

BAIL OVER JAIL: ON DUE PROCESS

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The power of arrest is an extraordinary one, conferred on the police to be employed with discretion and deliberation, not as a tool of oppression and harassment at the hands of prosecuting authorities or the government of the day. The Supreme Court has emphasised that arrests should never be a reflexive response to an allegation of an offence, or even its commission. The law that empowers the police to arrest people without warrants (Section 41 of the CrPC) is reasonably stringent, demanding that some conditions be met, including that such arrests be carried out to prevent commission of further offences, tampering of evidence, and influencing of witnesses. Unfortunately, a power that affects the liberty of citizens and which can 'bring humiliation... and cast scars forever', as the Supreme Court noted in *Arnesh Kumar v. State of Bihar* (2014), continues to be used in a cavalier way. Recently, Tamil Nadu has attracted attention in this connection, particularly for the heavy-handed treatment of those [opposing the Chennai-Salem eight-lane highway project](#). The latest in a slew of unjustified round-ups and arrests was [Swaraj India Party's chief, Yogendra Yadav](#); ironically, he was on nothing more than a fact-finding mission to meet farmers affected by or opposed to the project.

Mr. Yadav was let off, but in most cases arrests without warrant follow a dishearteningly familiar course, with the accused sent to custody after the police oppose bail. In this prosecutorial ecosystem, jail succeeds in trumping bail almost every time and magistrates, who are empowered to refuse remand and grant bail, continue to issue orders mechanically. Tamil Nadu was witness to another high-profile example of this recently, when a [student was arrested and remanded to 15 days judicial custody](#) (before eventually being let off on bail) for political sloganeering on an aircraft; the complaint was filed by the BJP's State president. The dilemmas over maintaining the right balance between individual liberty and the interests of society invariably become more acute when the charges against the accused, well-established or otherwise, are serious. The [recent and shocking arrests of activists](#), over their alleged links to Maoists, have focussed attention on the severe restrictions on bail when booked under the Unlawful Activities (Prevention) Act. The prosecution has 180 days to file a charge sheet, a period during which bail is routinely denied. And after the charge sheet is filed, bail is extremely difficult to secure, dependent as it is on the accused establishing his or her innocence, a reversal of the usual burden of proof. If the Supreme Court decides that justice will be secured only by its intervention in the case, it will probably be forced to invoke its extraordinary powers under Article 142 of the Constitution, another reminder of the need to break the customary chain of arrest, custody and remand.

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