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Augustus Caesar🏷s advice to make haste slowly was evidently not on the minds of our Lok Sabha MPs when they recently cleared eights bills in only a few more minutes. One of these eight bills,the Code of Criminal Procedure (Amendment) Bill,2008,has sparked some controversy,inspiring lawyers in Delhi to go on a strike.

The bill introduces several changes to criminal procedure,affecting important issues like hostile witnesses,victim compensation,rape trials and compoundable offences. However,the provision that is at the heart of the controversy fundamentally transforms section 41 of the Code which defines the power of the police to arrest without warrant. The operative paragraph of the original section 41 allowed the police to arrest without warrant any person 💰who has been concerned in any cognisable 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.🏷 One need not even be suspected of committing the crime to be liable for arrest 🗣 merely being 💰concerned🏷 in a cognisable case made you vulnerable to arrest. The legal power to arrest was so widely defined that there was hardly a category of 💰illegal arrests🏷 for cognisable offences.

The amendment introduces a new and rationalised section 41. The first change is that the term 💰concerned🏷 has been dropped. Under the amended provision,only a person suspected of having committed a cognisable offence can be arrested. Secondly,mere existence of a 💰reasonable complaint🏷 is not enough. The police officer must have 💰reason to believe on the basis of such complaint,information,or suspicion that such person has committed the said offence.🏷 Thirdly,if the offence in question is punishable with imprisonment for a period of seven years or less,arrest can be made only when it is 💰necessary🏷 for prevention of further offence,or to ensure that evidence is not destroyed and the suspect keeps her date with the court hearings. The reasons must be recorded in writing while making the arrest,and if 💰necessity🏷 cannot be shown,the new section 41A requires the police to issue a notice of appearance instead of arrest.

The amended provision seems eminently sensible. Arrest is not a mode of punishment,but a tool for effective investigation and prosecution. If arrest is not 💰necessary🏷 for achieving these objectives,it shouldn🏷t take place. Then why are the lawyers protesting? There is a normative reason,given in press statements,and another cynical reason,admitted to in private conversations. The normative reason is that the fettered power to arrest will fail to deter criminals and result in increased lawlessness. It is surprising to see lawyers forgetting the foundational rule of their own trade 🗣 presumption of innocence. That the police,in practice,use their power of arrest and subsequent heavy-handed interrogation is used to

💰solve🏷 cases or to coerce 💰settlements🏷 does not detract from the fact that we are dealing with suspects,not convicts. Many countries manage a far more efficient policing system without using the process itself as punishment. In any case,the power to arrest has not been done away with 🗣 only due process requirements of necessity and recorded reasons have been imposed in certain cases.

Now to the cynical reason 🗣 the reduced number of arrests will mean fewer bail cases. The question suddenly becomes that of lawyers who make a living out of bail applications. But the worry is misplaced. The rationalised section 41,read with the new section 41A,imposes several constraints on the power to arrest. We suddenly have a new,sizeable category of arrests which will be 💰illegal🏷 under the new provisions,including arrests of non-suspects,arrests made without reasonable belief that the person has committed the offence,arrests which are not necessary,those without recorded reasons and those made without giving due notice. These new grounds of illegality may be invoked before courts for arrests already made as well for impending arrests. This whole new stream of litigation may more than make up for the drop in bail cases.

Given the nature of our police force,one can safely predict systemic violations of these due process norms. One even suspects a perverse institutional effect in that the police may now charge suspects with offences inviting punishments higher than seven years even when it is not merited,only to make sure they can be arrested. The amendment is well-meaning. But without systemic police reforms establishing the necessary institutional environment,their translation into practice is dubious. In the meantime,our lawyers can be certain that there will be enough violations of these due process norms to keep them in business.

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