such lower level officers, the protection of section 197 is not available and they can be prosecuted for wrongful confinement in case of an illegal or unwarranted arrest, as stated above, but such a prosecution is an impracticable proposition. If a police officer is so prosecuted, whether he is a police constable or sub-inspector or inspector, the whole police force, barring rare exceptions, would not only try to protect the officer but would also harass the complainant in several ways so as to compel him to withdraw it. It is this fear and apprehension, which cannot be said to be unfounded, which constitutes the reason for almost a total absence of such prosecutions of police officers. Notwithstanding the fact that a good number of arrests made are not lawful, no person ordinarily dares to challenge the might of the police department.

It is true that in case a police officer exercises his powers illegally or for oblique reasons he can be proceeded against departmentally (by way of disciplinary proceedings) and appropriate punishment can be imposed upon him. But such proceedings too are few and far in between. Only where the number of arrests are large, and totally arbitrary and illegal, and the human rights groups or political parties take up the cause of the victims, such a course would be adopted; otherwise the probability of such action is very little. In any event, the victim will not be a party to such disciplinary proceedings; he can only be a witness. The conduct of the disciplinary case will be in hands of the department. The complainant/victim has no control over the course of proceedings. It is said that in the 1990s, a good number of police officers were dismissed from service in Punjab, invoking proviso (c) to clause (2) of Article 311 of the Constitution of India but those dismissals were not for mere wrongful arrests but for much greater crimes, e.g., murders in police custody, fake encounters, cold-blooded murders and so on.

It is true that section 7 of the Police Act, 1861 (which Act is continuing in force by virtue of Article 372 of the Constitution) provides for dismissal, suspension or reduction in rank "of any police officer of the subordinate ranks whom they (the higher officials) shall think remiss or negligent in the discharge of his duties or unfit for the same". (Subordinate ranks of police force means officers below the rank of Deputy Superintendent of Police). Section 7 also provides for imposition of fine not exceeding one month's pay, confinement to quarters for a term not exceeding 15 days in case of a police officer of the subordinate rank performing the duties "in a careless or negligent manner or who by any act of his own shall render himself unfit for the discharge thereof (discharge of his duty) …." But it is a matter of common knowledge that action under this section is very rarely taken.

So far as the civil remedy of damages in torts for a wrongful arrest is concerned, the position is lot more gloomy. The law concerning claims for damages for tortious acts of government and its officers in India has been vitiated by the dual character of the East India Company which once ruled this country, i.e., of being both a ruler and a trader. The Government of India Act, 1858, the Government of India Act, 1919 and the Government of India Act, 1935, continued this dual character. These Acts provided that the liability of the Government of India in such matters shall be the same as was obtaining immediately prior to these Acts, which really means the dual character of the East India Company. Unfortunately, even Article 300 of our Constitution too has continued the same position. Article 300 reads as follows:

> "300. Suits and proceedings- (1) The Government of India may sue or be sued by the name of the Union of India and the Government of a State may sue or be sued by the name of the State and may, <u>subject to any provisions which may be made by Act of Parliament or of the Legislature of such State enacted by virtue of powers conferred by this Constitution</u>, sue or be sued in

relation to their respective affairs in the like cases as the Dominion of India and the corresponding Provinces or the corresponding Indian States might have sued or been sued if this Constitution had not been enacted.

(2) If at the commencement of this Constitution-

(a) any legal proceedings are pending to which the Dominion of India is a party, the Union of India shall be deemed to be substituted for the Dominion in those proceedings; and

(b) any legal proceedings are pending to which a Province or an Indian State is a party, the corresponding State shall be deemed to be substituted for the Province or the Indian State in those proceedings."

While we do not propose to expatiate upon the meaning and implications flowing from the said article, it may be necessary to examine the position with reference to police officials. The duties of the police officers are to maintain law and order and public order. This function is relatable to sovereign functions of the State; if so there is a total immunity in favour of the State against any action for damages for wrongful confinement. (We are proceeding on the assumption that a civil suit will be filed against the State for damages and not against the individual police officer; this assumption is made for the reason that a suit for damages against an individual police officer would not give satisfaction to the claimant even if he succeeds because of the difficulties in execution; it is for this reason that such suits are filed against the State as such, whether Central or State, inasmuch as State is the master of such police officers and is vicariously liable for the acts of their servants.) We may refer to the decision of the Supreme Court in Kasturi Lal v. State of U.P. (AIR 1965 SC 1039). The facts of the case are interesting. The plantiff was arrested by the police officers in UP on suspicion of possessing stolen property. On search of his person, a large quantity of gold was seized under the provisions of the Code of Criminal Procedure. Ultimately he was found not guilty but the seized gold was not returned to him inasmuch as the head-constable in charge of the 'malkhana' (property room) had absconded with valuable properties

stored therein including the gold seized from the plantiff. When the plantiff brought a suit for the return of the gold or in the alternative for its value, the State set up the defence of sovereign immunity. It contended that inasmuch as the seizure of the gold from the plantiff was in discharge of their official duties by the police officers conferred upon them by the Code of Criminal Procedure, the acts of the police officers pertain to the sovereign powers of the State. On the basis of the evidence adduced before the court, it was found even by the Supreme Court that the manner in which the gold seized from the plantiff was dealt with at the 'malkhana' showed gross negligence on the part of the police officers and that the loss suffered by the plantiff was due to the negligence of police officers of the State. Yet, it was held that since the act of negligence was committed by the police officers while dealing with the property of the plantiff which they had seized in exercise of their statutory powers and since the power to arrest a person, to search him and to seize property found with him are powers conferred upon the specified officers by the statute, their powers must be properly categorized as sovereign powers. If so, the Supreme Court held, the suit for damages against the State must fail because of the position flowing from Article 300 of the Constitution of India which continues the pre-constitutional position in the matter of liability of the Government of India or the government of a State in relation to their respective affairs. Accordingly, the suit was dismissed. The Supreme Court however recognized the inequity inherent in the said position and accordingly made observations recommending to the State to make a law (as contemplated by article 300 itself – underlined portion) defining the liability of the State in such matters. Unfortunately, the State has not moved in the matter so far though more than 36 years have passed by since then.

In a later decision rendered by a two-judge Bench of the Supreme Court in N. Nagendra Rao v. State of A.P. (AIR 1994 SC 2663), observations have been made as to the inequity inherent in the situation now obtaining under Article 300 and also upon the inaction of the State (Parliament/State Legislatures) to enact a law in that behalf. Yet it being a two-judge Bench, it has not purported to, nor

could it, overrule the decision in Kasturi Lal, which is a decision rendered by a Constitution Bench of five-judges.

In this context, we must refer to a recent innovative trend being adopted by courts. (a) In Challa Ramakrishna Reddy v. State of A.P. (1989 AP 235), the A.P. High Court held that where the fundamental right of a citizen is violated, the plea of sovereign immunity would not be available. This decision has since been affirmed by the Supreme Court in AIR 2000 SC 2083 (State of A.P. v. Challa Ramakrishna Reddy). (b) In cases of fake encounters and custodial deaths, the Supreme Court and the High courts have been awarding token, ad hoc amounts towards damages in proceedings under article 32/226 of the Constitution of India, leaving the aggrieved parties to a suit for damages where the proper damages awardable would be determined. This is undoubtedly a heartening trend but in present-day Indian conditions, a suit for damages against the State for police excesses is still a rarity.

It is for all the above reasons that we had mentioned earlier that the remedy available to a citizen for a wrongful or unjustified arrest is practically nil, though theoretically it is available in law.

The everyday situation is that wherever the arrest is found to be illegal, unwarranted or unjustified, the man is set free, may be sometimes unconditionally. But that is all that happens. Nothing happens to the police officer who has unlawfully or unjustifiably interfered with the liberty of a citizen and/or has wrongfully confined the person, whether in police custody or elsewhere. This position has indeed emboldened some police officers to abuse their position and harass citizens for various oblique reasons. They feel secure in their knowledge that any wrongful or illegal act on their behalf would not affect them, their careers or their prospects in service; all that would happen is, the person arrested would be let off by the courts. It is this situation which has also got to be remedied. (Some sanction, some liability, some punishment has to be provided for a police officer

who deprives a person of his liberty mala fide or for oblique reasons. Of course, merely because a person arrested is not prosecuted or is not convicted, it does not necessarily mean that the arrest was illegal or mala fide. But where the court finds the arrest to be wholly unjustified or an instance of abuse of power, the court must have the power to make appropriate orders against such police officer, either suo motu or on the application of the person so arrested unlawfully. Indeed, an obligation should be placed upon the court to make such orders wherever the arrest is found to be illegal, wholly unjustified or an instance of abuse of power.)

It appears that the National Commission for Reviewing the Working of the Constitution has issued a Consultation Paper on the subject of State liability in tort – which is, of course, only a minor aspect of the problem. Even so, it may be hoped that some concrete suggestions would emanate from that Commission to redress and rectify the unhappy and wholly inequitable position now obtaining by virtue of Article 300 of the Constitution and would persuade the Parliament/State Legislatures to enact a law clarifying the legal position in this behalf as indeed contemplated by Article 300 itself.

Important decisions of the Supreme Court concerning Law relating to Arrest

The effort of the courts, and in particular of the Supreme Court over the last more than two decades has been to circumscribe the vast discretionary power vested by law in Police by imposing several safeguards and to regulate it by laying down numerous guidelines and by subjecting the said power to several conditionalities. The effort throughout has been to prevent its abuse while leaving the police free to discharge the functions entrusted to it by law. While it is not necessary to refer to all of them for the purpose of this Report, it would be sufficient if we refer to a few of them (which indeed reaffirm and recapitulate the directions and guidelines contained in earlier decisions). In Joginder Kumar v. State of U.P. (AIR 1994 SC 1349), the power of arrest and its exercise has been

dealt with at length. It would be appropriate to refer to certain perceptive observations in the judgment:

> "The horizon of human rights is expanding. At the same time, the crime rate is also increasing. Of late, this court has been receiving complaints about violation of human rights because of indiscriminate arrests. How are we to strike a balance between the two?
>
> A realistic approach should be made in this direction. The law of arrest is one of balancing individual rights, liberties and privileges, on the one hand, and individual duties, obligations and responsibilities on the other; of weighing and balancing the rights, liberties and privileges of the single individual and those of individuals collectively; of simply deciding what is wanted and where to put the weight and the emphasis; of deciding which comes first – the criminal or society, the law violator or the law abider; of meeting the challenge which Mr. Justice Cardozo so forthrightly met when he wrestled with a similar task of balancing individual rights against society's rights and wisely held that the exclusion rule was bad law, that society came first, and that the criminal should not go free because the constable blundered.
>
> "The quality of a nation's civilisation can be largely measured by the methods it uses in the enforcement of criminal law."
>
> This court in Smt. Nandini Satpathy v. P.L. Dani AIR 1978 SC 1025 at page 1032, quoting Lewis Mayers, stated:
>
> "To strike the balance between the needs of law enforcement on the one hand and the protection of the citizen from oppression and injustice at the hands of the law-enforcement machinery on the other is a perennial problem of statecraft." The pendulum over the years has swung to the right.
>
> Again in para 21, at page 1033, it has been observed:
>
> "We have earlier spoken of the conflicting claims requiring reconciliation. Speaking pragmatically, there exists a rivalry between societal interest in

effecting crime detection and constitutional rights which accused individuals possess. Emphasis may shift, depending on circumstances, in balancing these interests as has been happening in America. Since Miranda ((1966) 334 US 436) there has been retreat from stress on protection of the accused and gravitation towards society's interest in convicting law-breakers. Currently, the trend in the American jurisdiction according to legal journals is that 'respect for (constitutional) principles is eroded when they leap their proper bounds to interfere with the legitimate interests of society in enforcement of its laws…. (Couch v. United States (1972) 409 US 322, 336). Our constitutional perspective has, therefore, to be relative and cannot afford to be absolutist, especially when torture technology, crime escalation and other social variables affect the application of principles in producing humane justice…."

The decision also refers to the recommendations of the National Police Commission, which are set out elsewhere in this Report.

The decision in Joginder Kumar proceeded to observe:

"The Royal Commission suggested restrictions on the power of arrest on the basis of the 'necessity of principle'. The two main objectives of this principle are that police can exercise powers only in those cases in which it was genuinely necessary to enable them to execute their duty to prevent the Commission of offences, to investigate crime. The Royal Commission was of the view that such restrictions would diminish the use of arrest and produce more uniform use of powers. The Royal Commission Report on Criminal Procedure – Sir Cyril Philips, at page 45 said:

"…. We recommend that detention upon arrest for an offence should continue only on one or more of the following criteria;

a) the person's unwillingness to identify himself so that a summons may be served upon him;

b) the need to prevent the continuation or repetition of that offence;

c) the need to protect the arrested person himself or other persons or property;

d) the need to secure or preserve evidence of or relating to that offence or to obtain such evidence from the suspect by questioning him; and

e) the likelihood of the person failing to appear at court to answer any charge made against him."*

The Royal Commission in the above-said Report at page 46 also suggested:

"To help to reduce the use of arrest we would also propose the introduction here of a scheme that is used in Ontario enabling a police officer to issue what is called an 'appearance notice'. That procedure can be used to obtain attendance at the police station without resorting to arrest provided a power to arrest exists, for example to be finger-printed or to participate in an identification parade. It could also be extended to attendance for interview at a time convenient both to the suspect and to the police officer investigating the case…."

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* Many of the recommendations of the Philips Committee, it may be mentioned, find place in the Police and Criminal Evidence Act, 1984 and the Codes of Practice issued thereunder, in U.K. Broadly speaking, the recommendations of the Philips Report can be summarized as saying that any new law governing police powers should meet the standards of "fairness", "openness" and "workability". Inter alia, the Report recommended a power of detention after arrest for the purpose of

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It would equally be relevant to quote para 24 of the said judgment, which reads as follows:

"The above guidelines are merely the incidents of personal liberty guaranteed under the Constitution of India. 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. The Police Officer must be able to justify the arrest apart from his power to do so. Arrest and detention in police lock-up of a person can cause incalculable harm to the reputation and self-esteem of a person. No arrest can be made in a routine manner on a mere allegation of commission of an offence made against a person. It would be prudent for a Police Officer in the interest of protection of the constitutional rights of a citizen and perhaps in his own interest that 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 to the person's complicity and even so as to the need to effect arrest. Denying a person of his liberty is a serious matter. The recommendations of the Police Commission merely reflect the constitutional concomitants of the fundamental right to personal liberty and freedom. A person is not liable to arrest merely on the suspicion of complicity in an offence. There must be some reasonable justification in the opinion of the officer effecting the arrest that such arrest is necessary and justified. Except in heinous offences, an arrest must be avoided if a police officer issues notice to person to attend the Station House and not to leave Station without permission would do."

The ultimate directions given, contained in paras 26 to 29, read as follows:

"These rights are inherent in Articles 21 and 22(1) of the Constitution and require to be recognized and scrupulously protected. For effective enforcement of these fundamental rights, we issue the following requirements:

1. An arrested person being held in custody is entitled, if he so requests to have one friend relative or other person who is known to him or likely to take an interest in his welfare told as far as is practicable that he has been arrested and where he is being detained.
2. The Police Officer shall inform the arrested person when he is brought to the police station of this right.
3. An entry shall be required to be made in the Diary as to who was informed of the arrest. These protections from power must be held to flow from Articles 21 and 22(1) and enforced strictly.

It shall be the duty of the Magistrate, before whom the arrested person is produced, to satisfy himself that these requirements have been complied with.

The above requirements shall be followed in all cases of arrest till legal provisions are made in this behalf. These requirements shall be in addition to the rights of the arrested persons found in the various Police Manuals.

These requirements are not exhaustive. The Directors General of Police of all the States in India shall issue necessary instructions requiring due observance of these requirements. In addition, departmental instruction shall also be issued that a police officer making an arrest should also record in the case diary, the reasons for making the arrest."

The next decision which may be usefully referred to is D.K. Basu v. State of West Bengal (AIR 1997 SC 610). The decision exhaustively referred to the law relating to arrest with reference to earlier decisions of the courts and finally issued the following directions (contained in paras 36 to 40). They read as follows:

"We, therefore, consider it appropriate to issue the following requirements to be followed in all cases of arrest or detention, till legal provisions are made in that behalf, as preventive measures:

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 be either 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 concerned State or Union Territory, 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 Ilaqa 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 police board.

Failure to comply with the requirements hereinabove mentioned shall apart from rendering the concerned official 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 requirements, referred to above flow from Articles 21 and 22(1) of the Constitution and need to be strictly followed. These would apply with equal force to the other governmental agencies also to which a reference has been made earlier.

These requirements are in addition to the constitutional and statutory safeguards and do not detract from various other directions given by the Courts from time to time in connection with the safeguarding of the rights and dignity of the arrestee.

The requirements mentioned above shall be forwarded to the Director General of Police and the Home Secretary of every State/Union Territory and it shall be their obligation to circulate the same to every police station under their charge and get the same notified at every police station at a conspicuous place. It would also be useful and serve larger interest to broadcast the requirements on the All India Radio besides being shown on the National Network of Doordarshan and by publishing and distributing pamphlets in the local language containing these requirements for information of the general public. Creating awareness about the rights of the arrestee would in our opinion be a step in the right direction to combat the evil of custodial crime and bring in transparency and accountability. It is hoped that these requirements would help to curb, if not totally eliminate, the use of questionable methods during interrogation and investigation leading to custodial commission of crimes."

It is a matter of debate, whether all these directions and guidelines have improved the situation, particularly in rural India and where the citizens concerned are poor, illiterate and helpless.

Chapter Four

Previous recommendations on the subject by Law Commission of India and other bodies

The power to arrest without warrant vested in police by the Code has been engaging the attention of the Law Commission and the National Police Commission over the last several years. It would be appropriate to refer to them at this stage.

In its 152nd Report on Custodial Crimes (1994), the Law Commission examined this issue in the context of custodial crimes and recommended insertion of a few pertinent new provisions in the Code. It recommended that after sub-section (1) of section 41, a new sub-section, (1A), may be introduced to the following effect:

> "41(1A) A police officer arresting a person under clause (a) of sub-section (1) of this section must be reasonably satisfied, and must record such satisfaction, relating to the following matters:
>
> (a) the complaint, information or suspicion referred to in that clause, is not only in respect of a cognizable offence having been committed, but also in respect of the complicity of the person to be arrested, in that offence;
>
> (b) arrest is necessary in order to bring the movements of the person to be arrested under restraint, so as to inspire a sense of security in the public or to prevent the person to be arrested from evading the process of the law or to prevent him from committing similar offences or from indulging in violent behaviour in general."

The second suggestion was to insert a new section, 41A, in the light of the decision of the Supreme Court in Joginder Kumar. The new section suggested was to the following effect:

> "41A. Notice of appearance – Where the case falls under clause (a) of sub-section (1) of section 41, the police officer may, instead of arresting the person concerned, issue to him a notice of appearance requiring him to appear before the police officer issuing the notice or at such other place as may be specified in the notice and to cooperate with the police officer in the investigation of the offence referred to in clause (a) of sub-section (1) of section 41.
>
> (2) Where such a notice is issued to any person, it shall be the duty of that person to comply with the terms of that notice.
>
> (3) Where such person complied and continues to comply with the notice, he shall not be arrested in respect of the offence referred to in the notice unless, for reasons to be recorded, the police is of the opinion that he ought to be arrested.
>
> (4) Where such person, at any time, fails to comply with the terms of the notice, 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."

The third suggestion in the 152nd Report of the Law Commission was to insert a new section, 50A, to the following effect:

> "50A. (1) whenever a person is arrested by a police officer, intimation of the arrest shall be immediately sent by the police officer (along with intimation about the place of detention) to the following person:
>
> (a) a relative or friend or other person known to the arrested person, as may be nominated by the arrested person;
>
> (b) failing (a) above, the local legal aid committee.

(2) Such intimation shall be sent by telegram or telephone, as may be convenient, and the fact that such intimation has been sent shall be recorded by the police officer under the signature of the arrested person.

(3) The police officer shall prepare a custody memo and body receipt of the person arrested, duly signed by him and by two witnesses of the locality where the arrest has been made, and deliver the same to a relative of the person arrested, if he is present at the time of arrest or, in his absence, send the same along with the intimation of arrest to the person mentioned in (1) above.

(4) The custody memo referred to in (3) above shall contain the following particulars:

(i) name of the person arrested and father's name or husband's name;

(ii)address of the person arrested;

(iii)date, time and place of arrest;

(iv)offence for which the arrest has been made;

(v) property, if any, recovered from the person arrested and taken into charge at the time of the arrest; and

(vi)any bodily injury which may be apparent at the time of arrest.

(5) During the interrogation of an arrested person, his legal practitioner shall be allowed to remain present.

(6) The police officer shall inform the person arrested, as soon as he is brought to the police station, of the contents of this section and shall make an entry in the police diary about the following facts:

(a) the person who was informed of the arrest;

(b) the fact that the person arrested has been informed of the contents of this section; and

(c) the fact that a custody memo has been prepared, as required by this section."

The fourth recommendation pertained to introduction of a new section, section 57A, in the following terms:

"57A. Duty of Magistrate to verify certain facts.

When a person arrested without warrant is produced before the Magistrate, the Magistrate shall, by inquiries to be made from the arrested person, satisfy himself that the provisions of sections… have been complied with (sections relating to safeguards in connection with arrest, rights on arrest, etc. to be entered) and also inquire about, and record, the date and time of arrest."

In their 135th Report on Women in Custody, the Law Commission had recommended a new section 450B with respect to arrest of women. The suggested new section was to the following effect:

"450B. Arrest of women.- (i) Where a woman is to be arrested under this Code, then unless the circumstances indicate to the contrary, her submission to custody on an oral intimation of arrest shall be presumed, and unless the circumstances otherwise require or unless the police officer arresting is a female, the police officer shall not actually touch the person of the woman for making her arrest.

(ii) Except in unavoidable circumstances, no woman shall be arrested after sunset and before sunrise, and where such unavoidable circumstances exist, the police officer shall, by making a written report, obtain the prior permission of the immediate superior officer not below the rank of an Inspector for effecting such arrest or, if the case is one of extreme urgency, he shall, after making the arrest, forthwith report the matter in writing to his such immediate superior officer, with the reasons for arrest and the reasons for not taking prior permission as aforesaid and shall also make a similar report to the Magistrate within whose legal jurisdiction the arrest has been made."

It appears that on the basis of the above recommendation sub-section (4) of section 46 was indeed included in the Code of Criminal Procedure (Amendment) Bill, 1994, which unfortunately has not yet become law. Sub-section (4) of section 46 which the Bill proposed to insert in the Code was to the following effect:

> "(4) Save in exceptional circumstances, no woman shall be arrested after sunset and before sunrise and where such exceptional circumstances exist, the police officer shall, by making a written report, obtain the prior permission of his immediate superior officer for effecting such arrest or, if the case is one of extreme urgency and such prior permission cannot be obtained before making such arrest, he shall, after making the arrest, forthwith report the matter in writing to his immediate superior officer explaining the urgency and the reasons for not taking prior permission as aforesaid and shall also make a report to the Magistrate within whose local jurisdiction the arrest had been made."

In their 154th Report on the Code of Criminal Procedure, the Law Commission examined this issue as well along with several others. After considering the earlier Reports of the Law Commission on the subject, the decision of the Supreme Court in Joginder Kumar and the Third Report of the National Police Commission, the Commission made the following recommendations:

1) Addition of a proviso to section 46(1) in the following terms:

> "Provided that where a woman is to be arrested, then, unless the circumstances indicate the contrary, her submission to custody on an oral intimation, arrest shall be presumed and, unless the circumstances otherwise require or unless the police officer arresting is a female, the police officer shall not actually touch the person of the woman for making her arrest."

2) Addition of a new sub-section (2) in section 46, as is indeed proposed to be done by the 1994 (Amendment) Bill.

3) Insertion of a new sub-section, (3), in section 41 to the following effect:

> "41(3). A police officer arresting a person under clause (a) of sub-section (1) of this section must be reasonably satisfied that arrest is necessary and must record such satisfaction in respect of matters covered by every clause of sub-section (1)."

4) Addition of a new section, section 41A, to be inserted in the following terms:

> "41A(1) The police officer may, if satisfied that immediate arrest of the person concerned is not necessary, issue to him a notice requiring him to appear before the police officer at specified time and place for further investigation and it shall be the duty of that person to comply with the terms of the notice.
>
> (2) If such person fails to comply with the terms of the notice, it shall be lawful for the police officer to arrest him for the offence mentioned therein."

In their 172nd Report on the Review of Rape Laws, the Law Commission recommended insertion of several provisions designed mainly to protect the women and children. It may not be necessary to refer to the recommendations contained in this Report because most of them deal with post-arrest stages, that too, in the case of women and children alone.

The recommendations in the Third Report of the National Police Commission (January 1980)

The law concerning arrest has been considered by the National Police Commission (NPC) in Chapter 22 – 'Corruption in Police'. It would be appropriate to briefly notice the contents of this chapter:

> Corruption in Police department is qualitatively different "because of the pre-dominance of extortion and harassment as compared to collusive corruption that prevails in several other departments…." As a law enforcement agency, the Police system even from ancient times has always carried with it scope for mala fide exercise of powers and consequent corruption, which was emphasized by the Police Commission of 1902-03. In the period of British rule, corruption was generally confined to lower ranks of all government agencies including Police, which generally alienated the administration from the people. In a sense it suited the British to have a lower level bureaucracy so alienated from the people but completely loyal to the rulers. The scope for corruption increased enormously during World War II because of the enormous spurt in government expenditure on war effort including supplies and contracts.
>
> Several Police Commissions appointed by the State Governments after independence have also referred to the increasing corruption in the Police department.
>
> The scope for corruption and connected malpractices arises at several stages in the day-to-day working of the Police, starting from the registering of a case, for arresting or for not arresting, for extortion, for interfering in civil disputes, for fabricating false evidence, for collecting 'hafta' from businessmen and so on.
>
> The power of arrest is the most important source of corruption and extortion by the police officers. From the moment a case is registered by the Police

on a cognizable complaint, they get the power to arrest any person who may be 'concerned in that offence', either on the basis of the complaint itself or on credible information otherwise received. It is under section 41(1)(a), that the Police are making large number of arrests everyday throughout the country. Of course, the arrests are not only for the offences under the IPC but also for offences under the local and State laws. The local laws mostly relate to excise, prohibition, arms, gambling, suppression of immoral traffic and Motor Vehicles Act, etc. Most of these arrests are made on the basis of information and intelligence available to Police in their field work or on the basis of complaints. A sample study (conducted by the NPC) with respect to the quality of arrests effected in one State during three years' period 1974-76 disclosed the following position:

	1974	%age	1975	%age	1976	%age
1. Total number of persons arrested	150,448		155,954		143,940	
2. Number involved in IPC offences	2,950	2.0	3,492	2.2	2,856	1.8
3. Number against whom security proceedings were launched	40,887	27.2	46,063	29.6	45,698	31.8
4. Number prosecuted under minor section of City Police Act	94,346	62.9	96,078	61.6	86,248	60.0
5. Number against	5,026	3.3	6,367	4.1	6,450	4.5

whom action was dropped						
6. Number against whom cases were under investigation	7,039	4.6	3,954	2.5	2,958	1.5

(These figures are very significant and go to substantiate the facts and figures set out in Annexure II thereto, prepared on the basis of reports of DPGs of various States. Though these figures in NPC Report pertain to the years 1974 to 1976, there does not appear to be any marked or qualitative change over the years. 62 to 63 per cent of arrests are for minor offences under the City Police Acts and about 27 to 29 per cent arrests are in "security proceedings" i.e., under sections 109 and 110 read with section 41(2) or may even be of persons involved in proceedings under section 107/108 CrPC. Only a small percentage, about 2 per cent, were arrests for offences under IPC.)

The said material shows "that a major portion of the arrests were connected with very minor prosecutions and cannot, therefore, be regarded as quite necessary from the point of view of crime prevention. Continued detention in jail of the persons so arrested has also meant avoidable expenditure on their maintenance. In the above period, it was estimated that 43.2 per cent of the expenditure in the connected jails was over such prisoners only who in the ultimate analysis need not have been arrested at all. The fear of police essentially stems from the fear of an arrest by the police in some connection or other. It is generally known that false criminal cases are sometimes engineered merely for the sake of making arrests to humiliate and embarrass some specified enemies of the complainant, in league with the police for corrupt reasons".

The definition of cognizable offence in Criminal Procedure Code is inadequate. "Whether an offence should be deemed cognizable or not has to be determined on consideration whether or not it is desirable to make it investigable by the police without orders from a Magistrate. The emphasis should really be on police competence for investigation and not on the power of arrest. The question of arrest arises only after an investigation has been taken up, and it is only an incidental task in the entire exercise of investigation. Before the Cr.P.C. was amended in 1973, the First Schedule did not specifically mention whether an offence was cognizable or non-cognizable but merely referred to the fact whether or not the police may arrest without warrant. This irrationality was set right when the Cr.P.C. was amended in 1973 and the cognizable or non-cognizable nature of each offence was specifically mentioned as such in column 4 of the First Schedule. This amendment in the First Schedule was apparently omitted to be reflected in the definition of cognizable offence in section 2(c) which continues to refer to the power of arrest without warrant, while in fact the First Schedule makes no such reference at all now. We, therefore, recommend that section 2(c) of Cr.P.C. be amended to read as under:

> "(c) "cognizable offence" means an offence which is specified as such in the First Schedule and "cognizable case" means a case arising from such an offence or a case in which a police officer may under any other law for the time being in force, arrest without warrant."

Likewise section 2(1) of Cr.P.C. maybe amended to read as under:

> "(1) "non-cognizable offence" means an offence which is specified as such in the First Schedule and "non-cognizable case" means a case arising from such an offence.

The amendments proposed above would not in any way abridge the power of arrest presently available to police officers under sections 41 and 157 Cr.P.C. but would underline the fact that a case is deemed cognizable not because of the power of arrest but because of police competency to investigate it".

Section 170 of Code of Criminal Procedure also requires to be amended. At present Police and some of the magistrates are under the impression that when a chargesheet is filed by the Police in court, the accused must be necessarily produced. This understanding is incorrect. The production of the accused on such occasion is not necessary. Sub-section (1) of section 170 must therefore be amended as follows:

Bond for appearance of accused and witnesses, when evidence is sufficient.	170(1). If, upon an investigation under this chapter, it appears to the officer-in-charge of the police station that there is sufficient evidence or reasonable ground to forward a report to a Magistrate for taking cognizance under clause (b) of sub-section (1) of section 190 of an offence alleged to have been committed by a person, such officer shall, if the aforesaid person is not in custody, take security from him for his appearance before the officer or Magistrate on a day fixed and for his attendance on further days as may be directed by the officer or Magistrate.

Apart from a legal perception on the part of the Police of the necessity to make arrests on cognizable cases, the Police are also frequently pressed by

the force and expectation of public opinion in certain situations to make arrests merely to create an impression of effectiveness. It is necessary that the Press and the Legislators should realize that they should not so pressurize the Police since such pressure leads on some occasions to unjustified arrests.

Guidelines for making arrests (laid down in the Report of N.P.C.)

"22.28 While the existing powers of arrest may continue to be available to the police to enable their effective handling of law and order and crime problems, we feel it would be useful to lay down some broad guidelines for making arrests. An arrest during the investigation of a cognizable case may be considered justified in one or other of the following circumstances:

(i) 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.

(ii) The accused is likely to abscond and evade the processes of law.

(iii) The accused is given to violent behaviour and is likely to commit further offences unless his movements are brought under restraint.

(iv) 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. There may be quite many cases in which it would be adequate either during or at the end of the investigation to take a bond from the accused on the lines indicated in the amended form of section 170 Cr.P.C. as proposed in para 22.26 above, without having to make a formal arrest. This arrangement in law would, in our view, considerably reduce the scope for malpractices and harassment arising from arrests".

The bail provisions were also required to be modified in the interest of reducing the scope for malpractices. Section 437 of the Code was suggested to be amended by adding the following proviso under sub-section (3) of section 437:

"Provided that before ordering the release on bail of such person, the Court shall have due regard to-

(a) the likely effect on public order and public peace by the release of such person, and

(b) his conduct after release on bail on a previous occasion, if any,

as may be brought to the notice of the Court by the police officer investigating the case in connection with which the aforesaid person was taken into custody."

Relevant provisions of the Code of Criminal Procedure (Amendment) Bill, 1994, being Bill No.35 of 1994 (introduced in Rajya Sabha on 9th May, 1994)

In the year 1994, the Government of India (Ministry of Home Affairs) introduced a Bill to amend the Criminal Procedure Code. As many as 46 provisions in the Code were sought to be amended in addition to certain entries in the First and Second Schedules. A few provisions of the Indian Penal code were also sought to be amended. The Law Commission understands that the Bill was referred to the Parliamentary Committee on Home Affairs, which has indeed submitted its Report thereon on February 19, 1996. It has offered its comments on the several proposals contained in the Bill which will be referred, insofar as they are relevant, hereinafter. The Bill has not been passed either by Rajya Sabha or by Lok Sabha so far.

Among other provisions, the Bill proposes to amend sections 45 and 46 besides inserting a new section 50A. It also seeks to amend section 53 and seeks to insert a new section 53A. Section 54 is also sought to be amended in addition to

inserting a new section 54A. (These amendments are proposed in chapter V of the Code which deals with arrest of persons.) The Bill also seeks to amend certain provisions in chapter XII which deals with "information to the police and their powers to investigate". Only two sections, namely sections 173 and 176 are proposed to be amended. The First Schedule is also sought to be amended as mentioned earlier.

Section 45 says that members of the armed forces of the Union shall not be arrested under sections 41 to 44 except after obtaining the consent of the Central Government. Sub-section (2) of section 45 empowers the State government to extend the provisions of sub-section (1) "to such class or category of the members of the force charged with the maintenance of public order" as may be specified in the notification. Section 6 of the Amendment Bill seeks to add the words "or to such other public servants" after the words "members of the force". (The Parliamentary Committee has disapproved this proposal. We are in respectful agreement with the opinion of the Parliamentary Committee.)

Section 46 prescribes the manner in which an arrest shall be made. Sub-section (3) is sought to be amended by adding certain words. We shall refer to sub-section (3) at a later stage. A new sub-section, sub-section (4) is also sought to be inserted in section 46 to the following effect:

> "(4) Save in exceptional circumstances, no woman shall be arrested after sunset and before sunrise, and where such exceptional circumstances exist, the police officer shall by making a written report, obtain the prior permission of his immediate superior officer for effecting such arrest or, if the case is one of extreme urgency and such prior permission cannot be obtained before making such arrest, he shall, after making the arrest, forthwith report the matter in writing to his immediate superior officer explaining the urgency and the reasons for not taking prior permission as aforesaid and shall also make a report to the Magistrate within whose local

jurisdiction the arrest had been made." (The Parliamentary Committee has opined that the arrest of a woman can be made only by a woman police officer, if the arrest is made after sun-set and before sun-rise and that in every case, permission of the F.C.J. Magistrate should be obtained before arresting a woman. We respectfully commend the amendment, as modified by the Parliamentary Committee.)

After section 50, a new section 50A in the following terms is sought to be inserted:

"50A. Every police officer or other person making any arrest under this Code shall forthwith give the information regarding such arrest and the place where the arrested person is being held to such person as may be nominated by the arrested person for the purpose of giving such information." (The Parliamentary Committee has recommended addition of few more clauses to the effect: the right of an accused to have his friend or relative informed of his arrest; the obligation of the police to inform the accused of the said right available to him; making of an entry in the police diary of the above facts and the duty of the Magistrate, before whom the accused is produced, to satisfy himself that the aforesaid requirements are complied with. We commend the proposed amendment, as modified by the Parliamentary Committee.)

By section 9 of the Bill, the existing explanation to section 53 is sought to be substituted. The proposed explanation reads as follows:

"Explanation – In this section and in sections 53A and 54,-

(a) "examination shall include the examination of blood, swabs in case of sexual assault, sputum and sweat, hair samples and finger nail clippings and such other tests which the registered medical practitioner thinks necessary in a particular case;

(b) "registered medical practitioner" means a medical practitioner who possesses any medical qualification as defined in clause (h) of section 2 of the Indian Medical Council Act, 1956 and whose name has been entered in a State Medical Register." (The Parliamentary Committee has pointed out that the expression "sexual assault" used in the proposed provisions is not defined anywhere and therefore it would be more appropriate to use the expression "sexual offence".)

We agree with the proposed amendment. Our 172nd Report deals elaborately with sexual assault, its various forms and other incidental matters.

A new section, section 53A is sought to be inserted by section 10 of the Amendment Bill. The proposed new section reads as follows:

"53A. (1) When a person is arrested on a charge of committing an offence of rape or an attempt to commit rape and there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of such offence, it shall be lawful for a registered medical practitioner employed in a hospital run by the Government or by a local authority and in the absence of such a practitioner, by any other registered medical practitioner, acting at the request of a police officer not below the rank of a sub-inspector, and for any person acting in good faith in his aid and under his direction, to make such an examination of the arrested person and to use such force as is reasonably necessary for that purpose.

(2) The registered medical practitioner conducting such examination shall, without delay, examine such person and prepare a report of his examination giving the following particulars, namely:

(i) the name and address of the accused and of the person by whom he was brought,

(ii) the age of the accused,

(iii) marks of injury, if any, on the person of the accused, and

(iv) other material particulars in reasonable detail.

(3) The report shall state precisely the reasons for each conclusion arrived at.

(4) The exact time of commencement and completion of the examination shall also be noted in the report.

(5) The registered medical practitioner shall, without delay, forward the report to the investigating officer, who shall forward it to the Magistrate referred to in section 173 as part of the documents referred to in clause (a) of sub-section (5)of that section." (The Parliamentary Committee has opined that examination of the accused by a private-registered medical practitioner should be valid only if no hospital run by government for a local authority is available.)

Section 11 of the Amendment Bill proposes to renumber the existing section 54 as sub-section (1) thereof and to introduce a new sub-section to the following effect:

"(2) Where an examination is made under sub-section (1), a copy of the report of such examination shall, on a request being made by the arrested person or by any person nominated by him in this behalf, be furnished by the registered medical practitioner to the arrested person or the person so nominated." (The Parliamentary Committee has supported this proposal. It has indeed suggested that the requirement in this sub-section be made mandatory.)

Section 12 of the Bill seeks to introduce a new section, section 54A which runs thus:

"54A. Where a person is arrested on a charge of committing an offence and his identification by any other person or persons is considered necessary for the purpose of investigation of such offence, the Court, having jurisdiction,

may, on the request of the officer in charge of a police station, direct the person so arrested to subject himself to identification by any person or persons in such manner as the Court may deem fit." (The Parliamentary Committee has not made any comment on this proposal.)

Section 173 which occurs in chapter 12 as mentioned above, is sought to be amended by inserting a new sub-section, sub-section (3A), between the existing sub-sections (3) and (4), to the following effect:

"(3A) Where in respect of any offence compoundable under section 320, the person by whom the offence may be compounded under the said section gives in the course of investigation a report in writing to the officer in charge of the police station expressing his desire to compound the offence as provided for in the said section, such officer shall mention this fact in the police report under sub-section (2) and forward it to the Magistrate who shall thereupon deal with the case under section 320 as though the prosecution for the offence concerned had been launched "before that Magistrate." (The Parliamentary Committee has disapproved this proposal on the ground that it may be misused by forcing the parties to agree to a compromise.)

Sub-section (1) of section 176 is sought to be amended by deleting the words "where any person dies while in the custody of the police or". After sub-section (1), a new sub-section (1A), is sought to be introduced which runs thus:

"(1A) Where,-

(a) any person dies or disappears, or

(b) rape is alleged to have been committed on any woman,

while such person or woman is in the custody of the police, in addition to the inquiry or investigation held by the police, an inquiry shall be held by

the Judicial Magistrate or the Metropolitan Magistrate, as the case may be, within whose local jurisdiction the offence has been committed."

After sub-section (4) and before the explanation, a new sub-section, sub-section (5) is proposed to be inserted to the following effect:

"(5) The Judicial Magistrate or the Metropolitan Magistrate or Executive Magistrate or police officer holding an inquiry or investigation, as the case maybe, under sub-section (1A) shall, within twenty-four hours of the death of a person, forward the body with a view to its being examined to the nearest Civil Surgeon or other qualified medical man appointed in this behalf by the State Government, unless it is not possible to do so for reasons to be recorded in writing." (The Parliamentary Committee has suggested that the incidence of death, disappearance and rape occurring in judicial custody must also be brought within the purview of the proposed provisions. It has further suggested providing for compensation in the form of either employment to eligible family members or a pension of, say, Rs.1500/- p.m. to the bereaved family in the case of death in police/judicial custody.)

Chapter Five

The need for this study and the approach underlying it

The law concerning the power of the police to arrest without warrant and/or without an order from the magistrate is a fundamental aspect of the Criminal Procedure Code. It is true, as has been suggested by a number of participants in the seminar and other persons/organizations who have responded to our questionnaire that the law relating to arrest ought not to be examined in isolation but that it must be a part of a larger study of the entire procedural law (criminal) obtaining in the country but the said reasoning has no application herein for the reason that Law Commission has already examined in depth not only the Code of Criminal Procedure but also the Indian Penal Code very recently – 154th and 156th Reports submitted in 1996 and 1997, respectively. Earlier, several aspects of Criminal Procedure were examined in several Reports. The 154th Report on CrPC deals inter alia with Law of arrest as well and has recommended certain changes, as pointed out earlier in a preceding chapter. Since this particular aspect did not receive the attention it deserved in earlier Reports and also because, the Commission did not have before it the data concerning the arrests under preventive provisions, arrests for bailable offences and other particulars contained in Annexure II, the Commission thought it fit to undertake this separate study. The 41st Report of the Law Commission on the Code of Criminal Procedure, 1898 is an extensive one and it formed the basis for the 1973 Code. The other Reports dealing with various aspects of criminal procedure are the 25th Report (concerning the evidence of officers about forged stamps, currency notes, etc. and suggesting and introduction of a new section, section 50A), 32nd Report (section 9 of the Code of Criminal Procedure, 1898), 33rd Report (section 44 of the 1898 Code), 35th Report (on capital punishment), 36th Report (on sections 497, 498 and 499 of 1898 Code – subject of bail), 37th Report (sections 1 to 176 of 1898 Code), 41st Report (Code of Criminal Procedure, 1898), 47th Report (the trial and punishment of social and economic offences), 48th Report (some questions under the Code of Criminal

Procedure Bill, 1970), 73rd Report (criminal liability of the husband upon his failure to pay maintenance or permanent alimony to the wife), 78th Report (congestion of undertrial prisoners in jails), 132nd Report (suggestion for amending chapter 9 of the 1973 Code), 135th Report (women in custody), 141st Report (upon the need for amending the law to empower the courts to restore criminal appeals and revisions dismissed for default of non-appearance), 142nd Report (concessional treatment of offenders who on their own initiative choose to plead guilty without any bargaining) and 152nd Report (on custodial crimes). Indeed, recently the Law Commission has also submitted its 172nd Report on (Review of Rape Laws) which suggests certain amendments to Criminal Procedure Code along with Indian Penal Code and Evidence Act. We do not therefore think that we should hold back this study of the law relating to arrest on the ground that it should be taken up only as part of an overall study of the Criminal Procedure Code as has been suggested by certain individuals and organizations.

Another critical approach adopted by certain police officers (who participated in our seminars and also sent their written responses to the Working Paper) is that the material/data collected by the Commission is not adequate and that some more data ought to be collected before such an important law reform is thought of. We are unable to accede to this plea either. The material collected by us and which is presented in a capsule form in Annexure II cannot be said to be inadequate. It is the data supplied by the Directors General and Inspectors General of the several States, based upon the precise data collected by them through their officers and records. Except saying that more data should be collected, the proponents of this view could not point out in which particular, the data is lacking. It may also be noticed that the data collected by the National Police Commission from three districts in the country, referred to in chapter XXII of their Report (referred to in an earlier chapter), fully corroborates the basic premises of Annexure II. It may be mentioned that the particulars supplied by the AGPs/IGPs is quite extensive, all of which could not naturally be set out in the Working Paper. Annexure II is only an abstract prepared by the Commission on the basis of their

Reports. Some of these Reports have also put forward several suggestions and comments with respect to the proposals contained in the Working Paper. The several reported decisions of the Supreme Court and High Courts are eloquent testimony to the several abuses afflicting the Police administration in the area concerned herein. Even the NPC Reports speak of misuse of this power, the corruption accompanying this power and the frequent harassment of citizens by uncalled for, unjustified and motivated exercise of this power. Several decisions of the Supreme Court/High Courts, Reports of Law Commission and the Report of NPC have suggested measures to streamline and regulate this power by laying down several guidelines for the police officers. In this state of affairs, the plea that a reform of this branch of law should be put off till more data is collected, cannot be countenanced.

Another idea put forward by some participants/respondents is that present time is not the proper time to change the law. Except saying so, they have not given any reasons in support of this plea. When the phenomenon of misuse of power of arrest is rampant – the NHRC is flooded with such complaints – it is difficult to agree that the time is not propitious for effecting changes in it. At the same time, we must make it clear that we are not unaware of the menace of terrorism afflicting our country. India is one of the worst victims of terrorism, both home-grown as well as imported. Foreign mercenaries in J&K have been taking a toll of our security and police forces and we are obliged to divert our meagre resources to fight this evil. We are also aware that existing criminal law is not adequate to meet this menace and that our anti-terrorism law is the need of the hour. Taking note of this fact and taking note of the further fact that both UK and USA have permanent anti-terrorism laws, we in the Law Commission had recommended the enactment of a law called 'Prevention of Terrorism Act'. In our 173rd Report, we had pointed out the necessity of such a law and had also enclosed a Bill containing provisions which were less rigorous than the provisions of the UK and USA Act. We may also mention that after the tragic events of September 11, 2001 (bombing of World Trade Centre and Pentagon) in USA, both the Federal and

State Governments in USA are toughening their anti-terrorism laws. We are not saying that the Bill submitted by us in the year 2000 should be toughened. What we are suggesting is that an anti-terrorism law is called for in the present security situation in the country. At the same time, we wish to emphasise that just as a special law is required to fight terrorism effectively, the ordinary law of the land should be adequate to safeguard the rights of the citizens while maintaining and preserving the law and order and societal peace. There is no contradiction between having an effective anti-terrorism law and a balanced criminal law applicable to ordinary citizens and situations not governed by the anti-terrorism law. Suppression of terrorism indeed contributes to a situation where the ordinary citizens can peacefully enjoy their civil, political and economic rights.

Yet another idea put forward is that any curtailment of the powers of the police in this behalf would take away the fear of the police from the public mind and would not be conducive to a proper maintenance of law and order. We find it difficult to agree that there should be fear of police in public mind or that such fear is necessary for maintaining law and order in the society. In a democracy, where the people are the masters, and the public servants their agents appointed to do a particular job, the very idea of fear is inadmissible and unacceptable. Fear must be of doing a wrong thing. The British society is an example where a friendly police yet maintains the law and order in a far more effective manner. In any event, what does this fear of police mean? Mere arrest cannot be such a fear as to hold back a person from committing a crime. Or is it fear of harsh or third-degree treatment at the hands of the police? If it is the latter, it is unacceptable. Indeed, the only fear that can be countenanced is the fear of punishment by court.

But then it is said that since the conviction rate is very low, the very fact of arrest is a sort of punishment that can be meted out to the guilty. This argument is again misleading and unacceptable. Guilt or innocence has to be determined by the courts and not by the police. Police merely prosecutes on being satisfied that a person is guilty of an offence; it doesn't punish. It is also suggested that there is a

distinct increase in crime because of enormous increase in population, unemployment and lack of adequate resources. May be so. But how does this phenomenon militate against the proposed changes in law. In fact, the attention of the police must be more on serious offences and economic offences and not so much on minor offences. The undesirable practice of arresting persons for minor offences and keeping them in jail for long periods (either because they cannot move for bail or because they cannot furnish bail to the satisfaction of the court – all because of their poverty) must come to an end. In fact, this aspect has already engaged the attention of the Supreme Court, which has given several directions for release/discharge of accused in case of minor offences and offences punishable up to seven years excepting therefrom the economic offences. These directions were given keeping in view Article 21, the way in which trials for minor offences are dragging on for years and years together with the result that the criminal judicial system is operating as an engine of oppression against them. See Common Cause decisions reported in AIR 1996 SC 1619 and in AIR 1997 SC 1539. The Court took note of the fact that in some cases, the accused have been in jail for periods longer than the period to which they would have been sentenced, even if found guilty – and that all this was happening even before their guilt or innocence is determined. The Court said: "The very pendency of criminal proceedings for long periods by itself operates as an engine of oppression…. It appears essential to issue appropriate directions to protect and effectuate the right to life and liberty of the citizens guaranteed by Article 21 of the Constitution".

So far as the plea for reclassification of offences (cognizable/non-cognizable) in IPC is concerned, we do not think it necessary to do so except making a distinction (elaborated hereinafter) between offences which are committed in the presence of the police officer and offences which are reported to him after they are committed. (This distinction is relevant only in the context of power of arrest and is an important and relevant distinction as will be pointed out hereinafter.) Regarding the demand for reclassification, we may say that we are not convinced by the reasons behind the said demand. We have explained

hereinbefore the criteria/basis upon which the said distinction is based. We are of the opinion that the said basis is a reasonable and cogent one and need not be meddled with.

The criminal procedure devised by any country should aim at resolving State-citizens' disputes in a manner that commands the society's respect for fairness of its processes as well as reliability of its outcomes. It's function should be to reaffirm the fundamental values of the nation and devise a procedure consistent with such values and the substantive criminal law. This is referred to as the principle of restraint. The principle of 'restraint' means that the liberty of an individual and his freedom should be interfered with by resorting to the power of arrest without warrant only where the circumstances necessitate the same. Not only the procedure should be consistent with the fundamental constitutional values of our nation but they must also be expressed in language which is simple, certain and coherent and at the same time comprehensive. It must provide clear and unambiguous guidance both to the law enforcement agencies as well as to the citizens.

We may now refer to a valid criticism of the proposals (in the Working Paper) to introduce the concept and practice of issuing summons and appearance notices instead of arrest in bailable and non-cognizable and bailable and cognizable, respectively. The criticism runs as follows: riot (s.147) and riot with dangerous weapons (s.148) are both cognizable but bailable offences according to the Schedule to CrPC. When a riot with deadly weapons is going on in the presence of the police officers and if you say that the police officers cannot arrest the rioters and the only power they have is to serve summons or appearance notice upon them – the situation would be ridiculous; the police would become totally ineffective, and a laughing stock, and the public confidence in the police as an agency to maintain law and order would be totally shaken. Such an absurd scenario cannot and should not even be imagined, it is suggested. We have taken due note of this criticism and accordingly devise herewith a classification of offences –(this

classification is relevant to and is made only in the context of the power of the police to arrest without a warrant) - into those committed in the presence of police officer(s) and those which he comes to know after they are committed – a distinction recognized in some criminal judicial systems. The basic distinction that has to be kept in mind vis-à-vis the power of arrest is a situation where the offence is committed or is being committed in the presence of a police officer and a situation where the police officer comes to know of the offence after it is committed. Let us elaborate by referring to various possible situations and the powers of police in those respective situations as per the recommendations made in this Report:

(a) Where a police officer comes to know of a design to commit a cognizable offence and the only way of stopping the commission of offence is by arresting the person (so designing to commit a cognizable offence), he can arrest him under section 151 CrPC.

(b)(i) Where a cognizable offence is committed or is being committed in the presence of a police officer (as in the case of a riot with or without dangerous weapons), he would be, and must be, empowered to arrest the person who has committed or is committing the offence, if that is the only way of stopping the commission or further commission of that or other cognizable offence. Indeed, this is what section 149 of the Code says. It places a duty upon the police officer to "interpose for the purpose of preventing, and shall to the best of his ability, prevent, the commission of any cognizable offence". However, if the offence is bailable, he would immediately release the person after obtaining a personal bond to appear whenever called by the police or the court, as the case may be.

(ii) Similarly, if the police officer finds that any person is attempting to commit or is committing an act causing injury to any public property (see section 152), it is his duty to take necessary steps to prevent it. Indeed, this power

is all the more necessary today, when on the slightest provocation – or without any provocation, sometimes – people attack and damage public property like buses, railway property, government vehicles and so on. In such a case, his power extends to arresting the person and to hot-pursuit, where necessary. This is so irrespective of the fact whether the offence is cognizable or not.

(c) Where the police officer comes to know of the offence after it is committed, his power to arrest the alleged offender should be different. This is the most usual case. Most of the time, the police officer comes to know of the offence after it is committed, either on some one's information or through intelligence. In such a case, the police officer has to follow the following courses of action:

(i) if the offence is a non-cognizable one, he should take no action in the matter except recording the information and refer the informant to the Magistrate, as contemplated by section 155 of the Code;

(ii) if the offence is a cognizable one and is punishable with sentence of imprisonment not exceeding seven years the police officer may commence investigation into the offence, but his power to arrest is governed by the provisions of section 41 (as recommended in this Report). If the offence is bailable, it is obvious that he shall release him on bail or on personal bond, in case he arrests him;

(iii) if the offence is a cognizable one punishable with imprisonment for more than seven years or with life imprisonment or death, he may arrest the person as provided in Chapter V of the Code.

The point to be emphasised is that arrest must be resorted to only where it is necessary. This is the principle of restraint, referred to hereinabove. It must be remembered that arrest is not meant to be a punishment but is merely a detention of

the person in police custody/jail for a particular purpose or purposes, as the case may be. The purpose may be to ensure his presence during the course of investigation or whenever his presence is required or called for by the court or where the arrest is called for for one or more of the reasons mentioned hereinabove. Of course, in the case of serious offences like murder, dacoity, arson, offences against the State and offences against women – indeed in the case of offences punishable with imprisonment exceeding seven years, arrest may be called for for instilling a sense of confidence among the members of the public. To put it in different words, the arrests can be both 'preventive' as well as 'repressive' – expressions coined by the jurists. Preventive purpose includes protective purpose. This power will be exercised in cases where it is necessary to arrest the person to prevent the commission of an offence, terminating a breach of the peace, to detain the person who may be a danger to himself or to others, to prevent him from tampering with the witnesses or evidence of crime and so on. Repressive purposes are those where the object of arrest or detention is to compel his attendance in court whenever necessary or to gather evidence in relation to an offence with his assistance.

Let us look at the problem from a different angle: Inasmuch as an overwhelming majority of the alleged offenders are not likely to abscond (except in serious offences like murder, dacoity, robbery and offences against the State, etc.), the question is whether a person should be arrested merely because he is "concerned in any cognizable offence", where the offence has already been committed, i.e., where the offence is not committed in the presence of the police officer? In such a case, unless it is necessary to arrest a person for preventive purposes, no arrest should be made except in serious offences like murder and dacoity etc., as mentioned above. In case of most of the lesser offences, i.e., offences punishable up to seven years, the likelihood of the person absconding or evading arrest or running away from his normal place of abode, is very little. A mere appearance notice or a summons, as the case may be, should be sufficient in such cases. Only where it is apprehended that the person will not obey an

appearance notice/summons and where it is believed that rearresting him would involve unnecessary and avoidable effort and expense, that the person should be arrested for repressive purposes. We may conclude this chapter saying that while the tradition of common law has been to confer broad powers of investigation upon police officers, it has always tended to limit strictly the power and authority to interfere with an individual's liberty or property.

Chapter Six

Proposals contained in the Consultation Paper and the responses received thereto

The proposals put forward for debate in the Consultation Paper issued by the Law Commission are contained in part three thereof. The proposals briefly are to the following effect:

1) No warrant shall be issued and no one shall be arrested for offences which are now categorized by the Code as bailable and non-cognizable. The very expression "bailable" may have to be changed. In such cases only a summons may be sent to the accused to be served not by a police officer but by a civilian officer (3.1.1).

2) In case of offences specified as bailable and cognizable by the Code, no arrest shall be made for those offences (except certain offences so specified in Annexure IV to the Consultation Paper), unless of course there are grounds to believe that the accused is likely to disappear and that it would be very difficult to apprehend him or where he is a habitual offender. The expression "bailable" may be omitted even in respect of this category (3.1.2).

3) The offences, punishable with seven years imprisonment or less, mentioned in Annexure V to the Consultation Paper (excluding offences punishable under sections 124, 152, 216A, 231, 233, 234, 237, 256, 257, 258, 260, 295, 298, 403, 408, 420, 466, 468, 477A and 489C), which are categorized now as cognizable and non-bailable should be treated as bailable cognizable offences and be dealt with accordingly (3.1.3).

4) No arrest may be made merely on the basis of suspicion of complicity in an offence (3.2.1).

5) The guidelines issued in the decision of the Supreme Court in D.K. Basu v. State of West Bengal should be incorporated in the Code (3.3).

6) Representatives of registered NGOs should be entitled to visit police stations to check against unlawful arrests and unlawful treatment (3.4).

7) The compoundability of offences should be increased and the concept of plea bargaining should be incorporated in the Code (3.5).

8) No arrests should be made under sections 107 to 110 CrPC read with section 41(2). (No change is suggested in section 151 CrPC) (3.6).

9) In respect of offences (except in case of serious offences like murder, dacoity, robbery, rape and offences against the State), the bail must be granted as a matter of course except where it is apprehended that the accused may disappear and evade arrest or where it is necessary to prevent him from committing further offences (3.7).

10) No arrest shall be made and no person should be detained for mere questioning (3.8).

11) Ensuring the safety and well-being of the detainee is the responsibility of the detaining authority and action can be taken for negligence in that behalf (3.9).

12) Custody record should be maintained at every police station containing the specified particulars which shall be open to inspection by members of the Bar and representatives of the registered NGOs interested in human rights (3.10).

13) The law relating to tortious liability of the State requires to be changed (3.11).

14) Strict compliance with section 172 CrPC should be insisted upon (3.12).

Response to the questions raised in the Consultation Paper:

Delhi Seminar: Three Seminars were conducted by the Law Commission at Delhi, Calcutta and Hyderabad. At the Seminar held in Delhi, two divergent and sharply opposing viewpoints emerged. One was the view espoused by the police officers (barring certain exceptions which we shall refer to later) and the other by the members of the Bar and the representatives of the Human Rights' organizations. The first view was forcefully articulated by Shri Padmanabahiah, former Home Secretary, Government of India. He submitted that in fact the number of arrests vis-à-vis the number of crimes is decreasing and that this is not the right time to change the law relating to arrest. He submitted that there is no clear data which establishes the misuse or abuse of the power of arrest by the police. The reported misuse is really on account of increase in crime and of explosive growth of the population. He also opined that arrest is one of the most immediate preventive actions that can be taken by police and this power should not be curtailed. Today only the fear of arrest is there among the criminals but not the fear of conviction because of the undue delays in the courts. While welcoming the idea that the guidelines in D.K. Basu should be incorporated in the statute, he opposed the idea of NGOs being permitted to visit police stations. His suggestion was that legal aid cells, not involved in the particular case, be given the right to visit police stations. He was supported in this view by Shri Ashok Vijaywargiya, Home Secretary, State of Chattisgarh, Shri Ganeshwar Jha of Border Security Force (who suggested additionally that the status and salaries of the police personnel be upgraded and they should be asked to undergo proper and effective training), Shri M.L. Sharma, IGP, Rajasthan (who was also of the opinion that the law relating to arrest cannot be examined in isolation but should be studied as a part of the entire criminal judicial system), Shri Masud Choudhary, IGP of J&K State, Shri Hira Lal, former

IGP Gujarat, Shri Arun Gupta, DIG, CBI and Shri S.K. Sharma, Legal Adviser, CBI.

Shri Jagdish Singh, IGP, UP, however, agreed with all the recommendations of the Law Commission except the one contained in para 3.4 of the Consultation Paper (permitting the registered NGOs to visit police stations).

Shri Dalpat Singh Dinkar, Deputy Director, Bureau of Police Research and Development while generally supporting the views of Shri Padmanabahiah, welcomed any measures to check the abuse of power of arrest. Similarly, Shri G.S. Tiwari, Director, Ministry of Defence opined that the root cause of abuse of this power lies in the fact that the police officers who exercise vast police powers are not properly educated nor properly trained in the relevant provisions of law, much less in the human rights principles.

The opposite view was articulated with equal force by Shri P.P. Rao, Senior Advocate, Supreme Court of India and former President of the Supreme Court Bar Association. He suggested that measures should be adopted to check the irregularities committed by police during arrest in the matter of date of actual arrest and the treatment of the detainees. He suggested that the law relating to bail should also be revised because it is here that tremendous corruption takes place. Safeguards must also be provided to the accused during investigation; the time for interrogation be fixed, say, between 10.00 am to 5.00 pm and the magistrates should satisfy themselves that there is no delay in producing the accused after arrest. He supported the suggestion of compulsory medical examination at the time of production of the accused before the magistrate by a doctor of the accused's choice. He supported the idea of approved NGOs being allowed to visit the police stations and prisons. He was supported in this behalf by Justice Rajinder Sachhar, former Chief Justice of Delhi High Court and a renowned Human Rights' activist, who added that most of the arrests take place under the preventive provisions like sections 107 to 109 and 151, which requires to be checked; he opined that the

concept of fear of arrest is ill-suited and inconsistent with a democratic system. Shri K.T.S. Tulsi, Senior Advocate and former Addl. Solicitor General was of the opinion that arresting a person without proper basis and then dropping the case for lack of evidence is a violation of fundamental rights and human rights of the person concerned. Shri Gopal Subramanium, Senior Advocate emphasized the importance of implementation aspect of law and upon the necessity of proper training of the police officers. Shri Ravi Nair from South Asian Human Rights Initiative generally supported the proposals while Shri Sushil Kumar, Senior Advocate opined that the corruption begins from the stage of recruitment itself and that the kind of training which is imparted to the police officers is wholly inadequate to the modern day policing. Shri P.N. Lekhi, Senior Advocate, Shri Prashant Bhushan, Advocate, Smt. S.K. Verma, Director, ILI, Shri Manmohan Bara, Advocate, Orissa, Shri Krishnamany, Senior Advocate, Shri Dholakia, Senior Advocate and Shri Pundhir, Advocate generally supported the proposals of the Law Commission. Shri D.N. Srivastava, Advocate (former DGP) opined that it is time that the confessions made before the Superintendent of Police and higher police authorities are made admissible in evidence.

Calcutta Seminar: At the Seminar held at Calcutta in association with the West Bengal National University for Juridical Sciences, again two divergent views emerged as had happened at Delhi Seminar. However, the following further suggestions were put forward at this Seminar. Justice Ganguly of Calcutta High Court suggested that the provision contained in sub-section (3) of section 46 (which recognizes by necessary implication, the power of a police officer to cause death of the person, in the course of arrest, if such person is accused of an offence punishable with death or imprisonment for life and resists or evades the arrest) requires to be modified. Justice Talukdar, a Judge of the Calcutta High Court supported the proposals of the Law Commission and emphasized the provisions concerning the arrest of a woman. He criticized the exclusion of Armed Forces from arrest provided by section 45 and referred in this connection to the decision of the Privy Council in Cristie's case where it was held that a police constable was

liable for prosecution for wrongful arrest. He suggested incorporation of a similar provision in the Code. He pointed out the anomaly of the statements recorded by customs officers during their investigation being made admissible while the statements recorded under section 161 CrPC are not admissible.

Shri N.C. Sil, Principal Secretary, Law Department, Government of West Bengal pointed out the total silence of the Consultation Paper with respect to economic offences. Otherwise he supported the proposals contained therein. Mr. Mukherjee, a retired District Judge suggested that in section 157(1) the words "reason to suspect" should be substituted by the words "reason to believe". He suggested that the law should provide that before a person is arrested, the police officer must be satisfied prima facie about the guilt of the accused. Justice A.V. Gupta (retired) suggested that once a person is arrested and produced before a magistrate, he should be sent to judicial custody and should not be sent back to police custody. Shri J. Bagchi, Advocate pointed out the difficulties faced by accused persons in West Bengal in the matter of obtaining bail. He stated that the registered sureties do not come forward without receiving adequate money therefor; and because the relatives of the accused cannot act as sureties, many accused are facing serious harassment. Other speakers, Shri Sen J., West Bengal Administrative Tribunal, Shri Tapan Bhattacharya, ASO, Human Rights, Ms. J. Sen, Shri Kirit Roy from MASUM, Shri Gupte, Dr. Nilanjan Dutta, APDR, Shri Brojo Roy, Centre for Care of Torture Victims, Shri Basu J. (retired), generally supported the proposals contained in the Consultation Paper, emphasizing the human rights' aspect.

On the other hand, Shri Arun Mukherjee, former Director, CBI, Shri A.M. Jordha, ARG Training, Shri Baugh from Police Training School, West Bengal, Dr. Sharad, Department of Forensic Sciences and Dr. Arun Mukherjee, former CBI officer, were of the opinion that no major changes should be effected in the law relating to arrest and that it would be more appropriate to undertake a study of the entire criminal judicial system in the country.

Hyderabad Seminar: At the Hyderabad Seminar, Shri C. Padmanabha Reddy, a leading criminal lawyer of A.P. High Court for the last more than 25 years, was the first speaker. After emphasizing the value of liberty and the necessity of regulating the power of arrest, he made the following suggestions: (1) All the offences except certain serious offences should be made bailable, (2) Every arrest should be notified in writing and it should be served upon the accused before he is arrested, (3) The normal rule should be judicial custody and not police custody; the prison rules also require to be amended and improved, (4) A mechanism should be evolved to screen the arrests made by the police. Even where a writ of habeas corpus is filed for the production of the arrest of a person the police officers very often deny the arrest or shift the person from place to place. He however, opposed the idea of permitting the NGOs to visit police stations or prisons. He also opined that even after the decision of the Supreme Court in D.K. Basu, complaints of non-compliance with those directions persist and such complaints are not generally considered sympathetically by the higher officials.

Shri Bharat Chandra, Home Secretary, Government of AP emphasized the difficulty of finding a satisfactory solution to the problem of abuse of power of arrest by the police. He opined that the Consultation Paper suffers from a lacuna inasmuch as it does not mention or say anything about victims on whose grievances, arrests are made. According to him, the police is a "social institution" and hence suffers from abuse. According to him further the politicians and bureaucrats have come to believe that the society needs to be policed more inasmuch other institutions of the State have virtually collapsed. He suggested that all offences should be made non-cognizable so as to eliminate any kind of abuse of discretion by the police in the matter of arrest. He concluded by saying if we are trying to put human rights above societal gains, what about the human rights of police?

Prof. Hargopal of University of Hyderabad, who is a renowned activist on the civil liberties' front, opined that the working of the police department requires a lot of improvement. He gave the example of France where both public and police cooperate with each other and the complaints of abuse of powers by the police are very rare. He pointed out that 80 to 90% of the custodial deaths in India are of those involved in theft, robbery and dacoity. He questioned why it is so and answered the question himself by saying, it must be because of the deep respect for property that the police have. He regretted that police officers are not punished for abuse of power and that more often than not, the policemen protect each other on the plea of demoralization of the force. A person with power or a person with property, he said, is generally immune from arrest and it is only the poor who are at the receiving end. He bemoaned the deterioration of democratic values and structures in our society.

Dr. Amita Dhanda, Registrar of NALSAR suggested that the law relating to arrest should be so amended that the persons arrested are immediately released on personal bond. She was of the opinion that it is the marginalized sections of the society that face harassment at the hands of the police. Prof. Nageswar Rao examined the power of arrest in the context of the presumption of innocence. He submitted that this power should be exercised only in exceptional cases and that the police force must be sensitized about the nature of this power and its impact upon human rights. He supported the idea of plea bargaining and suggested the creation of a body to monitor the exercise of power by the police. He also suggested that confessions made before police officers of the rank of DSP and above should be made admissible in evidence.

Shri Jaspal Singh, Addl. Director, CBI espoused the other point of view. He said that arrest becomes necessary in several situations. For example, in case of rape or other offences against women and in the case of communal riots and offences affecting public tranquility arrest becomes a necessity and a timely arrest very often saves the situation. He opined that so far as white-collar crimes are

concerned, there may be no reason for immediate arrest. He felt that the 24 hours' time given by the Constitution and the law for producing the accused before a magistrate needs to be extended and the provisions regarding grant of police remand should be liberalized.

Shri Bhawani Prasad, Law Secretary to the Government of AP emphasized the necessity of a reclassification of the offences in the IPC. He pointed out that the offence under section 304A, IPC is still being treated as bailable, which is no longer consistent with the present day realities. He emphasized that unless the mind-set of the police personnel is changed and they are made to realize that they are performing a public service, mere change in law would not help. One of the speakers, Shri Jaipal Reddy suggested reorganization of the police organization into two wings, one for investigation and the other for maintaining law and order. Shri Krishna Dev Rao, a teacher at NALSAR made a comparative study of the subject and raised the following issues: Who makes a decision to arrest; what is the mechanism to review arrests and what structural changes have been made in the police department to implement the guidelines in D.K. Basu. He favoured the idea of reclassification of offences and desired the introduction of alternate dispute resolution techniques in the criminal justice system. He pleaded for liberalization of the bail provisions and maintenance of records concerning the health of the persons arrested. A number of other speakers participated in the Seminar. Some of them supported the proposals in the Consultation Paper while some others opined that time is not ripe for making any substantial changes in the law of arrest.

Written Responses:

A number of written responses have been received by the Law Commission dealing with the several proposals in the Consultation Paper. Prof. B.B. Pande of Delhi University suggested reclassification of the offences in the IPC into 'petty offences' and 'serious offences' inasmuch as the present classification into bailable and non-bailable, cognizable and non-cognizable is an inadequate classification. He pointed out several offences in the IPC, which according to him could be

categorized as petty offences. Illegal arrests, according to him, can be classified into two broad categories, those which violate human rights and constitutional guarantees and those which violate the statutory provisions. He supported the provisions of the CrPC (Amendment) Bill, 1994 proposing to amend inter- alia the provisions of the Code relating to arrest. Commenting upon the proposals in the Consultation Paper, he submitted that the object of the proposals contained in paras 3.1 to 3.3 can be achieved by directly amending section 41 instead of seeking to convert the cognizable into non-cognizable or non-bailable into bailable. He supported the other proposals in the consultation paper including the idea of decriminalizing some of the offences in the IPC.

Dr. G.S. Tiwari, Director in the Ministry of Defence emphasized the necessity of providing statutory safeguards to guard against abuse of power of arrest under the police. He opined that the vast discretion vested in the police under section 41 should be curbed. He referred to several undesirable practices being indulged in by the police, very often for oblique reasons. He however made it clear that the views expressed by him are his personal views and not that of his Ministry.

Dr. K.K. Paul, Joint Commissioner of Police (Crime), Delhi Police submitted that the proposals of the Law Commission do not appear to be practical and do not also take into account the ground realities. He submitted that several offences which the Law Commission has suggested be converted from cognizable to non-cognizable or from non-bailable to bailable, are serious offences and that any such change would prove counterproductive and would not help the police in maintaining law and order.

Maj. Gen. K.N. Mishra, AVSM (Retd), former Judge Advocate General (Army) supported the recommendations of the Law Commission in general and pointed out that very often the magistrates do not duly and properly perform their statutory duties and obligations thereby depriving the accused persons of their

constitutional and legal protections. He supported the idea of amending section 41 of the Code.

Shri M.L. Sharma, IPS, IGP(CID) (Crime Branch), Rajasthan suggested that several offences like adulteration of foods and drugs, fouling the atmosphere and forgery etc. be made cognizable and bailable. Some other offences which are non-cognizable, he suggested, should be made cognizable. In particular he suggested that section 498A which is now a cognizable offence should be converted into a non-cognizable one.

Justice (Dr.) R.R. Mishra, a retired Judge of the Allahabad High Court supported the proposals in the Consultation Paper generally. However, he emphasized the apathy of general public even where offences are committed in their presence. He pointed out that the political pressures and influence are also responsible for some of the abuses by the police officers.

Shri Manmohan Prahviah, IGP (Intelligence), Orissa justified the power of arrest saying that the aggrieved public have come to see the arrest of culprits by the police as a first step in their yearning for justice. Any curtailment of this power, he said, will result in loss of public faith in the criminal justice system. He pointed out that the importance of custodial interrogation to elicit evidence has been recognized by the Supreme Court in State V. Anil Sharma AIR 1997 SC 3806. He also justified the power vested in the police by section 151 CrPC. According to him, in Orissa, arrests do not routinely take place under sections 107 to 110 of the Code and that where group clashes are apprehended or during the time of elections or VIP visits, some anti-social elements are arrested as a part of bandobast duty and released later. He submitted that in the matter of exercise of power of arrest, the guidelines indicated in Report Nos. 2, 5 & 8 of National Police Commission be kept in mind. He pointed out that Indian society is generally perceived to be meek and relies considerably upon the armed police to keep order and hence police should not be weakened. He suggested that the problem must be solved by

strengthening the in-house mechanisms within the police organization and by insisting upon effective supervision by judiciary - and not by amending the law. He stressed the necessity of transparency in the working of the police department and greater access of the public to police procedures and actions. He opined that the guidelines enunciated in D.K. Basu, if strictly observed, would remove any scope for abuse by the police.

The Inspector General of UP, Shri Jagat Singh has, in his comments on the Consultation Paper, agreed with the proposals contained in paras 3.1.1 and 3.1.2 of the Consultation Paper. So far as the proposals contained in para 3.1.3 is concerned, he has stated that no change is needed in the existing law and that the only modification needed is to provide that arrest should be made only before submitting the chargesheet in the court and that the arrested person should be sent to the court along with the chargesheet. He has agreed with the proposals contained in paras 3.2.1 and 3.3. He has however opposed the proposal contained in para 3.4 of the Consultation Paper on the ground that sufficient legal and departmental safeguards are already available to the accused. So far as the proposals contained in paras 3.5 and 3.6 of the Consultation Paper is concerned, he has expressed his agreement thereto. With respect to the proposal contained in para 3.7 of the Consultation Paper, the IGP of UP has responded by saying that since no specific recommendations have been made in the said para, he is not offering any comments. He has agreed with the proposal contained in para 3.8 of the Consultation Paper but opposed the proposal contained in para 3.10. With respect to proposal contained in para 3.12 of the Consultation Paper, his response was that since the proposal does not contain any specific recommendations, he is not offering comments in that behalf.

Shri N. Kumar, Senior Advocate opined that the provisions under sections 108, 109 and 110 CrPC merely add to the work-load of the magistrates and are unnecessary. If there is any definite allegation against any person it is always open to the police to file a chargesheet against him without arresting the accused. With

respect to section 151 CrPC he opined that it gives a draconian power to the police to arrest any person on mere suspicion and that this weapon is mainly used against the poor and helps to keep a vast segment of population under perpetual bondage.

Shri Paramjit Singh Roy, Director (Prosecution & Litigation) and Additional Secretary to the Punjab Government has agreed with and welcomed all the proposals of the Law Commission except the one contained in para 3.4 (permitting the registered NGOs to visit police stations and other places of custody).

Shri A.K. Ganguly, Senior Advocate opined that instead of approaching the problem of arrest in isolation, the Law Commission may suggest a comprehensive reform touching all aspects of the problem such as recruitment and training of police officials, judicial officials and prosecutors, providing checks and balances on the exercise of powers by the authorities, mechanism by which they could be made accountable for their actions and restricting the power of arrest only to those cases where it is absolutely necessary. He stated that the moment a police officer is made accountable for his actions, a sea- change occurs in his attitude. Once he knows that he cannot go scot free for his illegal actions, he becomes conscientious and is likely to perform his duties in accordance with law. All actions of police officers should be subject to scrutiny by an external agency. He suggested that the recommendations made in the Consultation Paper should be given effect to in a phased manner as suggested by him.

The Government of Rajasthan through its Principal Secretary, Home Affairs and Justice Department has welcomed the proposals of the Law Commission contained in paras 3.1.1 and 3.1.2, subject to certain exceptions. They submitted that in respect of bailable offences the formality of arrest and release on furnishing bail bonds is unnecessary and that the accused may be required to furnish surety bonds or a personal bond. A personal bond should also be insisted upon to ensure the presence of witnesses. With respect to the proposal contained in para 3.1.3 of

the Consultation Paper, the Government of Rajasthan has welcomed it subject to the qualification that offences like theft, robbery, dacoity, house breaking and receiving stolen property should not be made bailable. They suggested that some other offences in the IPC should be treated as non-cognizable and some others may be made non-bailable. Two other offences, namely, those under sections 476 and 505 IPC, they submitted, be made cognizable.

The Amnesty International suggested that the provisions in sections 107 to 110 of the Code be reviewed to ensure that they are not used to deny human rights' defenders their right to peaceful assembly, freedom of expression and freedom to protest peacefully. With respect to section 151, they suggested that it must also be reviewed to ensure against its misuse and that in case a human rights' defender is arrested thereunder, he must be produced before a judicial magistrate within 24 hours. So far as the other amendments are concerned, they have invited our attention to the Brochure enclosed to the letter. On a perusal of the Brochure, we find that it mainly deals with prevention of torture and not so much with the power of arrest though the power of the police to arrest without warrant has also been discussed incidentally. For this reason it may not be necessary to deal with the contents of the Brochure at any length. The Amnesty International have also requested us to evolve a legal system minimizing the harassment and violation of the human rights of the citizens.

The IGP, Itanagar (Arunachal Pradesh) has sent a communication agreeing with all the proposals of the Law Commission.

The Bar Council of Maharashtra and Goa have suggested that the powers of the police be regulated keeping in view the guidelines laid down by the Supreme Court in D.K. Basu. They have suggested that offences under sections 498 and 498A be made bailable, but offences against property be made non-bailable. They suggested that the offences against the State, coins and weights be also made non-bailable. They supported the proposal for NGOs visiting the police stations and

other places of detention and have suggested further that after the arrest, grounds for arrest shall be conveyed not only to the accused but be also to their relatives. Another suggestion is to make the offences under sections 307 and 498A compoundable.

Shri A. Palanivel, IGP (Law and Order), UP has expressed his views separately which are identical to those expressed by the IG, UP referred to hereinbefore.

The IGP, CID, Meghalaya has expressed the opinion that the proposed measures are likely to cause more harm than good in the militancy-affected areas like Meghalaya. He submitted that the acts of the police are, as it is, under tremendous public scrutiny and any further curtailment of the powers of the police would disable them from fighting the militancy effectively.

Dr. John V. George, IPS, IGP (Crime and Law and Order), Haryana stated in his written response that there is no statistical data or any definite basis for the impression that police are widely misusing their power of arrest without warrant. He submitted that the data collected by the Commission is of no significance and that overall, and on average, one person is arrested in every criminal case. He submitted further that "in a country where the citizens have no identity cards, where floating population of a town is larger than the residential population, where large percentage of population are migrants and a person may live anywhere under any assumed name, arrest is an unavoidable exercise even in bailable offences. Additionally, Indian public do not expect the police to release an offender immediately after arrest. They would accuse the police of collusion in most such cases". He also stated that courts in Punjab and Haryana and CBI special courts insist upon the accused being produced along with chargesheet in every case, even where the accused is on bail. He expressed the opinion that the categorization of the offences in IPC into cognizable and non-cognizable was made by the "British Colonialists" to cut down expenditure on law enforcement. This distinction should

go, he said. He suggested that several offences in the IPC which are non-cognizable now should be made cognizable. He also opined that the proposal to limit the power to arrest an accused in the bailable offences, if implemented, would cause tremendous damage to maintenance of public order in the society. He suggested that several offences in the IPC may be made non-baliable, also because the public is not prepared to accept many of those offences being treated as non-bailable. He opposed the proposal to re-designate the offences punishable upto seven years as bailable. He opined that inasmuch as the directions in D.K. Basu are being implemented by the police and the courts properly, there is no need for incorporating them in the Code. He opposed the proposal to permit the registered NGOs to visit police stations and other places of detention. With respect to arrest on the basis of suspicion, he stated "arrests are made on suspicion in investigation of offences against property. Technically all arrested persons are suspects till the case is proved in courts". With respect to the apprehensions of the Law Commission regarding clause (b) of sub-section (1) of section 41, he opined that the apprehension is unfounded. He stated that not a single person has been arrested for "carrying an agricultural implement during day time". He expressed an apprehension that "if section 41 of CrPC is amended to curtail the power of arrest of constable on patrol, it would be better to withdraw all policemen from patrol duty". With respect to introducing and widening the compoundability of the offences and the concept of plea bargaining, the IG expressed the opinion that in the present scenario where the conviction rate is low, no one would come forward to make use of plea bargain facility and that compounding of offences is very rare in India – hence, he says, no amendment is needed. With respect to sections 109 and 110 of the Code, the IGP submitted that no arrests are made under this section and that the arrests are made only under section 151 read with any of the preventive provisions including sections 107, 109 and 110. He also submitted that since the police do not arrest any one on mere suspicion or merely for questioning, no amendment of law is required in that behalf. He also submitted that the safety and well being of the arrested persons can be ensured by making appropriate provisions in the Police Manual and that the law need not be amended for the purpose. With

respect to proposal regarding maintenance of a Custody Record, he stated that Police Manuals already provide for maintaining the minute to minute record regarding arrest and interrogation and that a case diary is also maintained besides the police station general diary. In this view of the matter it is not necessary to introduce another record with respect to tortious liability of the State. The IGP stated, "the State may compensate individuals if it is proved that they were wrongly arrested and prosecuted. However, it would be disastrous to presume that all who were acquitted by the courts were wrongly arrested and prosecuted". With respect to maintenance of the uniform case diary under section 172 CrPC, he suggested that the suggestion may be implemented.

The Human Rights Council, Vishakhapatnam, have, in their response, supported the proposals of the Law Commission. They have also suggested that the categorization of the offences into cognizable and non–cognizable may be substituted by the classification 'grave offences' and 'minor offences'.

Chapter Seven

Section 41 of the Code of Criminal Procedure, 1973

Bearing the principles adumbrated in Chapter Five and the material referred to in Chapter Six, let us now proceed to first examine section 41 of the Code. Our main concern is with clauses (a) and (b) of sub-section (1) and sub-section (2) thereof. With a view to clear the ground we may first deal with sub-section (2).

Sub-section (2) says that "any officer in charge of a police station may, in like manner, arrest or cause to be arrested any person, belonging to one or more of the categories of persons specified in section 109 or section 110", i.e., to arrest without a warrant and without an order from a Magistrate. We have set out the purport of sections 109 and 110 hereinbefore. Section 109 provides for the Executive Magistrate calling upon a person, who, in his opinion (formed on the basis of information placed before him), is taking precautions to conceal his presence and there is reason to believe that he is doing so with a view to committing a cognizable offence, to execute a bond for good behaviour for a period not exceeding one year. After appropriate inquiry, final orders have to be passed under section 117. Under section 109, no person can be sentenced to imprisonment or fine. Even if the proceeding ends against the person, it does not result in a conviction. Section 109 is in truth a preventive measure and section 41(2) provides that if a person belongs to the category mentioned in section 109, he can be arrested, without a warrant and without an order from a magistrate, by an officer in charge of a police station. It is evident that the real purpose of section 41(2) is to clothe the police officer in charge of a police station to arrest a person, who is taking precautions to conceal his presence with a view to commit a cognizable offence, to prevent such person from committing a cognizable offence. Similarly, section 110 provides for an Executive Magistrate calling upon a habitual offender (of the kind mentioned in the said section) to execute a bond for his good behaviour for a period not exceeding three years. This is again a preventive

measure aimed at habitual robbers, house-breakers, thieves and other types of habitual offenders specified in the section. It means that a habitual offender of the kind mentioned in section 110 can be arrested any time by an officer in charge of a police station since neither section 110 nor section 41(2) prescribe any other condition for such arrest. Even so, it is obvious that section 41(2) read with section 110 is again a preventive measure. It cannot be presumed that the law provides for picking up such a person at any time, at the pleasure of a Station House Officer, even if there is no apprehension that he is about to commit a crime. Again, under section 110, in case the allegations against the person are established, it does not result in a conviction nor can a sentence of fine or imprisonment be imposed upon that person. Of course, section 110 takes in, inter alia, habitual offenders under Drugs and Cosmetics Act, 1940, Foreign Exchange Regulation Act, 1973 (now replaced by FEMA), Employees Provident Fund and Family Pension Fund Act, 1952, Prevention of Food Adulteration Act, 1954, Essential Commodities Act, 1955, the Untouchability (Offences) Act, 1955, the Customs Act, 1962 and any other law preventing the hoarding, adulterating or profiteering in food or drugs or of corruption. It is however a matter of common knowledge that this power is hardly ever used against these economic offenders. It is mainly and generally used only against habitual offenders against property like thieves, robbers and house-breakers. We do not mean to suggest that such persons should not be arrested. All that we are pointing out is the in-built bias against the "non-respectable" criminals while taking no action against the economic offenders who are the real and more dangerous offenders. Be that as it may, this kind of carte blanche power to arrest "habitual offenders" of the specified kind at any time of his choosing, by an officer in charge of a police station – if the section is construed literally - is intrinsically capable of abuse and is liable to be characterized as discriminatory. And if the section is construed as a preventive measure, it is unnecessary and superfluous as indicated hereinafter.

In our considered opinion, sub-section (2) of section 41 is unnecessary and superfluous in view of section 151 of the Code. As has been pointed out

hereinbefore, section 151 occurs in chapter XI - 'Preventive Action of the Police'. Sections 149 to 153 contained in the said chapter provide for preventive arrests. In particular, section 151 provides that a police officer "knowing of a design to commit any cognizable offence may arrest, without orders from a magistrate and without a warrant, the person so designing, if it appears to such officer that the commission of the offence cannot be otherwise prevented". It is true that section 151 permits arrest only in case of a design to commit a cognizable offence, but so do sections 109 and 110. (Indeed, while section 41(2) empowers only an officer in charge of a police station to make arrest thereunder, section 151 empowers each and every police officer to do so.) Section 109 speaks of a person concealing his presence with a view to commit a cognizable offence; it does not speak of a person seeking to commit a non-cognizable offence. If so, such person can be arrested under section 151 and resort to section 41(2) read with section 109 is unnecessary. Clause (a) of section 110, theft (379 and its aggravated forms in succeeding sections), dacoity (397 with its aggravated forms in the succeeding sections), house-breaking (453 and its aggravated form in the succeeding sections) and forgery (465 and its aggravated form in the succeeding sections) are all cognizable offences. The offence of receiving stolen property knowing it to be stolen (under section 411, IPC) mentioned under clause (b) of section 110 is again a cognizable offence. Similarly, the offences mentioned in clauses (c) and (d) of section 110 are all cognizable offences. Clause (e) speaks of offences involving breach of peace. Evidently the reference is to chapter VIII of the IPC which carries the title "Offences Against the Public Tranquility". All the offences mentioned in this chapter are cognizable offences except three offences of a minor nature. So far as clause (f) is concerned, the reference is to offences under several special enactments – mostly dealing with economic activity - some of which may be cognizable and some not. So far as the offences under these special enactments are cognizable, section 151 can take care of them and so far as non-cognizable offences under the said special enactments are concerned, there is no reason why such a wide and absolute power of arrest is conferred upon the Station House Officers even in case of such non-cognizable offences. The last clause in section 110 is

clause (g) (desperate and dangerous character, whose being at large is hazardous to the community). A person falling under clause (g) can certainly be arrested under section 151.

We are of the opinion for the above reasons that sub-section (2) of section 41 is superfluous and unnecessary – apart from the inherent discriminatory character of the provision. The power under section 151 CrPC is sufficient to take care of situations contemplated by the said sub-section. Indeed, it is more effective than section 41(2) inasmuch as section 151 clothes every police officer with the power to arrest a person who is designing to commit a cognizable offence if the commission of such offence cannot be prevented otherwise whereas under section 41(2), only the officer in charge of a police station can make the arrest. We are therefore of the opinion that sub-section (2) of section 41 deserves to be deleted from the Code. Of course, this recommendation does not in any manner affect the power of the Magistrate under sub-section (3) of section 116 CrPC.

Now we shall take up clauses (a) and (b) of sub-section (1) of section 41.

Clause (a) of sub-section of section 41 empowers a police officer to arrest, without an order from a Magistrate and without 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". Similarly, under clause (b), any person "who has in his possession without lawful excuse, the burden of proving which excuse shall lie on such person, any implement of house-breaking" can also be so arrested.

Clause (a) of sub-section (1) of section 41 speaks of arrests of four categories of persons, viz.:

(i) A person who has been concerned in any cognizable offence;

(ii) A person against whom a reasonable complaint has been made of his having been concerned in any cognizable offence;
(iii) A person against whom credible information has been received of his having been concerned in any cognizable offence; and
(iv) A person against whom a reasonable suspicion exists of his having been concerned in any cognizable offence.

It would be appropriate to deal with each of these four categories separately. Let us take the first category: "(i) person who has been concerned in any cognizable offence". What is the meaning of the words "concerned in"? The expression is ambiguous and vague - and vagueness or ambiguity is not permitted when we are dealing with the liberty of a citizen, as would be explained hereinafter. It is not even a case of vesting the police with the power to arrest on their subjective satisfaction. For it is well-known that where a subjective power is sought to be conferred, the Legislature uses the expressions "if there are grounds", "has reason to believe", "is satisfied" or "there are circumstances suggesting … (a particular inference)" (vide the celebrated decision of the Supreme Court in Barium Chemicals Limited v. Company Law Board, AIR 1967 SC 295). It has been held in the said decision that where such expressions are used, the entire process is not subjective but that while the existence of relevant material/information is objective, drawing of inference therefrom alone is a subjective process. It has also been held that the only check upon the subjective power is the existence of circumstances/material/information; in case it is established that there was no material/information or factual basis, the exercise of power becomes illegal. But then look at the first category contemplated by section 41(1)(a). You will find that even these protective words are not there. The matter is left entirely to the sole and absolute discretion of the police officer. It is true that the courts have tried to reduce the rigour of this provision by saying that there must be some information or material before the police officer on the basis of which he must be satisfied prima facie that the person appears to be guilty of offence and that he should be arrested. At the same time, the courts have said that since he is the officer to make a decision

on the spot, the matter must be left to him to decide whether there are reasonable grounds for him to arrest the person. The question is - why should not the Act itself contain the requisite safeguards. In Chapter Four we have pointed out that the Law Commission has been repeatedly suggesting introduction of provisions precisely designed to regulate this power by saying that before the arrest is made, the officer must have with him some material or information on the basis of which he is fairly and honestly satisfied that the person must be arrested.

Now coming to the second, third and fourth situations contemplated by clause (a) of section 41(1), the position is slightly better or worse – depending upon the way you look at them. Firstly, here again there are no words which speak of formation of a reasonable belief or a reasonable satisfaction by the police officer before arresting the person. It is true that when clause (a) speaks of a 'reasonable complaint' or 'credible information' or 'reasonable suspicion', it undoubtedly means reasonable or credible in the opinion of the police officer but opinion about what? It is undoubtedly again about the person being 'concerned' in a cognizable offence. The said phrases therefore do not advance the cause of liberty, much of they revolve around the expression "having been concerned in a cognizable offence". The conclusion appears inescapable that the language actually employed falls short of the standard which must be observed while dealing with the liberty of the citizen. One course to redress this situation may be to introduce a provision in terms of sub-section (1A), which was suggested by the 152nd Report of the Law Commission on Custodial Crimes (1994). We however think that instead of retaining clause (a) in sub-section (1) as it stands and inserting a new sub-section, sub-section (1A), as suggested by the said Report, the more appropriate course would be to substitute clause (a) with a new clause containing the requisite safeguards.

But before we actually seek to set out the provision which is to be substituted in the place of existing clause (a), it would be appropriate to examine the question whether clause (a) of section 41(1), as it stands, can be said to be a

reasonable law or a law laying down reasonable procedure within the meaning of Article 21 as construed in Maneka Gandhi*. Since Article 21 must be read as taking in Articles 14 and 19 as well, as per the said decision, can it be said that the procedure prescribed by section 41(1)(a) is "right and just and fair and not arbitrary, fanciful or oppressive". Liberty is the most precious right of a citizen. Only a person who is deprived of the liberty can understand the significance and value of liberty. In any society including ours the very fact of arrest places a person's reputation under a cloud. Arrest by police is by itself humiliating and demeaning. It reduces the individual's self-respect. His image in the society suffers. Is it reasonable and fair and just to vest such enormous power in any and every police officer – indeed in every police constable in this country - to deprive a citizen of his freedom and liberty merely because he thinks that the person is concerned in a cognizable offence, without being prima facie satisfied on the basis of some relevant material or information that the person concerned appears to be prima facie guilty

* It is true, the decision in Maneka Gandhi was rendered long after the enactment of the present CrPC and that the interaction of Articles 21, 19 and 14 was not and could not have been in the contemplation of Parliament when it enacted the Code, yet that circumstance is no excuse nor a ground for not testing the said provisions on the touchstone of Article 21 as interpreted and adumbrated in Maneka Gandhi.

of a cognizable offence? It is interesting to note the amount of faith the Parliament has reposed in the good faith and fairness of the police constables of this country. A police constable, who is hardly a matriculate (School higher secondary examination pass), whose training is almost nil, who is hardly aware of the constitutional, statutory and human rights of the accused, who is financially in a bad shape all the time and who is so badly treated by his superiors that he

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passes on that bad language and bad treatment to the people whom he comes across in course of his duties. In this connection, it is well to remember that even if the arrest is made unlawfully and unjustifiably, the remedies available to an individual in our legal system are almost nil, practically speaking – an aspect dealt with hereinbefore.

Even assuming that section 41(1)(a) – atleast in part - provides for arrest on the subjective satisfaction of the police officer, would it be reasonable to predicate the liberty of a citizen on the subjective satisfaction of a police officer – indeed any and every police officer. In this connection, it is well to remember that the Supreme Court has held repeatedly that predicating the fundamental right of a citizen on the subjective satisfaction of an executive official is impermissible under our Constitution and it would be a clear case of placing an unreasonable restriction upon the fundamental right of the citizen. In State of Madras v. V.G. Row (1952 SC 196) the court said: "The formula of subjective satisfaction of the government or its officers, with an Advisory Board thrown in to review the materials on which the government seeks to override a basic freedom guaranteed to the citizen, may be viewed as reasonable only in very exceptional circumstances and within the narrowest limits, and cannot receive judicial approval as a general pattern of reasonable restrictions on fundamental rights". [Peoples Education Society, banning case] This was so said in case where the act of the executive official was indeed subject to review by an Advisory Board. In R.M. Seshadri v. D.M. Tanjore (1954 SC 747), a condition in Licence requiring the Exhibitor to exhibit one or more approved films, as may be specified by the government, was struck down on the reasoning that "a condition couched in such wide language is bound to operate harshly upon the cinema business and cannot be regarded as a reasonable restriction". In Maneklal Chotelal v. Makwana (1967 SC 1373) it was held that under Articles 14 and 19 "if an uncontrolled and unguided power is conferred, without any reasonable and proper standards or limits being laid down in the enactment, the statute may be challenged as discriminatory". Similarly, in Harichand v. Mizo Dist. Council (1967 SC 829) it was held that a provision of a

Regulation vesting unrestricted power in the licensing authority in the matter of grant or refusal of licence, without laying down any standards or criteria, was unreasonable and bad. In State of Maharashtra v. Kamal (1985 SC 119), the Maharashtra Vacant Lands (Prohibition of Unauthorised Occupation and Summary Eviction) Act, 1975 was struck down by the Supreme court on the ground that the Act did not provide any guidelines for exercising the power under section 2(f) (power to declare a land as 'vacant land') nor were any safeguards against arbitrary exercise of discretion provided by the Act.

The above principles enunciated with respect to fundamental rights in Article 19 are equally applicable under Article 21 inasmuch as it is now declared (Maneka Gandhi) that a law within the meaning of Article 21 has to be a reasonable and non-discriminatory law tested on the touchstones of Articles 19 and 14. Indeed, the liberty guaranteed by Article 21 is more valuable and precious than the freedoms guaranteed by Article 19. Deprivation of liberty, i.e., incarceration in the police custody even for 24 hours is worse than deprivation of property for one year. It may also be recalled in this connection that a eleven-judge Constitution Bench decision in R.C. Cooper v. UOI (1970 SC 564) has established that any restriction placed upon a particular fundamental right need not necessarily be examined only with reference to that right but must have to answer the other fundamental rights as well if it impinges on such other rights.

The courts, it is true, have been saying over the last several decades that the power of arrest cannot be exercised without any justification and that the police officers must exercise this power fairly and honestly. At the same time, the courts have also said that reasonableness or justification of an arrest is a matter for the police officer to determine in the given circumstances of each case and that it is not possible to lay down exhaustively what do the expressions "credible information" or "reasonable complaint" or "reasonable suspicion" in section 41(1)(a) mean. The result is that the police officer's powers under section 41 remain unchecked. It would be interesting to see in how many cases, have the courts punished the

police officer for making a wrongful or unjustified arrest. It would not even be one per cent.

We must say emphatically at this stage that the argument that there must be fear of police in the public (for an efficient discharge of the functions of the police to maintain law and order) does not appeal to us. This is really a hangover of the colonial past, where it suited the colonial power to have a (lower) bureaucracy alienated from people but loyal to its masters – a truism emphasized by the National Police Commission. In a democratic society, the police should also be imbued with the democratic spirit and a spirit of service towards the people – not an attitude of contempt or superciliousness. In U.K., a policeman is looked upon with trust, as a friendly creature.

It is true that the population explosion and the shrinking material resources in the country is giving rise to an all-round sense of dis-satisfaction and that the daily tales of corruption of very high order is making the people disenchanted with the very system we are living in. But this is no answer to police high-handedness. If anything, police should not add to the sense of frustration and to a feeling of brooding injustice. On the contrary, it should try to curb these unlawful activities. It would not do if the police looks upon the mass of people, most of them no doubt poor, as potential criminals who, given a chance, are bound to commit some or other cognizable crime. We do not think that bulk of our population, poor that they are, are all potential criminals. There are undoubtedly some such elements, but those are hardly kept off their activity for "fear of police".

One of the police officers (DGP (Crime and Law & Order) Haryana) has stated in his response that if the power of arrest of constable on patrol is to be curtailed, it would be better to withdraw all policemen from patrol duty. We are unable to appreciate this argument. We are not suggesting that the power of arrest inhering in the police constable should be taken away. What we are suggesting is to regulate that power, to make it reasonable so as to ensure that that power is not

exercised whimsically or for oblique purposes and for extortion and harassment, a fact situation recognized by the National Police Commission too. He can certainly arrest while on patrol but only when he has reasonable grounds to believe that such person, has or is about to commit a cognizable offence and that it is necessary to arrest him – and not to arrest persons in a casual manner. If this apprehension were to be well-founded, the Directors General of U.P., Rajasthan and Arunachal Pradesh would not have agreed with our proposals in the Working Paper, as indicated hereinbefore. We may reiterate at this stage our classification of the offences, in the context of power of arrest, into (a) those offences which are committed in the presence of a police officer and (b) those offences which are reported to the police officer after they are committed. Once this distinction is kept in mind, as explained by us hereinbefore, many of the apprehensions of the law enforcement authorities would be allayed.

Now let us take up clause (b) of sub-section (1) of section 41. This clause is not only vague but is highly objectionable because it constitutes the police officer the sole judge of the fact mentioned therein. Firstly, what is an "implement of house-breaking"? A screw-driver can also be such an implement. Many tools used by mechanics and agriculturists can also be used as implements of house-breaking. There are hardly any implements meant exclusively for house-breaking. Secondly, the person must establish the "lawful excuse" for possession of such an implement to the satisfaction of the police officer/police constable. If he is not satisfied, he will arrest him and put him up in the lock-up. This power is not confined to dark hours – say, between 10.00 pm to 3.00 am – but extends to all twenty-four hours. In our opinion, this is an extraordinary and unusual provision totally at variance with a civilized society and must go. It is exclusively used to harass poor and indigent persons and is a source of harassment. We suggest that clause (b) of sub-section (1) of section 41 be deleted.

Before we suggest the replacement of clause (a) of sub-section (1) of section 41, it is necessary to advert to yet another circumstance, viz., the definitions of

"cognizable offence/cognizable case" and "non-cognizable offence/non-cognizable case". On this aspect, we may refer to the recommendation of the National Police Commission referred to in Chapter Four of this Report. The NPC has recommended a change in the definition of the said expressions. In short, their reasoning is that the cognizability of an offence and the power of police to arrest without warrant should be delinked: cognizability should now be linked to power of the police to investigate into that offence without orders from a magistrate; in other words, the issue of arrest should be determined on grounds different from the ground that the offence is a cognizable one; merely because an offence is cognizable one, it does not mean that arrest should or can be made; whether to arrest a person/accused must depend upon other factors; cognizability of the offence shall only be one of the factors in determining whether arrest should be made – says the NPC.

Though this recommendation appears to be attractive at first look, it does not appear to be advisable to adopt. We may explain: the meaning and scope of a "cognizable offence" cannot be fully gathered from looking at its definition in clause (c) of section 2 (which speaks only of arrestability without a warrant or order from a magistrate); it would be necessary to refer to sections 155 and 156 also in chapter XII of the Code.

Section 155(2) says that "no police officer shall investigate a non-cognizable case without the order of a magistrate having power to try such case or commit the case for trial". Sub-section (1) of section 155 empowers the police merely to enter the substance of such information in the prescribed book and refer the informant to the magistrate. Section 156, on the other hand, empowers an officer in charge of a police station to investigate any cognizable case without the order of a magistrate. In other words, a cognizable offence means an offence in which (a) the Police can arrest the person without a warrant or order from a magistrate and (b) the Police can investigate without an order from the magistrate. Correspondingly, in case of a non-cognizable offence, the Police can neither arrest

without a warrant or order from a magistrate nor can they investigate into it without an order from a magistrate. If a cognizable offence is made only investigable – if we can use that expression – without an order of a magistrate but not "arrestable" without a warrant or order from a magistrate, the power to arrest would depend upon the provisions in chapter V and section 157 alone. But here again, the close nexus between cognizability and arrestability cannot be denied. We may reiterate that the categorization into cognizable/non-cognizable in the Code is based upon a reasonable and cogent basis viz., the need to arrest the man for one or the other of the relevant reasons. (See Chapter Three of this Report). There appears no good reason for changing the said categorization or the criteria upon which it is based.

In the light of the above discussion, we recommend that the existing clauses (a) and (b) of sub-section (1) of section 41, be substituted by the following clauses:

"(a) who commits, in the presence of a police officer, a cognizable offence;

(b) against whom credible information has been received that he has committed a cognizable offence punishable with imprisonment for a term which may extend to seven years, (whether with or without fine), if the following conditions are satisfied, namely:-

(I) the police officer has reason to believe on the basis of that information that such person has committed the said offence;

(II) the police officer is satisfied that such arrest is necessary-

(a) to prevent such person from committing any further offence; or

(b) for proper investigation of the offence or for the reason that detention of such person in custody is in the interest of his safety; or

(c) to prevent such person from, causing the evidence of the offence to disappear or tampering with such evidence in any manner; or

(d) to prevent such person 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; or

(e) that unless such person is arrested, his presence in the court whenever required cannot be ensured; and

the police officer records his reasons in writing.

(ba) against whom credible information has been received that he has committed a cognizable offence punishable with, imprisonment for a term which may extend more than seven years (whether with or without fine) or with death and the police officer has reason to believe on the basis of that information that such person has committed the said offence;".

We are of the opinion that if the amendments mentioned above are carried out, it may not be necessary to change or amend the definition of the expression "bailable offence". In any event, the bailability or non-bailability is relevant more for the purpose of and on the question of bail. Section 41(1)(a) and (b) as suggested by us empowers the police officer to arrest a person if he has committed a cognizable offence; it does not refer to bailability or otherwise of the offence. The relevance of bailability of the offence is dealt with by us hereinafter while discussing the provisions relating to bail. In such a situation, all that would be necessary to provide is to say, by way of a separate section, section 60A, that "no arrest shall be made except in accordance with the provisions of this Code or any other law for the time being in force providing for such arrest". This is for the reason that according to Annexure II a large number of arrests are being made in bailable offences, most of which offences are bound to be non-cognizable offences. We accordingly recommend that the following new section, section 60A, be inserted in the Code:

"60A. No arrest shall be made except in accordance with the provisions of this Code or any other law for the time being in force providing for arrest."

Proposals in the Consultation Paper:

We may next take up the proposals contained in Part Three of the Working Paper. The first proposal is contained in para 3.1.1. The proposal is that in respect of bailable and non-cognizable offences, no court shall issue an arrest warrant and that only summons shall be served through a court process server or by other means but not through a policeman. It was also proposed that the very expression "bailable" may have to be changed inasmuch as the said expression implied an arrest and an automatic bail by the police/court. While there was a good amount of support to this proposal there have also been dissenting voices. Before we proceed to discuss this proposal we must make it clear that our immediate concern is with the arrestability of the person who is accused of committing a bailable/non-cognizable offence. We are not concerned with nor are we suggesting any change in the punishment provided for the relevant offences. If the person is guilty of any of the said offences he can be proceeded with according to law and punished if found guilty. The limited question is whether there should be an arrest of such person either under the warrant of a magistrate or by the police. So far as the arrest by police, without warrant, of a person accused of bailable and non-cognizable offence is concerned, the Code itself does not empower the police to do so simply because the Code, as it now stands, does not permit arrest without warrant in a non-cognizable case (except for the limited purpose mentioned in section 42). But the fact remains that, as a matter of fact, in number of such cases arrests are made by the police. This is in fact admitted in so many words by Dr. John V. George, IPS, IGP (Crime and Law & Order), Haryana, which we have extracted in an earlier chapter. He has stated in his written response that "in a country where the citizens have no identity cards, where floating population of a town is larger than the residential population, where large percentage of population are migrants and a person may live anywhere under any assumed name, arrest is an unavoidable exercise even in bailable offences". He also opposed the proposal in the Working Paper to curtail the power of the police to arrest an accused in bailable offences on the ground that if the said proposal is implemented, it would cause tremendous damage to maintenance of public order in the society.

After giving our due consideration to the pros and cons of the proposal contained in para 3.1.1 of the Working Paper in the light of the several responses received and opinions expressed at the Seminars, we are of the opinion that the police should be specifically barred from arresting any person accused of a non-cognizable offence – whether bailable or otherwise - without a warrant or an order of the Magistrate. We have in fact suggested insertion of a new section, section 60A, providing that no arrest shall be made except in accordance with the provisions of this Code. There should be no question of the police being empowered to arrest, without warrant or an order of a Magistrate, any person accused of or against whom information has been received that he may have committed a non-cognizable offence. (Of course, the power of the court to issue a warrant even in a non-cognizable shall remain undisturbed.) [Accordingly, we recommend substitution/insertion of sub-section (2) of section 41 providing that police shall not arrest without a warrant or an order of a Magistrate, any person who is accused of having, or believed to have, committed a non-cognizable offence. [It would mean that there shall be no arrest in any case of non-cognizable offence (except under the warrant/orders of the magistrate), irrespective of the fact whether such offence is bailable or non-bailable]. Such course would go a long way in saving the people from harassment at the hands of unscrupulous elements among the police force and would also go a long way in reducing the number of undertrial prisoners in jails, circumstances commented upon both by the Supreme Court and the National Police Commission. It may be remembered that according to Annexure-II, bulk of arrests are in bailable offences and since most of the bailable offences are non-cognizable, these kind of arrests would be drastically curtailed. Section 436, as it now stands, speaks of enlarging a person on bail, who has been arrested in connection with a bailable offence. The section evidently contemplates arrest of a person in a bailable offence, which is cognizable, inasmuch as no arrest can be made without a warrant in a non-cognizable case. In this view of the matter, no amendment is necessary in section 436. Of course, where a person is arrested in a non-cognizable case in pursuance of a warrant/order of a

magistrate, and is produced before a magistrate, he can deal with him as provided in section 436.

The next proposal in the Working Paper is contained in para 3.1.2. The proposal is that in respect of the offences now categorized as bailable and cognizable by the First Schedule to the Code, no arrest should be made by the police without warrant and that in such cases only an appearance notice may be served upon the person directing him to appear at the police station or before the magistrate as and when called upon to do so, unless there are strong grounds to believe, which should be reduced into writing and communicated to the higher police officers as well as to the concerned magistrates, that the accused is likely to disappear and that it would be very difficult to apprehend him or where the person concerned is a habitual offender. In respect of this proposal also there were both supporting and dissenting voices. The opponents of this proposal who are by and large police officials have submitted that the said proposal, if implemented, would seriously disable the police from performing their functions, inter alia, the maintenance of law and order and a proper and effective investigation into offences.

This aspect is covered by our discussion and conclusion in respect of the proposal in para 3.1.1 where we have pointed out that there shall be no arrests in a non-cognizable case, whether bailable or not, except under the warrant/order of a magistrate. It may also be noted that according to clauses (a) and (b) recommended by us hereinabove, in the place of the existing clauses (a) and (b) in sub-section (1) of section 41, the police is entitled to arrest a person only in the situations specified therein. In such a situation, it would be appropriate to suggest that in cases of cognizable/bailable offences punishable with seven years or less imprisonment, with or without fine, where the arrest of the accused is found not necessary but his cooperation or presence is called for the purposes of investigation, the police can serve a notice calling upon him to appear before the police during the course of investigation, or before the Court, as the case may be, whenever called upon to do

so. The proposal in the Consultation Paper is affirmed, subject to the above discussion.

It may be necessary to clarify at this stage that by making the aforementioned recommendations, we are in no way interfering with the power of the Magistrate to issue warrants of arrest nor are we interfering with the definitions of or distinction between a summons case and a warrant case, in the matter of procedure, prescribed by chapters XIX and XX. Our limited concern, to repeat, is the power of police to arrest without warrant and/or without an order of a magistrate.

We have already stated hereinabove that in the light of the proposals we are making in this Report, it is not necessary to change the existing classification of offences into bailable and non-bailable and cognizable and non-cognizable. We are taking the said two classifications as they stand and are defining the powers of arrest and other incidental matters on that bases.

The next proposal of the Law Commission is contained in para 3.1.3 of the Working Paper. The proposal is that the offences punishable with seven years imprisonment or less at present (except the offences punishable under sections 124, 152, 216A, 231, 233, 234, 237, 256, 257, 258, 260, 295 to 298, 403 to 408, 420, 466, 468, 477A and 489C) - and which are treated at present by the court as cognizable and non-bailable offences - should be treated as bailable/cognizable offences and be dealt with accordingly. It was clarified that insofar as excluded offences are concerned, i.e., offences which are mentioned within the brackets, the present position will remain unchanged. This proposal was seriously opposed by almost all the police officers while it was appreciated by the proponents of human rights and the members of the Bar in general. This proposal in the Working Paper however has to be examined in the light of the recommendations made by us hereinabove, namely, not to change the present classification of offences into bailable and non-bailable and cognizable and non-cognizable and to make a further

classification, in the context of power of arrest without warrant, of offences committed in the presence of the police officers and offences which are reported to the police officer after they are committed. We have also suggested that in case of offences punishable up to seven years and which are treated as cognizable and non-bailable by the Code, arrest can be made only where the circumstances mentioned in sub-section (1) of section 41 (recommended in this report) are satisfied. In the light of the said proposals, it is not necessary to pursue the proposals contained in para 3.1.3 of the Working Paper.

In para 3.2.1 of the Consultation Paper, a proposal was put forward to amend section 41 so as to provide that no person shall be arrested merely on the suspicion of complicity in an offence. It was suggested that an arrest should be made only where the police officer is satisfied prima facie on the basis of the material/information with him that the person is involved in a crime/offence for which he ought to be arrested without a warrant. Reference was also made in that connection to the decision of the European Court of Human Rights in Fox, Campbell and Hartley v. U.K. delivered on 30th August, 1990 declaring that section 11 of Northern Ireland (Emergency Provisions) Act, 1978 is violative of article 5(1) of the European Convention on Human Rights. The section empowered a police officer to arrest a person if he is "suspected of being a terrorist". The court held by a majority that mere suspicion, however bona fide held, cannot be a ground for arrest. It was also pointed out in the Consultation Paper that pursuant to the said decision, section 11 was amended and the aforesaid words were substituted by the words "has been concerned in the commission, preparation or instigation of acts of terrorism". It may be remembered in this connection that section 41(1)(a), as it stood, provided for arrest without warrant of a person against whom "a reasonable suspicion exists" of his having been concerned in any cognizable offence. The IGP, Haryana has stated in his written response that "arrests are made on suspicion in investigation of offences against property. Technically all arrested persons are suspects till the case is provided in courts". Frankly, we are unable to appreciate the mind-set and the approach of the certain police officers evidenced by the said

statement. It is difficult to countenance the argument that a man can be deprived of his liberty merely on suspicion; indeed, Section 41 even as it stands now, speaks of reasonable suspicion and not mere suspicion. We have already pointed out the fall-out of the arrest of a person and how his image and reputation suffers in the eyes of the society by such arrest. We are therefore of the opinion that unless there is some specific information on the basis of which the police officer believes it reasonably probable that the person is involved in an offence, that it is a cognizable offence, and for which it is necessary to arrest him i.e., in the circumstances set out in section 41 as proposed to be amended herein, there can be no question of an arrest. With a view to drive home the point, let us imagine a situation where there is a provision saying that an order of censure can be passed against a public servant by his superior without notice to him; how would such public servant feel? Similarly, suppose if there is a provision which says that a public servant can be suspended from service pending inquiry on the basis of suspicion or on the basis of reasonable suspicion, how would it sound? One can always say that suspension pending inquiry is no punishment, that it is only a temporary measure and that if the person is not found guilty ultimately, he can always be restored all the antecedent benefits with retrospective effect. Let us repeat that liberty is no less important than the service career of a public servant. Indeed, the decision of the European Court of Human Rights and the consequent amendment of the Northern Ireland (Emergency Provisions) Act, 1978 - which is indeed an anti-terrorist enactment - indicates the unacceptability of the proposition that a person can be arrested merely on suspicion or merely on a reasonable suspicion of his being concerned in a cognizable offence. The question then arises whether there should be a specific provision in the Code providing that no person shall be arrested on mere suspicion or on reasonable suspicion of his having been concerned in a cognizable offence. We do not think that any such specific provision is called for in view of the fact that section 41(1)(a), as recommended by us in this chapter, permits arrest only in certain specified situations which necessarily means and implies that no arrest can be made on mere suspicion.

Chapter Eight

Implementing the decision in D.K. Basu

In para 3.3 of the Consultation Paper, it was proposed that the several directions/safeguards enunciated in the decision of the Supreme Court in D.K. Basu should be incorporated in the Code by appropriate amendments. There was in fact no opposition to this proposal at all. Indeed, there can't be any for the simple reason that the decision itself directs that the said decisions will be effective "till legal provisions are made in that behalf". More important, the decision also states that the directions/safeguards issued in the said decision "flow from articles 21 and 22(1) of the Constitution and need to be strictly followed". It was also made clear that the said requirements do not detract from the existing constitutional safeguards nor do they detract from various other directions given by the court from time to time in connection with the safeguarding of the rights and dignity of the arrested person. The eleven directions/safeguards issued in the said decision have already been set out in Chapter Three of this Report.

It may be mentioned that similar provisions have also been recommended by the Law Commission on previous occasions referred to in Chapter Four of this Report. We may refer in this connection to the recommendations contained in the 152nd Report on Custodial Crimes (1994) (four recommendations in all) and to the recommendations contained in 154th Report on Code of Criminal Procedure for insertion of a new sub-section, sub-section (3) in section 41 and for insertion of a new section, section 41A. Reference may also be made to the "Guidelines for making arrests" contained in the Report of the National Police Commission (para 22.28). Indeed, the Criminal Procedure Code (Amendment) Bill, 1994 proposed to insert section 50A providing for giving information of the arrest of such persons as may be nominated by the arrested persons. The Parliamentary Committee which examined the said provision in the Amendment Bill has further recommended for making it more comprehensive and more effective as has been

stated in Chapter Four The proposals contained in the said Amendment Bill for insertion of a new sub-section, sub-section (2) in section 54, and the insertion of a new section, section 54A, are equally relevant in this behalf. Accordingly, it is recommended that the aforesaid directions in D.K. Basu be incorporated in Chapter V of the Code of Criminal Procedure, along with the consequences for not complying with such directions/provisions. It is obvious that by incorporating the said directions into the Code, the sanction now operating (contempt of Court) under and by virtue of the directions contained in the said decision, would not disappear. Evidently, the violation of the proposed provisions in sections 41A to 41D would constitute an offence within the meaning of section 166 IPC, which not being a provision relating to contempt of subordinate courts would not also attract proviso to section 10 of the Contempt of Courts Act, 1971 (see Bathina Ramakrishna Reddy v. State of Madras, AIR 1952 SC 149 and State of Madhya Pradesh v. Reva Shankar, AIR 1959 SC 102). It would be a case of contempt under and by virtue of the directions aforesaid. Be that as it may, any violation of the provisions being made in terms of the decision in D.K. Basu would clearly constitute an offence within the meaning of and as defined by section 166 of IPC apart from and in addition to constituting a contempt of court as laid down in D.K. Basu. It shall be open to a person affected by such violation or non-observance of the proposed provisions to lodge a complaint according to law. Section 166 IPC may also be suitably amended to clarify that violation of the provisions in sections 41 to 41D of CrPC shall constitute an offence thereunder.

Chapter Nine

Plea bargaining and compounding of offences

It was suggested in the Consultation Paper, para 3.4, that the representatives of the registered Non-governmental Organizations (NGOs) should be allowed to visit the police stations at any time of their choice to check and ensure that no person is illegally detained there or that no person is being ill-treated or otherwise subjected to inhuman treatment. This suggestion has been strongly opposed by all the police officials. It did not find favour with some of the members of the Bar as well though the human rights organizations lent strong support to the said proposal. On a consideration of the entire matter and keeping in view the recommendations already made in the preceding chapters, we are not inclined to pursue this suggestion; at the same time we are of the opinion that there should be a provision clearly entitling an advocate engaged by or on behalf of the arrested person to visit the police station at any time of his choice to ensure against any violations of constitutional or statutory safeguards. This safeguard coupled with the other safeguards mentioned in the preceding chapters would, in our opinion, be adequate to safeguard the constitutional and legal rights of the accused while in police custody. Accordingly, a new section in the above terms may be inserted in Chapter V. We may refer, in this connection to one of the directions contained in the decision D.K. Basu viz., that "the arrestee may be permitted to meet his lawyer during interrogation, though not throughout the interrogation". The said safeguard is actuated by the same concern which lies behind our proposal. In addition to allowing the lawyer to be present during interrogation, we think it would be more appropriate if the lawyer is permitted to visit the police station at any time of his choice with a view to ensure that his client's constitutional and legal rights are not being infringed while he is in custody. In view of our recommendation to permit the presence of the lawyer at the time of interrogation, no specific provision to the above effect is included in the Bill.

The next proposal in the Consultation Paper, para 3.5, is to increase the compoundability of offences and to incorporate the concept of plea bargaining. It was suggested that the recommendations of the 14th Law Commission contained in their 154th Report on Criminal Procedure Code, Chapters 12 and 13, relating to compounding of offences and plea bargaining, respectively, should be implemented at an early date. There has practically been no opposition to this proposal except a police officer saying that in view of the low rate of conviction in our country, there is no inducement for any accused to go in for plea bargaining and that any such scheme would not be successful or effective in our country. It is difficult to agree with this assessment. The rate of conviction may be low but the harassment involved in defending himself in a criminal court including attending the criminal court on every date of hearing over several years – which is the normal span of a criminal case in this country – should be a sufficient inducement for the accused to resort to plea-bargaining and thereby avoid the inquiry and trial and all the hassles that go along with it from the very first date of hearing. He would be rid of the botheration. He can devote himself to his normal pursuits.

With respect to compounding of offences (section 320), the 154th Report sets out the various reasons for which it has recommended the enlargement of the compoundable offences. In particular, it is recommended that a large number of offences be deleted from sub-section (2) of section 320 (offences compoundable with the permission of the court) and place them in sub-section (1) of section 320 (offences compoundable without the permission of the court). The offences so recommended to be shifted from sub-section (2) to sub-section (1) of section 320 are the offences punishable under sections 324, 325, 335, 343, 344, 346, 379, 403, 406, 407, 411, 414, 417, 419, 421, 422, 423, 424, 428, 429, 430, 451, 482, 483 and 486. The Report also supported the suggestions made by certain senior police officers and the National Police Commission in its Fourth Report that the investigating officers should be empowered to compound an offence which is compoundable at the investigation stage itself and make a report thereof to the magistrate who shall give effect to the composition of such effect. Accordingly,

the Report commended clause 20 of 1994 Amendment Bill which sought to insert a new sub-section, sub-section (3A) in section 173 to the above effect. We commend the above recommendations.

Another recommendation made in the 154th Report is to make the offence under section 498A compoundable and place it in sub-section (2) of section 320 which means that it shall be compoundable with the permission of the court. Though there has been some opposition to this recommendation from certain women's organizations, today there is an overall realization that the said provision is being utilized quite often to harass the relatives of the husband and is being used as a lever of pressure. We may also mention that over the last several years a number of representations have been received by the Law Commission from individuals and organizations to make the said offence compoundable. We are inclined to agree with the same and accordingly reiterate the recommendation in the 154th Report that the offence should be made compoundable with the permission of the court.

On the issue of plea-bargaining, the 154th Report recommended a new chapter, chapter XXIA to be incorporated in the Code as recommended therein. The said Report indeed referred to the earlier Report of the Law Commission, 142nd Report, which set out in extenso the rationale behind the said concept, its successful functioning in the USA and the manner in which it should be given a statutory shape. The Report recommended that the said concept be made applicable as an experimental measure to offences which are punishable with imprisonment of less than seven years and/or fine including the offences covered by section 320 of the Code. It was also recommended that plea-bargaining can also be in respect of nature and gravity of the offences and the quantum of punishment. It was observed that the said facility should not be available to habitual offenders and to those who are accused of socio-economic offences of a grave nature and those accused of offences against women and children. The procedure to be followed in the matter has also been indicated in paras 9.1 to 9.9 of the said Report. We do not

think it necessary to reproduce the same. Suffice it to say that we support and reiterate the said recommendations.

On the issue of compounding we may refer as well to the Code of Criminal Procedure (Amendment) Bill, 1994. By section 33 of the said Bill, section 320 of the Criminal Procedure Code, which deals with compounding of offences, was sought to be amended. The amendments proposed in the Bill are however very minor in nature. One of the offences, rather the first of the offences mentioned in the table under sub-section (2), viz., "voluntarily causing hurt by dangerous weapons or means" (section 324 IPC) was sought to be omitted along with the words in columns 2 and 3 of the said table against the said entry. The result of the said amendment, if given effect to, would be to remove the offence under section 324 IPC from the list of offences which can be compounded with the permission of the court and also to raise the monetary limit placed in the several entries in the said table. The Parliamentary Committee on Home Affairs has not made any comment on this provision of the Amendment Bill. We see no reason to exclude the offence under section 324 from the Table.

Section 320 Code of Criminal Procedure: Raising pecuniary limit of Rs.250/- to Rs.25,000/- in respect of certain offences

Another change sought to be effected by the said Bill is to substitute the words "two hundred and fifty rupees" wherever they occur in the said table by the words "two thousand rupees".

Under sub-section (2) of section 320 of the Code of Criminal Procedure 1973, several offences which can be compounded with permission of the court, are listed. Among the offences so listed are those under section 379 (Theft), section 381 (Theft by clerk or servant of property in possession of master), section 406 (Criminal breach of trust), section 407 (Criminal breach of trust by a carrier, warfinger etc.), section 409 (Criminal breach of a trust by a clerk or servant),

section 411 (Dishonestly receiving stolen property) and section 414 (Assisting in the concealment or disposal of stolen property, known to be stolen). Under section 320, the above offences are compoundable provided the pecuniary value of the property involved does not exceed Rs.250/-.

In the 154th Report of the Law Commission, it was recommended that this limit be raised to Rs.2000/-.

With a view to reduce pendency of cases falling under these sections and also having regard to the fall in the monetary value of the rupee, and to the fact that several of these matters are settled by compromise, it is recommended that the limit can be raised up to Rs.25,000/- by suitably amending column 2 of the Table below sub-section (2) of section 320 in so far as the above offences under sections 379, 381, 406, 407, 408, 411 and 414 are concerned. We recommend accordingly.

So far as the plea bargaining is concerned, we have not included any provision in the accompanying Bill for the reason that we would like the Government to take a policy decision on the question whether to introduce the said concept. This is because the Supreme Court has criticized this concept in two of its judgments namely, Murlidhar Meghraj Loya v. State of Maharashtra, AIR 1976 SC 1929 and Kasambhai v. State of Gujarat, AIR 1980 SC 854. The Supreme Court had expressed an apprehension in the latter case that such a provision is likely to be abused. If, however, the Government yet decides to introduce this concept, the relevant provisions can be drafted thereafter.

In para 3.6 of the Consultation Paper it was suggested that no arrests should be permissible under sections 107 to 110 CrPC and under similar provisions, if any, in the State enactments. We do not think we need pursue this proposal in the light of what we have said earlier with respect to deletion of sub-section (2) of section 41. It is sub-section (2) of section 41 which empowers the police to arrest persons belonging to one or more of the categories specified in section 109 or 110. It is

obvious that if no arrest can be made of the person concerned under section 109 or 110, there can be no question of arresting the person belonging to any of the categories mentioned in section 107 or 108 CrPC.

Chapter Ten

Bail reform

In para 3.7 of the Consultation Paper it was suggested that bail should be granted as a matter of course except in case of serious offences and except in certain specified circumstances. It was suggested that except in case of serious offences like murder, dacoity, robbery, rape and offences against the State, the bail provisions should be made liberal and that bail should be granted almost as a matter of course except where it is apprehended that the accused may disappear and evade arrest or where it is necessary to prevent him from committing further offences or to prevent him from tempering with witnesses or other evidence of crime.

Though the subject of bail does not strictly fall within the ambit of the law relating to arrest, its close connection with the law of arrest cannot be denied. We are concerned herein with the question of bail pending investigation. For ensuring proper protection of the constitutional and legal rights of the accused, it is necessary not only to clarify and circumscribe the power of the police to arrest without warrant, it is equally necessary to deal with the question – in what circumstances a person arrested by the police without warrant is entitled to bail.

The objective of the provisions relating to bail contained in Criminal Procedure Code is a recognition of the fact that pending investigation, as well as pending trial, the accused should not be kept in police custody or in jail unless it is necessary for the purpose of the case. In other words, unless it is apprehended that the accused, if granted bail, would make himself scarce and it would be difficult to apprehend him again or where it is necessary to keep him in the police custody for the purpose of investigation or where it is necessary to keep him under confinement with a view to prevent him from committing further offences, bail ought to be granted as a matter of course. This rule is of course subject to the general exception that in the case of serious offences like murder, dacoity, robbery, rape,

offences against the State and so on, the grant of bail should be scrutinized by the court as at present. We may elaborate.

The question of bail arises not only when the accused is in judicial custody but also when he is in police custody. When the accused is in police custody, bail should be a matter of course except where his continuing presence in police custody is necessary for the purpose of investigation. Even if the offence is a serious one, the accused must be sent to judicial custody and not be kept in police custody unless required for the purpose of investigation. Similarly the apprehension that the accused, if enlarged on bail, may disappear and evade arrest or that it is necessary to keep him confined to prevent him from committing further offences or from tempering with witnesses and evidence or to ensure his own safety, can be grounds for keeping him in judicial custody but certainly not in police custody. We may repeat that police custody should be allowed and is justified only in cases where the presence of the accused in police custody is necessary for the purpose of investigation. In all other cases he must be sent to judicial custody. Then again, bail should be a matter of course except in the situations mentioned above, namely, where he is likely to make himself scarce and it will be difficult to rearrest him or where it is necessary to prevent him from committing further offences or from tempering with witnesses or other evidence of crime or where it is necessary to keep him confined in the interest of his own safety.

In this connection, we may refer to certain observations in the preface to the publication of the Indian Law Institute, "Right to Bail". It is stated therein:

> "Bail is a very vital institution in criminal justice system. It carries a twin objective of enabling an accused to continue with his life activities and, at the same time, providing a mechanism to seek to ensure his presence on trial. It is not always just or advisable to confine the accused before conviction. Only the sovereign interest or threat to social order may

necessitate such an action. Ordinarily, detaching an individual from society adds to the problems rather than solving them. The option of jail is also a limited one. Generally the jails are overcrowded and mismanaged which is a burden very difficult to shoulder. The maintenance of the dependents of the jailed persons is another problem with multiple dimensions, including the possibility of their developing delinquent tendencies. Thus, jail does not always serve the social interest. The current problem of undertrials, too, is an outcome of a large number of indiscriminate arrests and the non-use of the option of bail in preference to jail."

The following observations too are relevant:

"The existing law on bail is inconsistent and unconvincing. The subject has received only an ad hoc treatment at the hands of the legislature. The nature and extent of the conditions which may be imposed by Courts on grant of bail have not been defined. Most agonizing is one's failure to trace out even a definition of "bail" in the whole set of provisions of law relating to bail. The practice of bail is highly characterized by the recurrence of extremism on the part of the law enforcement agencies as well as the advocates of liberty. The reason on the side of enforcers is a need for stringent legal action, frequent bail-jumping and emergence of a clan of professional sureties. The opposite stance is supported by practice of prolonged investigations, delayed trials and torture. An unending debate, whether bail in bailable offences is a matter of right or a mere privilege conceded to an accused through the exercise of discretionary power, is continuing without a visible end in sight."

In this connection, it may be mentioned that the recommendations made by the Law Commission on the question of bail in its 41st Report on the Code of Criminal Procedure, are fully in accord with what we have recommended hereinabove.

The 78th Report of the Law Commission on Congestion of Undertrial Prisoners in Jails was concerned with the plight of large number of undertrial prisoners in Indian jails and recommended various measures to deal with the problem. The Commission recommended, inter alia, to expand the category of bailable offences, releasing on bond without sureties, obligation to appear and surrender, violation of which was to be an offence. It referred to position in England where a presumption is drawn in favour of the right to bail for all offences.

The 154th Report of the Law Commission on the Code of Criminal Procedure too dealt with this subject in chapters VI and VII. Chapter VI deals with pre-trial detention, anticipatory bail and sureties. The Report supports the insertion of section 436A and amendment of section 437, as proposed by the CrPC (Amendment) Bill, 1994 as also the insertion of section 441A and amendment of sub-section (3) of section 446 as proposed by the said Amendment Bill. (Chapter VII recommends insertion of section 437A, but that section is outside the purview of this study.)

Section 436A, amendments to section 437, section 441A and amendment to sub-section (3) of section 446, as proposed by the CrPC (Amendment) Bill, 1994 may now be referred to. They read as follows:

> "436A. Where a person has, during the period of investigation, inquiry or trial under this Code of an offence under any law (not being an offence for which the punishment of death has been specified as one of the punishments under that law) undergone detention for a period extending up to one-half of the maximum period of imprisonment specified for that offence under that law, he shall be released by the Court on his personal bond with or without sureties:
>
> Provided that the Court may, after hearing the Public Prosecutor and for reasons to be recorded by it in writing, order the continued detention of

such person for a period longer than one-half of the said period or release him on bail instead of the personal bond with or without sureties:

Provided further that no such person shall in any case be detained during the period of investigation, inquiry or trial for more than the maximum period of imprisonment provided for the said offence under that law:

Explanation – In computing the period of detention under this section for granting bail the period of detention passed due to delay in proceeding caused by the accused shall be excluded."

437. In section 437 of the principal Act,-

(i) in sub-section (1),-

(a) in clause (ii), for the words "a non-bailable and cognizable offence", the words "a cognizable offence punishable with imprisonment for three years or more but not less than seven years" shall be substituted;

(b) after the third proviso, the following proviso shall be inserted, namely:

"Provided also that no person shall, if the offence alleged to have been committed by him is punishable with death, imprisonment for life or imprisonment for seven years or more be released on bail by the Court under this sub-section without giving an opportunity of hearing to the Public Prosecutor."

(ii) in sub-section (3), for the portion beginning with the words "the Court may impose", and ending with the words "the interests of justice", the following shall be substituted, namely:

"the Court shall impose the conditions,-

(a) that such person shall attend in accordance with the conditions of the bond executed under this Chapter,

(b) that such person shall not commit an offence similar to the offence of which he is accused, or suspected, of the commission of which he is suspected, and

(c) that such person shall not directly or indirectly make 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 any police officer or tamper with the evidence.

and may also impose, in the interests of justice, such other conditions as it considers necessary."

"441A. Every person standing surety to an accused person for his release-on bail, shall make a declaration before the Court as to the number of persons to whom he has stood surety including the accused, giving therein all the relevant particulars."

"446. In section 446 of the principal Act, in sub-section (3), for the words "at its discretion", the words "after recording its reasons for doing so" shall be substituted."

The Parliamentary Committee, which examined this Bill, has not offered any comments on the above proposals.

We are in agreement with the aforementioned provisions in the Amendment Bill.

In the light of the above discussion, it may be stated as a general proposition that in offences punishable up to seven years imprisonment, with or without fine, the normal rule should be bail and the denial thereof an exception i.e., in any of the situations mentioned hereinbefore. In other serious offences, the matter has to be left to the discretion of the court to be exercised having regard to the totality of the circumstances and keeping in mind the necessity to maintain a balance between the interests of the society as a whole in proper maintenance of law and order and the constitutional, legal and human rights of the accused. The relevant provisions in the CrPC may have to be amended accordingly. It may also be provided that in

case of offences punishable with seven years or less, the police officer or the Court shall not insist on sureties unless there are special reasons for imposing that condition. The release should be on personal bond – as a general rule.

In para 3.8 of the Consultation Paper, a proposal was put forward to the effect that no arrest shall be made and no person shall be detained merely for the purpose of questioning. It was pointed out that such arrest or detention amounts to unwarranted and unlawful interference of the personal liberty guaranteed by Article 21 of the Constitution. There was no serious opposition to this proposal from any quarter. Indeed, this proposal follows from what we have stated hereinabove, namely, that arrest should not be made in a casual manner but only on the basis of some material on the basis of which, the police officer is reasonably satisfied that arrest of such person is necessary. It cannot be that the police is permitted to detain anyone they like and question him with a view to find out whether he has committed any cognizable offence. Such an absolute power cannot be conceded under our constitutional system. If questioning any person suspected of committing a cognizable offence is found necessary for the purposes of investigation, he may be questioned by the police officer either at the residence of the person or at such other place as may be indicated by the person and agreed to by the police officer.

Chapter Eleven

Certain recommendations for safety and well-being of detainee, amending section 172, separate investigating and prosecuting agency And the Code of Criminal Procedure (Amendment) Bill. 2001

In para 3.9 of the Consultation Paper a proposition was put forward that ensuring the safety and well-being of the detainee is the responsibility of the detaining authority. It would be sufficient to reproduce the reasons in support of the said proposal. It reads thus:

> "It should also be provided by law expressly that once a person is arrested, it is the responsibility of the arresting and detaining authority to ensure the safety and well being of the detainee. The recommendation of National Police Commission regarding mandatory medical examination of the arrested person deserves implementation. In this connection, the decision of A.P. High Court in Challa Ramkrishna Reddy v. State of A.P.(AIR 1989 AP 235) – which has recently been affirmed by the Supreme Court in State of A.P. v.Challa Ramkrishna Reddy AIR 2000 SC 2083 - and the examples given therein, wherein the State would be liable for damages for the negligent or indifferent conduct of police/jail authorities should be kept in mind. To put briefly, take a case where a person is arrested for simple theft or simple rioting; he is a heart patient; he is not allowed to take his medicines with him at the time of his arrest and no medicines are provided to him in spite of his asking and he dies. Or a case, where such a person (though carrying his medicines) suffers a heart attack and no reasonably prompt steps are taken for providing medical aid to him by the concerned authorities and he dies. It is obvious that had he not been arrested, his family and friends would have taken care of him. Should he die for want of medical help, only because he has been arrested and detained for a minor offence. It would be too big a punishment. In such cases, State would be liable for damages."

We affirm the said proposal. It is not necessary to elucidate the same since the principle has been affirmed by the Supreme Court. This aspect is covered by the amendments proposed by us in the accompanying Bill.

In para 3.10 of the Consultation Paper, a proposal was put forward to the effect that a custody record should be maintained at every police station. Some police officials opposed this proposal on the ground that there are already adequate provisions providing for maintaining a record of the persons arrested and the progress of investigation and therefore it is unnecessary to introduce yet another record under the name "custody record". In the light of the recommendations made elsewhere in this report, we do not propose to pursue this proposal.

In para 3.11 of the Consultation Paper, the Commission had dealt with the tortious liability of the State and to the unsatisfactory situation arising from the decision of the Supreme Court in Kasturilal v. State of U.P. (AIR 1965 SC 1039). The subsequent decisions have not improved the situation. On this aspect, the National Commission to Review the Working of the Constitution (NCRWC) has prepared a Consultation Paper discussing in detail the several aspects of the said problem. It is understood that a Final report is also being prepared on the topic by the said Commission. We fully agree with the approach adopted by NCRWC and we are sure that valuable and useful recommendations would be put forward by the said Commission on this topic.

The last proposal contained in para 3.12 of the Consultation Paper speaks of strict compliance with section 172 CrPC by the police officers and the duty of the court to ensure such compliance. Besides calling for strict compliance with section 172, the Consultation Paper also suggested an amendment to section 172. Since this proposal has not been opposed by anyone, we reiterate the same. The relevant proposal in para 3.12 reads thus:

"Sub-section (1) of section 172 of the Code of Criminal Procedure requires that (1) "every police officer making an investigation under this chapter shall day-by-day enter his proceedings in the investigation in a diary setting forth the time at which the information reached him, the time at which he began and closed his investigation, the place or places visited by him and a statement of the circumstances ascertained through his investigation". Inasmuch as such diary would also record and reflect the time, place and circumstances of arrest, it is necessary that the provisions of this sub-section should be strictly complied with. In this behalf, however, it would be relevant to notice the following observations of the Supreme Court in Shamshul Kanwar v. State (AIR 1995 SC 1748) where the court pointed out the vagueness prevailing in the country in the matter of maintaining the diary under section 172. The court referred, in the first instance, to the fact that in every State there are Police Regulations/Police Standing Orders prescribing the manner in which such diaries are to be maintained and that there is no uniformity among them. The court pointed out that in some States like Uttar Pradesh, the diary under section 172 is known as 'special diary' or 'case diary' and in some other States like Andhra Pradesh and Tamil Nadu, it is known as 'case diary'. The basis for distinction between 'special diary' and 'case diary', the court pointed out, may owe its origin to the words "police diary or otherwise" occurring in section 162 CrPC. The court also pointed out that the use of expression "case diary" in A.P. Regulations and in the Regulations of some other States like J&K and Kerala may indicate that it is something different than a "general diary". In some other States there appear to be Police Standing Orders directing that the diary under section 172 be maintained in two parts, first part relating to steps taken during the course of investigation by the police officer with particular reference to time at which police received the information and the further steps taken during the investigation and the second part containing statement of circumstances ascertained during the investigation which obviously relate to statements recorded by the officer in terms of section

161 and other relevant material gathered during the investigation. In view of this state of affairs, the Supreme Court suggested a legislative change to rectify this confusion and vagueness in the matter of maintenance of diary under section 172. It is therefore appropriate that section 172 be amended appropriately indicating the manner in which the diary under section 172 is to be maintained, its contents and the manner in which its contents are communicated to the court and the superior officers, if any. The significance of the case diary lies in its relevance as a safeguard against unfairness of police investigation. (The Amendment should also clarify whether case diary is different from General Diary and, if so, how should it be maintained.) (See the decision of the Delhi High Court in Ashok Kumar v. State (1979 Cr.L.J. 1477)). Such an amendment would also go to ensure that the time, place and circumstances of the arrest of an accused are also properly recorded and reflected by such record, which is indeed a statutory record."

Keeping in mind the recommendation in another Report of the Law Commission (178th Report on Misc. Amendments), which, inter alia, recommends amendment of section 162 of CrPC, and consistent with it, we are suggesting addition/insertion of certain words in sub-section (1) of section 172.

Lastly, we may refer to the idea, repeatedly put forward by several participants in the Seminar, to separate the investigating and prosecuting agency from the law and order agency. It has been suggested that investigation of crime is a specialized process requiring a good amount of patience, expertise, training and a good understanding of the legal position concerning the subject-matter of investigation. It is also pointed out that in the matter of economic offences and more so on account of technological advances, the investigation has become a skill by itself requiring knowledge of accountancy, computer operations, stock-market and so on, and that the said job ought not to be entrusted to the police engaged in maintenance of law and order. We are fully in agreement with this proposal but

we are not going into the said subject ourselves for the reason that this aspect has been elaborately dealt with by this Commission in its 154th Report on Criminal Procedure Code. Chapter II deals with establishment of a separate investigating agency. It explains the need for separation of investigating agency from the police staff engaged in the maintenance of law and order. It refers to the earlier recommendations of the Law Commission in its 14th Report, the recommendations of the National Police Commission, and records its own reasons, as many as seven in number, for accepting and implementing this idea. Their recommendation is contained in para nine of the said chapter:

> "9. We recommend that the police officials entrusted with the investigation of grave offences should be separate and distinct from those entrusted with the enforcement of law and order and other miscellaneous duties. Separate investigating agency directly under the supervision of a designated Superintendent of Police be constituted. The hierarchy of the officers in the investigating police force should have adequate training and incentives for furthering effective investigations. We suggest that the respective Law and Home Departments of various State Governments may work out details for betterment of their conditions of service.
>
> The officials of the investigating police force be made responsible for helping the courts in the conduct of cases and speedy trial by ensuring timely attendance of witnesses, production of accused and proper coordination with prosecuting agency. Other necessary steps should also be taken for promoting efficiency in investigation. Accordingly, we recommend that necessary changes in the Police Acts, both Central and State, Police Regulations, Police Standing Orders, Police Manuals, be made by the Home Department in consultation with the Law Departments of State Governments."

Chapter III (of the 154th Report) deals with Independent Prosecuting Agency. Here too the Law Commission referred to its earlier Reports, namely, 14th and 41st Reports, to the recommendations of the National Police Commission and the feedback it received in the several workshops it conducted on the subject of Criminal Procedure Code. Relevant observations in certain decisions of the courts emphasizing the desirability of insulating the prosecuting agency from the investigating agency are also referred to. The final recommendation is for establishment of a Directorate of Prosecution. The Report deals with the mode of appointment of Public Prosecutors and Assistant Public Prosecutors in the course of its discussion. It also touches upon the desirability of permitting the private complainant to engage his own lawyer to conduct the prosecution where the court finds that the public prosecutor is not effectively discharging his duties thereby subverting the process of law and justice. We may refer in this connection to the practice of police department (in some States) recruiting lawyers to act as prosecuting officers in the courts of Magistrates. The lawyers so recruited become employees of the department and therefore subject to their instructions and directions. This practice too may have to be reviewed.

We reiterate and commend the reasoning and recommendations contained in chapters II and III of the 154th Report of Law Commission and recommend their acceptance by the appropriate authorities.

In order to concretize our recommendations in the legislative form, we have appended The Code of Criminal Procedure (Amendment) Bill, 2001 **(Annexure I)** to this Report. There are, however, certain other recommendations in this Report (e.g. establishment of separate investigating agency and an independent prosecuting agency), which have not been concretized in the accompanying Bill. They are essentially administrative measures.

We recommend accordingly.

(Justice B.P. Jeevan Reddy)
Chairman

(Justice M.Jagannadha Rao)
Vice Chairman

(Dr. N.M. Ghatate)
Member

(Mr. T.K.Viswanathan)
Member-Secretary

Dated: 14 .12.2001

Annexure I

The Code of Criminal Procedure (Amendment) Bill 2002

A Bill

further to amend the Code of Criminal Procedure 1973

Be it enacted by Parliament in the Fifty-second Year of the Republic of India as follows, namely:-

Short title and commencement

1. (1) This Act may be called the Code of Criminal Procedure (Amendment) Act 2002.

(2) It shall come into force on such date the Central Government may by notification in the Official Gazette appoint.

Amendment of section 41

2. In the Code of Criminal Procedure 1973 (hereinafter referred to as the principal Act), in section 41 -

(i) in sub-section (1), for clauses (a) and (b),the following clauses shall be substituted, namely:-

"(a) who commits, in the presence of a police officer, a cognizable offence;

(b) against whom credible information has been received that he has committed a cognizable offence punishable with imprisonment for a term which may extend to seven years, (whether with or without fine), if the following conditions are satisfied, namely:-

(I) the police officer has reason to believe on the basis of that information that such person has committed the said offence;

(II) the police officer is satisfied that such arrest is necessary-

(a) to prevent such person from committing any further offence; or

(b) for proper investigation of the offence or for the reason that detention of such person in custody is in the interest of his safety; or

(c) to prevent such person from, causing the evidence of the offence to disappear or tampering with such evidence in any manner; or

(d) to prevent such person 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; or

(e) that unless such person is arrested, his presence in the court whenever required cannot be ensured; and

the police officer records his reasons in writing.

(ba) against whom credible information has been received that he has committed a cognizable offence punishable with, imprisonment for a term which may extend more than seven years (whether with or without fine) or with death and the police officer has reason to believe on the basis of that

information that such person has committed the said offence;".

(ii) for sub-section (2) the following sub-section shall be substituted , namely:-

"(2) Subject to the provisions of section 42, no person, concerned in a non cognizable offence or against whom, a complaint has been made or credible information has been received or reasonable suspicion exists of his having so concerned, shall be arrested except under a warrant or order of a magistrate.

Insertion of new sections 41A to 41D

3. After section 41 of the principal Act, the following sections shall be inserted, namely:-

Appearance Notice

" 41A. (1) The police officer may, in all cases where the arrest of a person is not required under the provisions of section 41, issue a notice directing the person against whom credible information has been received that he has committed a cognizable offence, to appear before him or the court, as the case may be, whenever called upon to do so.

(2) Whenever a notice is issued under subsection (1), directing any person to appear before the police officer or the Court such person shall appear as directed.

Procedure of arrest and the duties of the officer making the arrest

41B. (1) Every police officer while making an arrest shall –

(a) bear an accurate, visible and clear identification of his name which will facilitate easy identification;

(b) inform the person arrested ,the offence for which he is being arrested;

(c) prepare a memorandum of arrest which shall be –
  (i) attested by at least by one witness, who is a member of the family of the person arrested or a respectable member of the locality where the arrest is made ;
  (ii) countersigned by the person arrested;

(d) inform the person arrested ,unless the memorandum is attested by a member of his family, that he has a right to have a relative or a friend named by him be informed of his arrest;

(e) inform a relative or a friend of the person arrested, the place where he is detained in custody;

Control Rooms at Districts

41C.(1) The State Government shall establish a police control room at-
(a) every district;
(b) the State level.

(2) The State Government shall cause to be displayed on the notice board kept outside the Control rooms at every district, the names and addresses of the persons arrested and the names and designation of the police officers who made the arrests.

(3) The control room at the Police Head quarters at the state level shall collect from time to time, details about the persons arrested, nature of the offence with they are charged and maintain a database for the information of the general public.

Right of arrested person to have advocate during interrogation

41D. When any person arrested is interrogated by the police, he shall be entitled to have an advocate of his choice present during such interrogation in order to ensure that his rights are not infringed:

Provided that nothing contained in this section shall confer any right upon the person arrested to insist that the advocate shall be present throughout the interrogation.

Substitution of section 54

4. For section 54 of the principal Act, the following section shall be substituted, namely:-

Examination of arrested person by medical practitioner

"**54.** (1) When any person is arrested he shall be examined by a registered medical practioner soon after the arrest is made.

(2) The registered medical practioner so examining the arrested person shall prepare the record of such examination, mentioning therein any injuries or marks of violence upon the person of the person arrested, and the approximate time when such injuries or marks may have been inflicted.

(3) Such examination under sub-section (2) shall be repeated every forty-eight hours of his detention in police custody."

Insertion of new section 55A

5. After section 55 of the principal Act the following section shall be inserted namely:-

Health and Safety of arrested person

"**55A** It shall be the duty of the person having the custody of an accused to take reasonable care of the health and safety of the accused."

Insertion of new section 60

6. After section 60 of the principal Act, the following section shall be inserted, namely:-

Arrests to be made strictly according to the Code

"**60A**. No arrest shall be made except in accordance with the provisions of this Code or any other law for the time being in force providing for arrest."

Amendment of section 172

7. In section 172 of the principal Act, after sub-section (1), the following sub-section shall be inserted, namely:-

"(1A) The statements of witnesses recorded, during the course of investigation, under section 161 shall be entered in the case diary.

(1B) The case diary referred to in sub-section (1), shall be a bound volume, duly paginated and shall be maintained in the ordinary course of official business."

Amendment of section 320

8. In section 320 of the principal Act ,-

(a) in sub-section (1), for the Table ,the following Table shall be substituted, namely :-

TABLE

Offence	Section of the Indian Penal Code applicable	Person by whom offence may be compounded
1	2	3
Uttering words, etc., with deliberate intent to would the religious feelings of any person.	298	The person whose religious feelings are intended to be wounded.
Causing hurt.	323,334	The person to whom the hurt is caused The person to whom hurt is caused
Voluntarily causing hurt by dangerous weapons or means.	324	The person to whom hurt is caused.
Voluntarily causing grievous hurt.	325	The person to whom hurt is caused
Voluntarily causing grievous hurt on grave and sudden provocation	335	The person to whom hurt is caused
Causing grievous hurt by doing an act so rashly and negligently as to endanger human life or the personal safety of others.	338	The person restrained or confined.
Wrongfully restraining or confining any person.		The person confined
Wrongfully confining a person for three days or more.	341,342	The person confined

Wrongfully confining for ten or more days.	343	The person confined
Wrongfully confining a person in secret.	344	The person assaulted or to whom criminal force is used.
Assault or use of criminal force.	346	The owner of the property stolen
Theft by clerk or servant of property in possession of master, where the value of the property stolen does not exceed twenty five thousand rupees.	352,355, 358	
Dishonest misappropriation of property.	379	The owner of the property misappropriated.
Criminal breach of trust, where the value of the property does not exceed twenty five thousand rupees.	403	The owner of the property in respect of which the breach of trust has been committed.
Criminal breach of trust by a carrier, wharfinger, etc., where the value of the property does not exceed twenty five thousand rupees.	406	The owner of the property in respect of which the breach of trust has been committed.
Criminal breach of trust by a clerk or servant, where the value of the property does not exceed twenty five thousand rupees.	407	The owner of the property in respect of which the breach of trust has been committed.
Dishonestly receiving stolen property, knowing it to be stolen, when the value of the stolen property does not exceed twenty five thousand rupees.	408	The owner of the property stolen.
Assisting in the concealment or disposal of stolen property, knowing it to be stolen, where the value of the stolen property does	411	The owner of the property stolen.

not exceed twenty five thousand rupees.		
Cheating.	414	The person cheated.
Cheating by personation		The person cheated
Fraudulent removal or concealment of property, etc., to prevent distribution among creditors.	417	The creditors who are affected thereby.
Fraudulently preventing from being made available for his creditors a debt or demand due to the offender.	419 421	The creditors who are affected thereby.
Fraudulent execution of deed of transfer containing false statement of consideration.	422	The person affected thereby.
Fraudulent removal or concealment of property.		The person affected thereby.
Mischief, when the only loss or damage caused is loss or damage to a private person.	423	The person to whom the loss or damage is caused.
Mischief by killing or maiming animal of the value of ten rupees or upwards.	424	The owner of the animal.
Mischief by killing or maiming cattle, etc., of any value or any other animal of the value of fifty rupees or upwards.	426,427	The owner of the cattle or animal.
Mischief by injury to work of irrigation by wrongfully diverting water when the only loss or damage caused is loss or damage to a private person.	428 429	The person to whom the loss or damage is caused.
Criminal trespass.		

House trespass	430	The person in possession of the property trespassed upon
House-trespass to commit an offence (other than theft) punishable with imprisonment.		The person in possession of the property trespassed upon The person in possession of the house trespassed upon.
Using a false trade or property mark.	447	
	448	The person to whom the loss or injury is caused by such use.
Counterfeiting a trade or property mark used by another.	451	The person whose trade or property mark is counterfeited.
Knowingly selling, or exposing or possessing for sale or for manufacturing purpose, goods marked with a counterfeit property mark.	482	The person whose trade or property mark is counterfeited.
Criminal breach of contract of service.	483	
Adultery.	486	The person with whom the offender has contracted.
Enticing or taking away or detaining with criminal intent of a married woman.		The husband of the woman. The husband of the woman.
Defamation, except such cases as are specified against section 500 of the Indian Penal Code (45 of 1860) in column 1 of the Table under sub-section (2).	491	The person defamed.
	497	
Printing or engraving matter, knowing it to be defamatory.	498	
Sale of printed or engraved substance containing defamatory matter, knowing it to contain such	500	The person defamed.

matter. Insult intended to provoke a breach of the peace. Criminal intimidation except when the offence is punishable with imprisonment for seven years. Act caused by making a person believe that he will be an object of divine displeasure.	501 502 504 506 508	The person defamed. The person insulted. The person intimidated. The person against whom the offence was committed.

(b) in sub-section (2), for the Table, the following Table shall be substituted, namely :-

TABLE

Offence	Section of the Indian Penal Code applicable	Person by whom offence may be compounded
1	2	3
Causing miscarriage.	312	The woman whose miscarriage was caused.
Causing hurt by doing an act so rashly and negligently as to endanger human life or the personal safety of others.	337	The person to whom hurt is caused.
Assault or criminal force to woman with intent to outrage her modesty.	354	The woman assaulted to whom the criminal force was used.
Assault or criminal force in attempting wrongfully to confine a person.	357	The person assaulted or to whom the force was used.
Theft by clerk or servant of property in possession of master, where the value of the property stolen does not exceed twenty five thousand rupees.	381	. The owner of the property stolen.
Cheating a person whose interest the offender was bound, either by law or by legal contract, to protect.	418	The person cheated.
Cheating and dishonestly including delivery of property or the making, alteration or destruction of a valuable security.	420	The person cheated.
Marrying again during the life-time of a husband or wife.		The husband or wife of the person so

Husband or relative of a woman subjecting her to cruelty.	494	marrying.
		The woman subjected to cruelty.
Defamation against the President or the Vice-President or the Governor of a State or the Administrator of a Union territory or a Minister in respect of his conduct in the discharge of his public functions when instituted upon a complaint made by the Public Prosecutor.	498A	
	500	The person defamed.
Uttering words or sounds or making gestures or exhibiting any object intending to insult the modesty of a woman or intruding upon the privacy of a woman.		
	509	The woman whom it was intended to insult or whose privacy was intruded upon.

Amendment of section 436

9. In section 436 of the principal Act, in sub-section (1)

(a) for the words "such person shall be released on bail", the words "such person shall be released on a personal bond without sureties" shall be substituted.

(b) for the first proviso, the following proviso shall be substituted namely:-

"Provided that such officer or court may, if satisfied for reasons to be recorded in writing that such person should not be released on mere personal bond, release him on bail."

Insertion of new section 436A

10. After section 436 of the principal Act the following section shall be inserted namely:-

Release of detained persons on personal bond in certain cases

"**436A.** (1) Where a person has, during the period of investigation, inquiry or trial under this Code of an offence under any law (not being an offence for which the punishment of death has been specified as one of the punishments under that law) undergone detention for a period extending up to one-half of the maximum period of imprisonment specified for that offence under that law, he shall be released by the Court on his personal bond with or without sureties as it may deem fit.

Provided that the Court may, after hearing the Public Prosecutor and for reasons to be recorded by it in writing, order the continued detention of such person for a period longer than one-half of the said period or release him on bail instead of the personal bond with or without sureties as it may think fit.

Provided further that no such person shall in any case be detained during the period of investigation, inquiry or trial for more than the maximum period of imprisonment provided for the said offence under that law:

Explanation – In computing the period of detention under this section for granting bail the period of detention passed due to delay in proceeding caused by the accused shall be excluded.

(2) No person shall be detained in police custody unless such detention is required for the purposes of investigation of any offence.

(3) Where a person is required to be detained in custody, such custody shall be judicial custody."

Amendment of section 437

11. In section 437 of the principal Act,-

(a) in sub-section (1),-

(i) in clause (ii), for the words "a non-bailable and cognizable offence", the words "a cognizable offence punishable with imprisonment for three years or more but not less than seven years" shall be substituted;

(ii) after the third proviso, the following proviso shall be inserted, namely:

"Provided also that no person shall, if the offence alleged to have been committed by him is punishable with death or imprisonment for a term which may extend upto seven years or more, be released on bail by the court under this sub-section without giving an opportunity of hearing to the Public Prosecutor."

(b) after sub-section (1), the following subsection shall be inserted, namely:-

"(1A) Notwithstanding any thing contained in sub-section (1), a person accused of a non-cognizable offence punishable with imprisonment which may extend up to seven years (whether with or without fine) shall be released on bail unless there are reasons to

believe, which shall be recorded in writing ,that release of such person on bail is not in the public interest."

(c) in sub-section (3), for the portion beginning with the words "the Court may impose", and ending with the words "the interests of justice", the following shall be substituted, namely:

"the Court shall impose the conditions,-

(a) that such person shall attend in accordance with the conditions of the bond executed under this Chapter,

(b) that such person shall not commit an offence similar to the offence of which he is accused, or suspected, of the commission of which he is suspected, and

(c) that such person shall not directly or indirectly make 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 any police officer or tamper with the evidence

and may also impose, in the interests of justice, such other conditions as it considers necessary."

Insertion of new section 440A

12. After section 440 of the principal Act, the following section shall be inserted, namely:-

Sureties to make declaration before court

"**440A**. Every person standing surety to an accused person for his release-on bail, shall make a declaration before the Court as to the number of persons to whom he has stood surety including the accused, giving therein all the relevant particulars."

Amendment of section 446

13. In section 446 of the principal Act, in sub-section (3), for the words "at its discretion", the words "after recording its reasons for doing so" shall be substituted.

ANNEXURE-II

STUDY OF ARRESTS

Sl.No.	Name of the State	Total No. of person arrested under substantive	Persons Arrested Under Preventive Provision	Persons Charge-Sheeted	Persons Dropped Without Chargesheet	Persons convicted	% of persons arrested in bailable	Per arr unc Pre Pro

		offences					offences	Per Dr Wi Fil (In per
1.	Arunachal Pradesh	744	185	545	38	06	59.47	20.
2.	Uttar Pradesh	173634	479404 125268 Surrendered in Court	748440	29124	390507	45.13	4.8
3.	Goa	2938	1383	4005	257	319	61.02	18.
4.	Haryana	2048	483	1399	13	490	94	2.6
5.	Mizoram	3942	246	2491	54	1683	55	21.
6.	Pondicherry	3898	7348	3824	31	1457	50.8	.42
7.	Nagaland	47	125	146	26	05	193 (persons)	20.
8.	Delhi	57163	39824	78581	8904	34436	50	22.
9.	Manipur	708	1145	15 cases	534	2 cases	Not Furnished	46.
10.	Kerala	164035	5884	157135	4582	35505	71	77.
11.	Assam	1351	58	859	427	23	90	-
12.	Karnataka	10368	2262	10353	15	2394	84.8	.66
13.	Rajasthan	249084	26109	247469	69	NIL	-	.26
14.	Tripura	6560	25499	6149	5183	4579	9.2	20.
15.	Orissa	4616	733	2299	234	34	-	31.
16.	Gujarat	297939	189722	480611	1710	117805	99.75	.90
17.	West Bengal	49655	207625	32746	16820	1072	-	8.1
18.	Sikkim	755	23	510	NIL	296	113	-
19.	Laksha-Dweep	06	NIL	06	NIL	NIL	66.67	-
20.	Daman & Diu	569	111	350	14	336	89	12.
21.	Bihar	238613	-	211188	22158	12546	13.90	-
22.	Chandigarh UT	2215	4286	6032	165	895	53.81	3.8
23.	Maharashtra	23675	18366	40583	1469	350	61	7.9
24.	Andaman & Nicobar	2579	721	2471	17	1874	95.81	2.3
25.	Andhra Pradesh	249328	85850	259881	39205	13246	36.59	45.
26.	Madhya Pradesh	476281	354242	518658	12399	139379	89	3.5

27.	Himachal Pradesh	20172	6145	26225	417	2127	69	6.7
28.	Dadar & Nagar Haveli	NIL	NIL	NIL	NIL	NIL	NIL	NI