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## THE LAW AND PRACTICE OF ARREST IN INDIA: A CRITICAL STUDY OF MISUSE AND ACCOUNTABILITY

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### ABSTRACT:

The power of arrest, as one of the most coercive functions of the State, has a direct bearing on the fundamental right to personal liberty guaranteed under Articles 21 and 22 of the Constitution of India. This study critically examines the misuse of arrest powers in India by analysing its historical evolution, legal framework, judicial interpretation, and contemporary challenges. It traces the development of arrest powers from pre-colonial practices to their transformation into instruments of colonial control under the Police Act of 1861 and subsequent Criminal Procedure Codes and highlights their continued influence in post-independence India. The research evaluates the statutory framework under the Code of Criminal Procedure, 1973 and the Bharatiya Nagarik Suraksha Sanhita, 2023, focusing on procedural safeguards alongside the persistence of broad police discretion. It further examines the role of the judiciary in curbing arbitrary arrests through landmark judgments and guidelines. The study identifies patterns of misuse, including arrest as a tool of intimidation, coercion, and pre-trial punishment, and attributes these issues to structural deficiencies such as vague legal standards, lack of accountability, and institutional inertia. It argues that arrest is often treated as a routine measure rather than an exception, undermining the presumption of innocence and eroding public trust in the criminal justice system. It also underscores the impact of unnecessary arrests on marginalized and vulnerable groups, who are disproportionately affected by systemic biases. The study further evaluates the effectiveness of recent legal reforms and questions whether they meaningfully address ground-level realities. It emphasizes the need for a shift from a power-centric policing model to a rights-based approach rooted in accountability and transparency. The paper concludes by emphasizing the need for comprehensive reforms to strengthen accountability, restrict discretionary powers, and ensure effective enforcement of safeguards, thereby aligning arrest practices with constitutional values and democratic principles.

**Keywords:** Misuse of arrest powers, personal liberty, Article 21, Article 22, CrPC, BNSS, police discretion, arbitrary arrest, judicial safeguards, criminal

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justice system.

## I. Introduction

Another evident and most coercive type of State authority in the criminal justice system is the power of arrest. It involves the direct deprivation of an individual's personal liberty<sup>2</sup> and therefore occupies a sensitive position within the constitutional framework of India. While arrest is an essential tool for maintaining law and order, ensuring effective investigation, and preventing crime, its exercise is inherently prone to misuse. The Constitution of India, particularly under Articles 21 and 22<sup>3</sup>, seeks to regulate this power by imposing procedural safeguards and ensuring that any deprivation of liberty is carried out in a just, fair, and reasonable manner. However, the practical application of these safeguards often reveals a gap between constitutional ideals and ground realities, raising concerns about arbitrary and excessive use of arrest powers by law enforcement agencies<sup>4</sup>.

The colonial legacies have in the past had a profound impact on the structure of arrest powers in India. When a Criminal Procedure Code was introduced with the Police Act of 1861, and the other Criminal Procedure Codes followed, a system existed in which the role of arrest was not only a legal act but also a means of control and government. This colonialism mentality of wide discretionary authority and minimal responsibility remained in place even after independence even when a rights based constitutional system had been adopted. Despite procedural protection of individual liberty, which began with the reform of the Code of Criminal Procedure, 1973, the broad powers of arrest without warrant and lack of clarity concerning such standards as reasonable suspicion have enabled much discretion to continue. This has led to the tendency of arresting people as a procedural tool and not as a last resort, which predisposes the issue of abuse.

Judicial system in recent decades has been instrumental in dealing with the misapply of arrest powers in the process of interpreting provisions of the constitution in expansive terms as well as providing guidelines that are to govern police behavior. Courts have made historic decisions which highlight that the power to arrest does not imply the power to arbitrarily use this power and the power should be informed by necessity and proportionality. In spite of such

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<sup>2</sup> Maneka Gandhi v. Union of India, AIR 1978 SC 597.

<sup>3</sup> The Constitution of India, 1950, arts. 21, 22.

<sup>4</sup> M.P. Jain, *Indian Constitutional Law* (8th edn., LexisNexis 2018) 1234.

interventions, misuse still appears in many ways, such as arrests taken as the means of intimidation, coercion or pre-trial punishment. The study aims at critically analyzing the legal, historical, and institutional aspect of arrest authority in India with special emphasis on how arrest powers are abused. It will examine the efficacy of the current protection measures, the structural deficits and reforms that can effectively streamline the application of arrest authority with the principles of personal liberty, rule of law and constitutional government.

## II. Historical Evolution of Arrest Powers In India

### Pre-Colonial Practices

In pre-colonial India, the idea of arrest was not written down in the way it is presently. As discussed, the administration of justice was informed by the concepts of Dharma, according to which the king and other local authorities had the duty of ensuring that there was order. The writings of Kautilya, the 'Arthashastra', show that the detention practices were in place, but the ethical standards and limitations determined the detention practices (e.g., the prohibition against extended custody without evidence). The focus was on ethical conformity and localized justice as opposed to the state arbitrary power, though there were not completely negative examples of severe penalties and custodial regulation. *Colonial Transformation of Arrest Powers*

A major shift occurred during British rule, where arrest evolved into a structured instrument of state control. The Police Act of 1861<sup>5</sup> established a centralized and hierarchical police system primarily aimed at maintaining colonial authority. The Criminal Procedure Codes<sup>6</sup> of 1861, 1872, and 1898 further formalized arrest powers, granting wide discretionary authority to the police with limited safeguards. arrest during this era became a means of political repression which was in this case demonstrated by the enactment of acts like the Rowlatt Act, 1919, which permitted a person to be detained without trial. Arrest was therefore attached to governance, surveillance and control and not protecting individual rights.

### Post-Independence Continuity and Reforms

India was left with the colonial structure of policing to a large extent after independence. In the

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<sup>5</sup> The Police Act, 1861.

<sup>6</sup> K.N. Chandrasekharan Pillai, *R.V. Kelkar's Criminal Procedure* (7th edn., EBC 2016) 89.

Code of Criminal Procedure, 1973, proceduralist protection was to be provided in line with the constitutional principles, such as the personal liberty under Article 21. Nevertheless, as observed in this dissertation, it still allowed warrantless arrest in cognizable crimes and used imprecise criteria like reasonable suspicion, thus left the police with a lot of discretion. The new law Bharatiya Nagarik Suraksha Sanhita, 2023 is expected to update the system, yet there is still the issue of the continued existence of broad arrest authority. The history of the development of this issue demonstrates that there is an ongoing conflict between the power of the state and the individual freedom, which is at the centre of the abuse of arrest powers in India.

### **III. Legal Framework Governing Arrest Powers In India**

The law regarding the powers to make arrests in India is based on constitutional concepts, legislative rules, and judicial interpretation that as a whole attempt to strike a balance between the interests of good law enforcement and the interests of the liberty of an individual. As a direct violation of the personal freedom, arrest is highly regulated by the Constitution of India, in particular, Articles 21 and 22, saying that no individual can be denied his liberty without a justified, fair, and reasonable procedure. Besides the constitutional protections, the statutory law of criminal procedural law outlines the areas, circumstances, and constraints of arrest authority. The legal regime, which used to be regulated by the Code of Criminal Procedure, 1973 (CrPC), has recently been completely transformed by introducing the Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS), which is aimed at modernizing the procedures and reorganizing the system of laws. In spite of these changes, the underlying conflict between police discretion and individual rights still dominates the debate on police authority to make arrests in India.

#### **Arrest Powers under the Code of Criminal Procedure, 1973 (CrPC)**

The main statutory document that controlled the powers of arrest in India was Code of Criminal Procedure, 1973 before the implementation of the BNSS. It became very specific in provisions that governed arrest with and without a warrant as well including protections of the procedures that sought to secure the liberty of an individual. Section 41 of the CrPC<sup>7</sup> empowered police officers to arrest individuals without a warrant in cases involving cognizable offences, subject

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<sup>7</sup> The Code of Criminal Procedure, 1973, s. 41.

to the existence of reasonable suspicion or credible information. However, the provision also required that such arrests be justified by necessity, such as preventing further offences, ensuring proper investigation, or preventing tampering with evidence.

In response to concerns regarding arbitrary arrests, Section 41A<sup>8</sup> was introduced as an important safeguard, mandating the issuance of a notice of appearance in cases where arrest was not immediately required. The provision however demanded that such arrests must be based on necessity, i.e. prevention of further offences, proper investigation or prevention of evidence tampering. Additional safeguards included the requirement to inform the arrested person of the grounds of arrest, produce them before a Magistrate within twenty-four hours, and ensure their right to legal counsel under Article 22<sup>9</sup>.

Nonetheless, the CrPC framework has suffered criticism due to its ability to leave wide discretionary freedom in the hands of the police, especially through the unspecified standard of reasonable suspicion. In practice, arrests were often carried out mechanically, without adequate consideration of necessity, leading to judicial intervention in cases such as *Arnesh Kumar v. State of Bihar*<sup>10</sup>, where the Supreme Court laid down guidelines to prevent misuse of arrest powers.

### **Arrest Powers under the Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS)**

The Bharatiya Nagarik Suraksha Sanhita, 2023, which replaces the CrPC, represents a significant reform in India's criminal procedural law. While retaining the basic structure of arrest provisions, the BNSS reorganizes and updates the legal framework with an emphasis on technological integration and procedural clarity. Section 35 of the BNSS<sup>11</sup> now governs the power of arrest without warrant, largely corresponding to Section 41 of the CrPC, but with a greater emphasis on recording reasons for both arrest and nonarrest. This requirement aims to enhance transparency and accountability in the exercise of police discretion.

The BNSS also provides a continuation of the protection of the issuance of a notice of appearance in proper cases, which strengthens the idea that arrest is an action of last resort. It also adds further safeguards to frail populations, including the provision of an increased

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<sup>8</sup> The Code of Criminal Procedure, 1973, s. 41A.

<sup>9</sup> The Constitution of India, 1950, art. 22.

<sup>10</sup> *Arnesh Kumar v. State of Bihar*, (2014) 8 SCC 273.

<sup>11</sup> The Bharatiya Nagarik Suraksha Sanhita, 2023, s. 35.

approval to have elderly or an infirm person arrested in specific instances. Also, the legislation requires more explicit documentation of the reasons behind the arrest and enhances the documentation of the procedures with the help of arrest memos and electronic records.

The BNSS has also, however, been criticized as increasing the police power in some areas. The provisions that address the issue of prolonged police custody under Section 187 and the reintroduction of handcuffing under certain circumstances have brought up the issue of possible abuse. These developments are indicative of the fact that on the one hand, the BNSS is an effort to modernize the system, and on the other hand, it has established the aspects of state control, which, in turn, makes the long-standing dilemma between efficiency in the investigation and the safeguarding of civil liberties to persist.

#### **IV. Judicial Interpretation and Safeguards Against Arbitrary Arrest**

The Indian judiciary has taken the center stage in controlling the use of arrest powers and protecting the individual liberty against the caprice of the State. Although the police have extensive powers of arrest by statutory means, it is the judicial interpretation that has given such powers constitutional scrutiny. The courts have consistently reinforced the principle that arrest is not to be exercised mechanically<sup>12</sup>, but must be justified by necessity, proportionality, and fairness. Judicial intervention has therefore come out as an important tool to fill the gap between the provisions of the law and their enforcement to ensure the power of arrest is exercised within the confines of the Constitution.

#### **Role of Judiciary in Protecting Personal Liberty**

Article 21 of the Constitution has placed personal liberty in the protection of the judicial interpretation. The courts initially took a limited approach, but this stance changed to a great extent with the addition of the Article 21 to cover substantive due process<sup>13</sup>. The courts have always believed that a process that will deny an individual liberty has to be reasonable, just and fair, thus limiting the arbitrary arrests. Writ of habeas corpus has been a good solution to illegal detention where courts have been able to interfere quickly when a person is illegally detained. The judicial activism has also enabled the courts to make arrest more of a constitutionalized function rather than a statutory right and focus on the fact that individual dignity and liberty

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<sup>12</sup> *Joginder Kumar v. State of Uttar Pradesh*, (1994) 4 SCC 260.

<sup>13</sup> *Maneka Gandhi v. Union of India*, AIR 1978 SC 597.

should take precedence.

### ***Landmark Judgments on Arrest Powers***

In *Joginder Kumar v. State of Uttar Pradesh*, the Supreme Court drew an important line between the “power to arrest” and the “justification for arrest,” when it was found that just because there is the power to arrest does not mean that the power to arrest should be routinely exercised. The Court stressed that the necessity to make arrest should be substantial and such arrest should not serve as a harassing instrument.

In *D.K. Basu v. State of West Bengal*<sup>14</sup>, the Court laid down comprehensive guidelines to prevent custodial abuse and ensure transparency in arrest procedures. These were necessities like preparation of an arrest memo, communication of an arrest to a relative, and keeping of proper records of arrest. These were subsequently codified into law helping in their binding status.

The judgment in *Arnesh Kumar v. State of Bihar* addressed the issue of unnecessary arrests, particularly in cases involving offences punishable with imprisonment of up to seven years. The Court ordered that before police officers could take an arrest, they must meet the requirements of Section 41 CrPC and that the issue of issuing notices in accordance with Section 41A was important. This ruling was a major move to stem out normal and automatic arrests.

Other important decisions, such as *Hussainara Khatoon v. State of Bihar*<sup>15</sup> and *Sunil Batra v. Delhi Administration*<sup>16</sup>, expanded the scope of personal liberty by recognizing the rights of undertrial prisoners and protection against custodial violence. These judgments highlighted that deprivation of liberty must not extend beyond what is legally justified and that prisoners continue to retain fundamental rights.

### ***Judicial Guidelines and Procedural Safeguards***

- Arrest must not be **mechanical or routine**; it should be based on **necessity and**

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<sup>14</sup> D.K. Basu v. State of West Bengal, (1997) 1 SCC 416.

<sup>15</sup> Hussainara Khatoon v. State of Bihar, AIR 1979 SC 1369.

<sup>16</sup> Sunil Batra v. Delhi Administration, AIR 1978 SC 1675.

**justification.**

- Police must clearly **record reasons for arrest** as well as for **non-arrest** in appropriate cases.
- The arrested person must be **informed of the grounds of arrest** at the time of detention.
- Preparation of a **proper arrest memo** is mandatory, duly attested by a witness.
- The arrested individual has the **right to inform a friend, relative, or any known person** about their arrest.
- Police authorities must **maintain proper records** of arrest, including time, place, and circumstances.
- The arrested person has the **right to consult and be defended by a legal practitioner** of their choice.
- The individual must be **produced before a Magistrate within 24 hours** of arrest.
- **Medical examination** of the arrested person must be conducted to prevent custodial abuse.
- Police officers must **identify themselves clearly** (name and designation) during arrest.
- In cases where arrest is not necessary, a **notice of appearance** should be issued instead of detention.
- Arrest should be treated as a **measure of last resort**, especially when the accused is cooperating.
- Special care must be taken in cases involving **women, elderly, and vulnerable persons**.
- The use of **handcuffs should be limited** and justified only in exceptional circumstances.
- Courts emphasize **transparency and accountability** in the entire arrest process.

**V. Misuse of Arrest Powers in India**

The misuse of arrest powers<sup>17</sup> represents a critical concern within India's criminal justice

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<sup>17</sup> K.S. Subramanian, "Political Violence and the Police in India," 43 *EPW* 49 (2008).

system, reflecting the gap between legal safeguards and actual practice. Even though arrest is supposed to aid in investigation and preserve order in the community, it is often practiced with the purpose of violating individual freedom and the right to fair trials. The wide discretionary authority that the police are granted combined with the absence of strong accountability mechanisms has allowed arrest as a means of control and coercion instead of a means of law enforcement, as this is discussed in this dissertation. This part examines the trends and reasons of such abuse.

## **Patterns of Misuse**

### **1. Arrest as a Tool of Intimidation**

- Arrest is often used to **threaten or silence individuals**, particularly in cases involving political dissent, social activism, or personal disputes.
- The mere act of arrest creates **fear and social stigma**, regardless of eventual guilt or innocence.
- It is sometimes employed to **discourage individuals from pursuing legal remedies or complaints**.

### **2. Arrest as a Pressure Tactic**

- Law enforcement agencies may use arrest to **extract confessions or information** from the accused.
- It is also used to **compel compliance or cooperation** during investigations.
- In some instances, arrest is used to **settle private or civil disputes**, blurring the line between civil and criminal law.

### **3. Arrest as Pre-Trial Punishment**

- Arrest is frequently treated as a **punitive measure rather than a preventive one**.
- Individuals are subjected to **detention and custody even before guilt is established**, undermining the presumption of innocence.

- Delays in bail and trial processes contribute to **prolonged incarceration**, effectively turning arrest into punishment.

### **Causes of Misuse**

- **Wide Police Discretion**

Broad statutory powers allow police to arrest without warrant based on subjective satisfaction.

- **Vague Legal Standards**

Undefined terms like “reasonable suspicion” enable arbitrary interpretation and misuse.

- **Lack of Accountability Mechanisms<sup>18</sup>**

Weak oversight and minimal consequences for wrongful arrests encourage misuse.

- **Political and External Influence**

Arrest powers are often exercised under political pressure, compromising fairness.

- **Institutional and Cultural Factors**

A colonial policing mindset and routine use of arrest contribute to systemic abuse.

### **Impact of Misuse**

- **Violation of Personal Liberty:** Arbitrary arrests directly infringe the fundamental right to freedom.
- **Social Stigma:** Arrest leads to reputational damage regardless of eventual innocence.
- **Economic Hardship:** Detention results in loss of livelihood and financial instability.
- **Psychological Trauma:** Individuals face stress, anxiety, and long-term mental distress.
- **Impact on Marginalized Groups:** Vulnerable communities are disproportionately

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<sup>18</sup> Law Commission of India, 177th Report on Law Relating to Arrest (2001).

targeted and affected.

- **Prison Overcrowding<sup>19</sup>:** Unnecessary arrests contribute significantly to overcrowded jails.
- **Erosion of Public Trust:** Misuse undermines confidence in the criminal justice system.

## VI. Critical Analysis

The Indian legal system under the police authority to make an arrest shows a clear constitutional undertaking of protecting personal freedom by giving the provisions under Article 21 and 22 and the legal provisions under the criminal procedure laws. This framework has been strengthened further through judicial interventions that have provided guidelines that would avert arbitrary arrests and the procedural fairness. Nevertheless, with such safeguards, the effective enforcement of these safeguards is uneven. There is a disconnect between the principle of law and the realities on the ground, as well as, the use of arrest as an investigation tool as opposed to a last resort.

The fact that the use of the ambiguous criteria like reasonable suspicion is still used makes it possible to interpret it subjectively, thus expanding the area of abuse.

Moreover, the structural problems come into play in the form of absence of accountability, ineffective checks and balances, and a colonial-style of policing mentality are also contributing factors to the vice. Although recent changes to the legal framework under the Bharatiya Nagarik Suraksha Sanhita, 2023 are expected to streamline the legal framework, some of the clauses are concerning due to the potential to increase the police authority, which further strengthens the current problems. It means that it is not only a legislative issue but a very institutional one. Thus, the solution to the abuse of arrest authority is not limited to a legal change but also a proper enforcement, more responsibility, and a transition to the rights-based approach that puts more emphasis on individual freedom and constitutional principles.

## VII. Conclusion

As the present paper has explored, the power of arrest holds a pivotal role in the interface

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<sup>19</sup> National Crime Records Bureau, *Prison Statistics India* (2022).

between the State and an individual, being critical. Although it is an essential means of a successful law enforcement and upholding of the order in the society, its misuse can be a serious threat to the basic rights, as assured under the Constitution of India. The study has revealed that in spite of the fact that there is a detailed legal framework which includes a set of constitutional protections, a set of statutory provisions contained in the Code of Criminal Procedure, 1973 and the Bharatiya Nagarik Suraksha Sanhita, 2023, and a broad base of judicial guidelines, the use of arrest powers remains characterized by arbitrariness and inconsistency. Colonial policing history and the broader discretionary authority and ambiguity in legislation has led to a situation whereby arrest can be viewed as a procedural tool of everyday operation and not as an extraordinary act of action that is based on necessity and proportionality.

The discussion also shows that judicial activism has been rather transformational in rearticulating the boundaries of arrest authority through the focus on fairness, responsibility and respect of individual freedom. Landmark judgments have sought to bridge the gap between law and practice<sup>20</sup> by introducing procedural safeguards and reinforcing the principle that the mere existence of the power to arrest does not justify its indiscriminate use. Nevertheless, that the misuse prevailed, in the form of intimidation, coercion, and pre-trial punishment, underscores the weaknesses of court supervision without workable application. The effectiveness of legal protection is still compromised by structural issues, such as the absence of accountability systems, institutional inertia, political interference, and the insufficiency of training of law enforcers. Also, the recent changes brought about by the BNSS, though they seek to modernize the system, they create significant issues on the increase in the powers of the police and why they might be abused again without having strong guiding measures.

Considering the presented findings, it is obvious that the issue of misusing the arrest power in India has to be addressed in a complex way that transcends the legislative changes. It is necessary to reinforce accountability measures, provide rigid adherence to judicial principles, and introduce more strict rules on the need to be arrested. The reforms in institutions need to aim at changing the culture of policing by means of training, sensitization, and adopting the rights-based culture of policing that emphasizes the importance of dignity and liberty of individuals. Accountability can also be improved through technological interventions, including the online maintenance of records and greater disclosure in the arrest processes.

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<sup>20</sup> Arvind Verma, "Police Reforms in India," 41 *IIPA* 159 (2005).

Finally, it is the legitimacy of the criminal justice system to strike a balance between the requirements of an effective law enforcement and the safeguard of constitutional rights. To maintain the rule of law by guaranteeing that the powers of arrest are exercised in a judicious, responsible manner that ensures that the public trust is given and that the democratic principles underpinning the Indian legal system are strengthened is a necessity.

## **VIII. Recommendations and Reforms**

### **a. Clear Limitation on Arrest Powers**

The law should clearly define the “necessity of arrest” to prevent arbitrary and routine detention.

Arrest must be treated as a last resort, especially in minor and non-violent offences.

### **b. Strengthening Accountability Mechanisms**

Strict legal and departmental action should be taken against officers responsible for unlawful arrests.

Independent oversight bodies must be empowered to ensure transparency and accountability.

### **c. Strict Implementation of Judicial Guidelines<sup>21</sup>**

Guidelines laid down in *D.K. Basu v. State of West Bengal* and *Arnesh Kumar v. State of Bihar* must be mandatorily enforced.

Non-compliance should attract penal consequences and judicial scrutiny.

### **d. Police Reforms and Sensitization**

Regular training programs should be conducted to promote human rights awareness and constitutional values.

Policing must shift from a power-centric to a rights-based approach.

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<sup>21</sup> *D.K. Basu v. State of West Bengal*, (1997) 1 SCC 416.

**e. Use of Technology for Transparency**

Body cameras, CCTV, and digital arrest records should be implemented to ensure transparency.

Real-time documentation can help reduce misuse and improve accountability.

**f. Protection of Vulnerable Groups**

Special safeguards should be ensured for women, elderly persons, and marginalized communities.

Access to legal aid and protection against unnecessary arrest must be strengthened.

**g. Strengthening Bail and Pre-Trial Safeguards**

Bail procedures should be simplified and applied liberally to prevent unnecessary detention.

Speedy judicial review must ensure that arrest does not become pre-trial punishment.

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