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The Rights Of An Arrested And Detained Person In The Indian Law- An Overview

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Abstract

This dissertation provides a comprehensive analysis of the rights of arrested and detained individuals under Indian law. It examines the legal framework governing arrest and detention, focusing on constitutional provisions, statutory protections, and judicial interpretations. The study emphasizes the fundamental principle of presumption of innocence and highlights the safeguards against arbitrary arrest and detention enshrined in Articles 20, 21, and 22 of the Indian Constitution. It also discusses the procedural requirements for arrests, such as informing the accused of the grounds for arrest, the right to legal counsel, and the right to be produced before a magistrate within 24 hours.

The dissertation explores key Supreme Court rulings that have shaped the legal landscape, including Kishore Singh Ravinder Dev v. State of Rajasthan and Maneka Gandhi v. Union of India. Additionally, it addresses issues related to bail, custodial violence, and the role of law enforcement in upholding human rights. The research further evaluates international human rights standards and their influence on India's legal framework.

The study concludes with recommendations for strengthening legal safeguards, enhancing police accountability, and ensuring the effective implementation of rights for arrested and detained persons. It advocates for legal awareness, judicial vigilance, and systemic reforms to prevent abuse of power and uphold the rule of law.

Keywords

- Arrest and detention
- Constitutional rights
- Indian criminal justice system
- Presumption of innocence
- Bail and custody
- Human rights jurisprudence
- Judicial interpretations
- Police accountability

CHAPTER -1

INTRODUCTION

The bail process and how it is acquired are detailed in the Criminal Procedure Code of 1973. It does not, however, define bail. According to Section 2(a) of the Criminal Procedure Code of 1973, a bailable offence is listed as bailable in the first schedule or is made bailable by any other law currently in effect, while a non-bailable offence is any other offence.

According to Indian law, no formality is needed during the procedure of arrest.[1] The arrest can be made by a citizen, a police officer or a Magistrate. The police officer is required to inform the person being arrested the full particulars of the person's offence and that they are entitled to be released on bail if the offence comes under the criteria for being bailable.[2] There is no general rule of eligibility, and requires that a police officer must handcuff a person who is to be arrested. When there is a question regarding handcuffing a person, then at that time, case laws have stated that the choice to handcuff a person depends on the surrounding circumstances and that officers should always take the proper precautions to ensure their safety and the public.

Humans are sociable creatures by nature. They will perish if they are not surrounded by civilization and other people. There are certain laws and principles that society's members must observe to maintain peace and order and make it a healthy society. Laws are the regulations that are so recognised and sanctioned by the state. Acts performed in contravention of such laws are referred to as "crimes." We, the people of India, are sovereign, and we have given the sovereign government the power to manage us. Furthermore, the Indian constitution is built around three pillars: the executive, legislature, and judiciary. If someone commits a crime, the executives are the people who have control over him, such as police officers. The police force is

[1] Shri. D.K. Basu, Ashok K. Johri vs State of West Bengal, State Of U.P AIR 1997 SC 610
[2] "CODE OF CRIMINAL PROCEDURE". Archived from the original.

critical in enforcing laws and preventing their violations, ensuring that society remains peaceful and orderly. It is sometimes necessary for police officers to arrest and detain individuals for whom they have suspicion or reason to believe and who also appear to be anti-social members of society in the course of their duties. Theagency of police has been appointed for safeguarding the members of the society against any violation of laws that hinders harmony and public tranquillity. The police force was established to protect society's members from any violations of the law that would jeopardize the peace and tranquillity of the community. Arrests and detentions by the police should always be carried out according to the Indian Constitution's due process clause. The judicial system interprets the method for how someone would be punished for his wrongdoing and reintegrate into society. Apart from that, a person who is arrested and detained is a member of society who has certain rights that have been granted to him, and those rights of an arrestee must be respected.

A person gets arrested when apprehended and taken into custody, usually because they are suspected of committing or preparing a crime. After a suspect is apprehended, they can be interrogated further and/or charged. In the Indian criminal justice system, an arrest is a procedure.

Police and other police officers hold arrest powers. A citizen's arrest is legal in some jurisdictions; for example, in England and Wales, anybody can arrest "anyone he has reasonable grounds for suspecting to be committing, have committed, or be guilty of committing an indictable offence," albeit certain requirements must be followed. If a person is caught in the act of committing a crime and is unwilling or unable to show valid identification, similar powers exist in India, France, Italy, Germany, Austria, and Switzerland.[3]

Many countries demand that an arrest be made for an utterly justifiable purpose, such as the need for reasonable cause in the United States, to protect against abuse of power. Furthermore, the amount of time a person can be held in custody is limited (usually 24 hours in the United Kingdom and France and 24 or 48 hours in the United States) before they must be prosecuted or released.

The benefit of the presumption of innocence of the accused until he is proved guilty at the end of a trial on legal evidence is one of the main pillars of our legal system. Even the rights of the accused are protected in a democratic society; even if someone is accused of a crime, he does not become a non-person. The rights of the accused include their rights at the time of arrest, during search and seizure, during the trial process, and so on.

In India, accused people have certain rights, the most basic of which are enshrined in the Indian Constitution. The underlying assumption underpinning these rights is that because the government has vast resources for prosecuting individuals, individuals are entitled to some protection from the government's abuse of those powers. During any investigation, inquiry, or trial into an offence with which he is charged, an accused has certain rights, and he should be safeguarded from arbitrary or illegal arrest. Police have broad powers to arrest someone for a Cognizable Offense without going to a magistrate. Thus the Court should be cautious to ensure that these powers are not exploited for personal gain. Based on mere suspicion or information, no

[3] Police and Criminal Evidence Act 1984". archive.vn. archived from the original on 2nd April, 2024.

arrest can be initiated. Even a private person cannot follow and arrest a person based on another person's statement, no matter how credible it seems.[4]

Although the police have been given certain authorities to aid in the apprehension of suspects, these powers are subject to specific limitations. These limitations are primarily in place to protect the interests of the individual who is about to be detained and the general public. The installation of constraints can be viewed as an acknowledgement of the arrested person's rights. On the other hand, other clauses have introduced crucial rights for the arrested person more explicitly and directly.

In the landmark case of *Kishore Singh Ravinder Dev vs. State of Rajasthan*[5], it was stated that India's laws, including its Constitutional, Evidentiary, and Procedural laws, have made extensive provisions for safeguarding the rights of accused persons to protect their dignity as human beings and to provide them with the benefits of a just, fair, and impartial trial. However, in another landmark decision, *Meneka Gandhi vs. Union of India*[6], it was determined that the state's procedure must be equitable, fair, and reasonable.

Criminal justice is the process of bringing persons who have committed crimes to justice. The criminal justice system is a collection of government agencies and entities whose mission is to identify and apprehend criminals in order to punish them. Other objectives include offender rehabilitation, criminal prevention, and moral support for victims. The police, prosecution and defence lawyers, courts, and prisons are the key institutions of the criminal justice system.

Detention is the process of a state or private citizen lawfully detaining a person by robbing them of their freedom or liberty at the time. This could be owing to (pending) criminal accusations brought against the individual by a prosecutor or to safeguard a person or property. Being detained may not always entail being brought to a specific location (often referred to as a detention centre) for interrogation or punishment for a crime (see prison).[7]

Detention in Brasília: For the same reasons, the phrase can also be applied to the possession of the property. An arrest may or may not have preceded or followed the detention process.[8]

The detainee is a term used by some governments and their armed forces to refer to anyone detained in custody who isn’t classified and treated as either prisoner of war or criminal suspect. "Any person captured or otherwise held by an armed force," said. It can also indicate "someone who is being kept in custody." The inmates at Guantánamo Bay are known as "detainees."

Article 9 of the Universal Declaration of Human Rights provides that "[n]o one shall be subjected to arbitrary arrest, detention or exile." In wars between nations, the treatment of detainees is governed by the provisions of the Fourth Geneva Convention.[9]

[4] https://www.legalserviceindia.com/legal/article-219-rights-of-accused-persons.html
[5] Kishore Singh Ravinder Dev vs. State of Rajasthan AIR 1981 SC 625
[6] Maneka Gandhi vs. UOI, AIR 1978 SC 597
[7] https://www.ohchr.org/en/instruments-mechanisms/instruments/body-principles-protection-all-persons-under-any-form-detention [accessed 25 April 2024]
[8] https://pretrialrights.org/brazil/ [accessed 25 April 2024]

1.1 Right under Indian Constitution

The first two clauses of Article 22 read as follows:

ARTICLE 22: Protection against arrest and detention in certain cases -

(1) No person who is arrested should be held in custody without being notified of the grounds for his detention as quickly as possible, nor shall he be denied the right to consult and be represented by a lawyer of his choice.

(2) Every person who is arrested and held in custody must be brought before the nearest magistrate within twenty-four hours of their arrest, excluding the time required to travel from the place of detention to the magistrate's court, and no one may be held in custody beyond that time without the permission of a magistrate.

Article 22 (1) and (2) confers four following fundamental rights upon a person who has been arrested:

i) Right to be informed, as soon as may be, of the grounds for such arrest.

ii) Right to consult and to be defended by a legal practitioner of his choice.

iii) Right to be produced before the nearest magistrate within twenty-four hours of his arrest excluding the time necessary for the journey from the place of arrest to the Court of Magistrate.

iv) Right not to be detained in custody beyond the period of twenty four hours without the authority of the Magistrate.

1.2 Statement of Problem

What if the process becomes inconvenient for the perpetrator, as it should not be under the law? Persons held by police without submitting a complaint, as well as those on trial and incarcerated prisoners, continue to wait for their cases to be resolved. Convicts are not always treated equally to other inmates. There are various processes in our procedural statute that, despite being the rights of criminals or those facing trials, are not available to them. Furthermore, the concept of premature release, furlough, or parole are rights provided to convicts on reasonable grounds that are often rejected or refused to them for no good reason. The purpose of this dissertation is to explore the provisions for arrested persons in the Indian criminal justice system, as well as the rights that they have throughout their arrests and detentions.

Furthermore, this study intends to identify flaws in the Criminal Justice System's pre-trial, under-trial, and post-trial procedures, with a particular focus on Delhi. It also aims to bring up the behaviour of police officers toward prisoners, lawyers' willingness to extract money, lawyers' unwillingness to work for their clients, and some suggestions in light of this issue to avoid injustice being done to prisoners and detained persons, as well as the proper functioning of three government organs.

[9] International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 12 August 1949, 75 UNTS 287, available at: https://www.refworld.org/docid/3ae6b36d2.html [accessed 27 April 2024]

1.3 Definition of Arrest

The term "arrest" is not defined in the Code of Criminal Procedure, but it refers to taking or keeping someone in custody by a legal authority[10]. Restraint and seizure of a person by someone acting with legal authority (e.g., a police officer) can be defined as the elaboration of the phrase. The arrest is a type of state-imposed restriction in which a person is detained, imprisoned, and denied the right to move freely. As a result, while an arrest implies a loss of personal liberty, the Indian Constitution, the country's ultimate law, gives considerable protection against arbitrary arrests.

The United Nations Programme on Crime Prevention and Criminal Justice includes the idea of arrest, which is described as "the act of depriving a person under governmental power to detain and prosecute that person with a criminal offence."[11]

The seizure or handling of a person's body to hold or detain him to answer a criminal charge or prevent the commission of a criminal offence is referred to as an arrest. Depending on the circumstances, words brought to the person's attention that is meant to indicate to him that he is under compulsion and that he then complies with it may amount to an arrest. The use of the words "arrest" does not constitute an arrest unless the person being arrested consents to the procedure and follows the arresting officer. Arrest can be carried out in three ways: 1) Verbal or physical submission to detention. 2) Touching the arrested person's body 3) Confining the arrested person's body "Chapter 46" If the individual to be detained resists arrest, the Cr.P.C. allows the police to use reasonable force to make the arrest. If the offence committed by the accused is punishable by life imprisonment or death, the use of force can go as far as causing death.

Every act of coercion or physical restraint is not an arrest, but when the restriction is complete and the deprivation of liberty is complete, it is. A person is said to imprison a toiler person if he suppresses or overpowers another's voluntary action, detains him in a given location, or forces him to travel in a specified direction. It would be an arrest if such detention or imprisonment was carried out on the basis of any legal authority or apparent legal authority.

Article 21 of the Indian Constitution contains the most fundamental clause concerning arrest. It states that no one's right to liberty may be taken away from them until they follow the legal procedures.

Police officer or other personnel authorized by law to make an arrest may do so. The arresting officer can only act in accordance with the provisions of the Criminal Procedure Code. If a person resists arrest, any necessary measures may be taken to effect the arrest. It is illegal to resist or obstruct a person's lawful arrest.

1.3.1 Arrest and Custody

[10] https://www.merriam-webster.com/dictionary/arrest
[11] https://www.unodc.org/unodc/site-search.html?q=arrest+definition

An arrest serves to notify the community that a person has been charged with a crime, as well as to chastise and dissuade the arrested person from committing more crimes. An arrest can take place with the consent of the person who is being arrested. There can be no arrest without restraint, and the restraint must be done by genuine or fictitious legal authority. To be considered an arrest, a person's custody does not have to be followed by formal words of arrest or a station house booking. The objective standard for determining whether an arrest occurred in a given situation is whether a reasonable person in these circumstances would feel he or she was confined or free to go. A reasonable person is someone who isn't guilty of unlawful behaviour, isn't too concerned, and isn't indifferent to the gravity of the situation. The defendant's subjective knowledge or fears are not included for determining reasonableness. Unless the officer makes that intent clear, the subjective intent of the police is usually immaterial to a court's decision of whether an arrest occurred. As a result, a defendant's voluntary attendance at a police station does not automatically result in an arrest based on an officer's subjective belief that the defendant is unable to depart. When an officer applies for an arrest warrant, he or she must submit sufficient evidence before a neutral judge or magistrate to prove probable cause that a crime has been committed. The evidence used to get a warrant does not have to be ultimately admissible at trial, but it cannot be based on false statements made knowingly or intentionally, or statements made with reckless contempt for the truth. When an investigation lasts too long, it inevitably becomes a de facto arrest.

1.3.2 Who can Arrest

Arrests can be made either with or without a warrant of arrest. Police officers, individuals, and magistrates can all have an impact on an arrest. It is extremely apparent in the Code of Criminal Procedure's texts. Although it is commonly assumed that only prosecuting/investigating authorities have the authority to make arrests, the Code contains provisions that allow people other than prosecuting/investigating agencies to make arrests. By following the protocol, even the magistrate might influence the arrest. The officer referred to in Section 41 must be a member of the Indian Police Force, as defined under the Indian Police Act of 1861. Section 41 contains a list of broad arrest powers granted to police officers; however, these powers are limited by other articles of the Code as well as special acts to which the Code is applied. The police only have the authority to arrest someone without a warrant if they are accused, concerned, or suspected in a crime. The legislation now recognises redress for arbitrary arrest and imprisonment by allowing citizens to file a complaint with the Superintendent of Police of that district and other senior police officers, as well as the court and the State Human Rights Commission/National Human Rights Commission.

1.3.3 Who can be arrested?

The Criminal Procedure Code mentions that the following persons can be arrested by police officials without a warrant[12]

1) who commits, in the presence of a police officer, a cognizable offence,

[12] Section 41 Criminal Procedure Code

2) against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists that he has committed a cognizable offence punishable with imprisonment for a term which may be less than seven years or 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 such complaint, information, or suspicion 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 (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) as unless such person is arrested, his presence in the Court whenever required cannot be ensured and the police officer shall record while making such arrest, his reasons in writing.

1.3.4 Handcuffing of Accused

The arrest entails detention under Section 49 Cr.P.C., which limits the amount of restraint to prevent the accused from fleeing. A police officer must not use handcuffs on an accused person while arresting him as a general rule. Handcuffing is only justified in exceptional circumstances or if there are reasonable grounds to believe the accused will attempt to flee. This idea is based on the idea that allowing police officers to handcuff suspects in all cases of arrest equates to giving them broad powers to oppress them Handcuffing or other fetters are generally not imposed on prisoners, convicts, or under-trials while they are lodged in a jail anywhere in the country, or while transporting or in transit from one jail to another, or from jail to court or back. On their own, police and jail authorities have no authority to order the handcuffing of any inmate in any jail in the country, or during transport from one jail to another, or from jail to court and back. The Supreme Court of India ruled in *Sunil Batra vs. Delhi Administration*[13] that fetters should be avoided as they are a violation of human dignity, and that the indiscriminate use of handcuffs is illegal.

1.3.5 Interrogation

When a person thinks of being arrested, the image that most often comes to mind, thanks to movies and television drama, is of a police officer using all means of oppression. In the minds of the general public, the police remand has the same image. In fact, the law forbids it, and the only way to get a breakthrough in an investigation is through interrogation. During interrogation, the suspect has a right to counsel and should be allowed to meet with his or her counsel; however, the counsel does not have to be present throughout the interrogation; if necessary, he is entitled to free legal assistance and has the right to remain silent. A woman or a child under the age of 16 may not be taken to a police station for questioning. This should also apply to those who are suffering from serious physical or mental illnesses. Despite the fact that this does not apply to the suspect/accused, this change may be necessary.

1.4 Literature Review

[13] Sunil Batra vs. Delhi Administration 1980 AIR 1579

Literature in connection with the present problem is reviewed from the earlier studies; published books are the main sources that are covered for the purpose to ascertain the views and conclusions of earlier works regarding the study of Human Rights of the Accused – a Socio Legal Study with reference to Rayalaseema Districts of A.P

- Dr.B. Hyder Vali book titled 'rights of accused in criminal trail published by Gogia law Agency, Hyderabad, (2004), deals with the concept of Judicial Interpretation and the rights against self incrimination.
- Dr. Ashutosh, Rights of Accused, Universal Law Publishing, 2009, deals with rights of the accused and recommendations of human rights and its provisions.
- Jain kapurrymbai, Human rights of Accused – an Indian perspective, BBPM law associates, new delhi 2001. In this books discussion about the 18 Indian constitutional provisions and legislatives of the arrested persons.
- Pravin H. Parekh, Human rights year book 2010,universal law company pvt ltd, 2010. deals with importance of the Human rights in India. Historical retrospection, Fundamental rights under the Indian constitution an overview.
- Jaishree Jaiswal, human rights of accused and juveniles: delinquent / in conflict with law, Kalpaz Publications, 2005, deals with the juveniles rights and rights of accused and their duties.
- Chitkara, M.G. Human Rights: Commitment and Betrayal. APH Publishing Corporation, New Delhi, 1996, deals with History of human rights and ancient period and British period
- lyer, Krishna V.R. Human Rights and Inhuman Wrongs. B.R. Publishing Company, New Delhi, 1990. Discussed violations of human rights and its rights of the human beings.
- Kapoor, S.K. Human Rights under International Law and Indian Law. 2nd ed. Central Law Agency, Allahabad, 2001, deals with International laws and national laws of Human rights.
- V.K.Sircar, 'Protection of Human Rights in India'. Asia law house, Hyd,(2004-05), deals with Right to liberty and freedom, liberty in Indian constitution, theory of interrelationship of fundamental rights.
- Gahrana, Kanan. "Human Rights: A Conceptual Perspective." Indian Journal of International L.aw, Vo1.29, Nos. 3 & 4. (July-December,1989), deals with Human rights and fundamental rights of the Indian constitution.
- Rao Prasad, C.R. and Raju Lakshmipathi. "State and Civil Society and Human Rights Scenario in India." The lndian Journal of Public Administration. Vol. XLVI., No.4 (October-December, 2001), discusses development of civil society and human rights of the accused and Indian scenario.
- M.P.Jain, 'Indian Constitutional law '(6TH edition, 2010), has devoted his energies in explaining the legal interpretation of various provisions of the Indian Constitution regarding Fundamental rights.
- BATRA.T.S., 'Human Rights' Critique Metropolitan Book Co. (Pvt.) LtdNew Delhi – 1979 discusses Human Rights of India and their rights in india.
- BHAGWATI.P. N., Human Rights and Democratization of Remedies; Indian Bar Review(1983), in his book Human rights protection and the provisions of human rights under constitution.

- CHANDRA, Human Rights and United Nations - Metropolitan book Co.(P) Ltd. New Delhi -1977. The United nations and conventions of human rights.
- SERVAI.H. M, The constitutional law of India, 3rd edition, 3 vols. Tripathi Bombay 1976. Fundamental rights of Indian constitution and Directive principles of states policies.
- M.P.RAJU, P.O. Mathew “legal news and views", vol.20- 5 , may, 2006. In his article the views of the author and legal decisions of the human rights under constitution. The above studies don’t cover every aspect of the Human Rights of the accused persons in Rayalaseema Districts of Andhrapradesh. So the present research i.e. Human Rights of the Accused – A Socio Legal Study with Reference to Rayalaseema Districts of A.P intendent to explore a wide range of issues namely the socio economic conditions of the accused, violations of their Human rights, Judicial attitude towards accused and its impact is dealt in detail.

1.5 Objectives of the proposed research is enumerated as follows -

1. The researcher shall point out constitutional and basic rights which are available to accused and detained persons under the criminal laws of India, Constitution of India Human Rights Jurisprudence and under the International obligation in the Form of International Covenants.
2. Present proposed research work aimed at finding the conditions of detained persons after the verdict in DK Basu case.
3. The torture, oppression and abuse of the powers by officers of administration of Justice are done easily and frequently. The proposed work is aimed at finding the main reasons behind it.
4. The thorough study of the criminal law administration of India, Constitution, Judicial Pronouncement, Human Rights Jurisprudence and International Covenant regarding the rights of alleged accused and detained person would help at knowing the depth and genuineness of the jail menace, & bringing out the positive suggestions.
5. In this study we have to find out the awareness about these rights among the accused and detained person also in other members of the society.
6. The proposed research is to be done for bringing awakening in the awareness about the rights of accused and detained person in them, social organizations, and other members of the society.
7. There is need to improve the techniques of handling the accused persons, detained person and radically changing the worst conditions of convicts and prisoners at both administrative and legislative level.

1.6 Methodology

The study is doctrinal in nature and the sources are primary and secondary sources conducted on various books by different authors and articles published in various journals, available in various libraries, law journals and case law etc.

Books, journals, magazines, and books on religious laws by various legal experts and scholars will be the primary source of information and knowledge for the topic. Articles written by well-known authors have appeared in traditional newspapers, and they could be one of the many sources available. It is a global issue, and efforts will be made to locate relevant literature, which may include government records of parliament debates, particularly speeches by national leaders, NGO efforts, and contributions from online studies, among other sources.

The normative nature of law distinguishes it from other social sciences. The law not only regulates human conduct and relationships, but also ensures the stability and continuity of the legal system, in order to achieve desirable goals, social and ethical values. As a result, the researcher believes that the doctrinaire method can be used to carry out the research in his paper titled "Human Rights of the Accused – A Socio Legal Study with Reference to Rayalaseema Districts of A.P." In general, 'Doctrinal Research' is concerned with case law analysis, the organisation, ordering, and systematisation of legal propositions, as well as the study of legal institutions.Hence, the main research is analytical, descriptive and doctrinaire study and based on empirical data and field studies etc were conducted.

1.7 Hypothesis

The abuse and oppression of the rights of accused, arrestees, detained persons were not new in ancient India. But in the modern era of welfare State the concept of totalitarian State is foreign one when there is strong recognition of Human Rights at global level. The accused and detained person still themselves have not aware about their Rights, also true about general public. In the proposed work the following Hypothesis has been formulated.

i) The alleged accused, suspect, arrestee, detained personhave certain rights more or less contains in the Criminal laws of India, Constitution, Jail manuals, International Covenants and Judicial Pronouncement. But the real challenge is regarding their implementation.

ii) Large of the Indian population is illiterate and also the rate of legal literacy and awareness is negligible. Ignorance of the general public regarding their rights prevails over their awareness.

iii) One of the basic cause of such an unfortunate situation is that the powers which are given to the police, prison authorities to fulfill their legitimate and essential functions are capable of being abused and misuse by them to torture mankind, to destroy lives and properties, to oppress and intimidate the weak and to trample the constitutional rights of the community as well.

iv) The judiciary has played an important role in the articulation and protection of the rights of accused and detained persons. The police jurisprudence and prison jurisprudence developed by the judiciary are of worth value in safeguarding the existing rights and evolving new rights.

v) Abuse and oppression of the rights of the accused and detained person are the crime against Human dignity. But the present criminal laws and legal works in this regard are inadequate and insufficient.

vi) The necessity is to change the traditional attitude of the public officials regarding the rights of accused, detained person and constitutional mandate should not remain only on paper but be practically applied and work out.

CHAPTER – 2

THE LEGAL FRAMEWORK OF THE RIGHTS

The detection and punishment of crime are functions that result in a dramatic concentration of power in the hands of a portion of the state. In comparison to the state's resources, the accused is relatively poor and alone. In fact, many of the rights, liberties, and immunities that the law declares, as well as the restrictions on the police and prosecution that their protection imposes, were established in response to the defendant's relative weakness in comparison to the crown. A number of rights are conferred on an accused to prevent abuse by officials and others who wield power in the criminal justice system.

There are two types of rights granted to an accused person: those that aim to compensate for his disadvantageous position, such as the right to silence and the right not to be tortured, and those that aim to torture, such as the nullapoena sine lege principle, or the presumption of innocence.[14] In the administration of criminal justice, these same rights take on a different tone, as we encounter rights asserted in the name of human rights as well as rights asserted in the name of fairness and natural justice. “The right not to be tortured” is perhaps the most widely recognized example of a human right. This right is said to be inherent in each person as a human being. It is regarded, like the right to life, as a right that should be recognized in every human being, regardless of his or her situation. The procedural rights based on fairness and natural justice, which have traditionally found expression in procedures like nullapeona sine lege, the presumption of innocence, the right to a fair trial, natural justice procedures, and the double jeopardy rule, are more numerous. Constitutions of the world give recognition to these rights by way of express legislation. The essence of such legislation is that no individual is to be treated in certain ways.

In the context of the criminal justice administration, it is assumed that the state or its agents are bound not to treat a person in certain ways in order to exercise power over him in the name of crime control. However, the whole point of rights is that they are valued in principle, and when they are recognized in a state's constitution, it is clear that the right cannot be taken away simply because it would benefit the majority of society by improving crime control. Articles 20, 21, and 22 of the Indian Constitution recognize an accused person's human rights. The aim of including them as fundamental rights is that certain elementary rights such as the right to life, liberty, freedom of speech, and so on should be regarded as inviolable under all conditions and that the shifting majority in the legislation of the country should not have a free hand in interfering with these fundamental rights.[15]

[14] https://www.legalserviceindia.com/legal/article-5178-the-rights-of-an-accused-person-in-india.html
[15] A.K Gopalan vs. State of Madras, AIR, 1950 SC 27.

2.1 Immunity from Retrospective Criminal Legislation (Article 20)

It has always been thought that a man's ability to know what conduct is and is not criminal, especially when punishments and penalties are involved, is of paramount importance. The State may or may not consider behavior to be illegal. Ex-post facto laws are those that punish people for doing something that was legal at the time. “There can be no doubt,” said Jagannath Das J., “as to the paramount importance of the principle that ex-post-facto laws that create and punish offenses retrospectively are bad and highly inequitable.”

An ex-post-facto law is a law that penalizes retrospectively and has already done or increases the penalty for such acts. Article 20 (1) imposes a limitation on the law-making power of the legislature. Clause [i] of Article 20 runs as follows:

“No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted by the law in force at the time of the commission of the offence”.

The legislature can enact both prospective and retrospective laws, but clause (i) prevents the legislature from enacting retrospective criminal legislation. When a law affects acts or omissions that occur after it takes effect, it is said to be prospective. In their operation, the majority of laws are prospective. However, legislation may give law retrospective effect by bringing it into force not only in future acts, but also in acts or omissions committed even before the law's enactment. Although legislation can enact both prospective and retrospective laws in most cases, the present clause states that legislation cannot make a criminal law retrospective in order to penalise people who committed crimes before the law was enacted. The imposition of civil liability retroactively is not prohibited by this article.

This clause of Article 20 embodies the maxim “Nullapeona sine lege” which expresses the idea that no man shall be made to suffer except for a breach of the criminal law which shall be enacted beforehand in precise and definite terms.

The first part of clause (1) states that no one shall be convicted of an offence unless the act charged as an offence was committed in violation of a law in effect at the time the act was committed. This means that a person can only be found guilty of an offence if the act charged against him was a crime under the law in effect at the time it was committed. If an act was not an offence at the time it was committed, no future legislation can make it so. If an act was not an offence at the time it was committed, no future legislation can make it so. Thus, where the rule became effective on July 1, 1961, and was published in the Gazette on July 7, 1961, it was determined that the rule could not be applied to acts committed prior to July 7, 1961. Because of Article 20 of the Penal Code, S. 304-B of the Penal Code, which was inserted into the Code on November 19, 1986, creating a distinct offence of dowry death and providing a minimum sentence of seven years imprisonment, does not apply to dowry deaths that occurred prior to the insertion of the section (1). The benefit provisions of an ex-post-facto law can be used by the accused. According to the principle of beneficial construction, an ex-post-facto law should be used to reduce the sentence of a previous law on the

same subject. Such a law is unaffected by Article 20(1). For example, if the law in force makes an offence punishable by life imprisonment and an amendment made on 1-4-1976 makes the same offence punishable by three years imprisonment, the offender can benefit from the amend ex-post-facto law because the latter reduced the punishment.

2.1.a Protection against Double Jeopardy

"No person shall be prosecuted and punished for the same offence more than once," says Clause (2) of Article 20. The clause embodies the English Common Law Rule of "nemo debet bis vexari," which states that "no man should be put in peril twice for the same offence, and if he is prosecuted again for the same offence for which he has already been prosecuted, he can take the entire defence of his previous acquittal." The plea of autrefois acquit' or 'autrefois convict' avers that the defendant has been previously convicted or acquitted on a charge for the same offence like the one for which he is currently arraigned.[16]

The corresponding provision in the American Constitution is embodied in that part "f the Fifth Amendment which declares that no person shall be subject – for the same offence to be put twice in jeopardy of life or limb."[17]

"…Nor shall any person subject to the same offence to be twice put in jeopardy of life or limb";

"nor shall be compelled in any criminal case to be a witness against himself."

"nor be deprived of life, liberty, or property without due process of law."

The expression Double Jeopardy is used in American law but not in our Constitution. Under our law, the principle has been recognized in Article 20(2) of the constitution along with S.26 of the General Clauses Act 1897 and S. 300 of the Cr. P.C 1973.

Although these are the materials that formed the background of the fundamental rights given in Article 20(2) of the Constitution, the ambit and the content of the guarantee are much narrower than those of Common Law in England or the "Doctrine of Double Jeopardy" in the U.S Constitution.

2.1.b Protection against compelling self-incriminating evidence

Article 20 (3) runs as "No person accused of any offence shall be compelled to be a witness himself".

This provision embodies one of the fundamental canons of Common Law criminal jurisprudence, namely, that the accused is presumed innocent, that the prosecution is responsible for proving his guilt by gathering evidence from sources other than the accused, and that the accused is not required to make any statement against his will. These ideas stem from a fear that if an accused person is forced to undergo a compulsory examination, force and torture will be used against him to trap him in fatal contradictions.

[16] K. Gupteshwar, *The Rule Against Double Jeopardy Under The Indian Constitution*, Supreme Court Journal, 1956, p.53.
[17] https://www.law.cornell.edu/wex/double_jeopardy#:~:text=The%20Double%20Jeopardy%20Clause%20in,or%20limb%20.%20.%20.%20.%20%22

This provision emerged as a sharp reaction to the courts.

Although today's police may not use the rack to induce incriminating statements, some of their methods are no less violative of the Constitutional rights of the accused.[18]

In America, the immunity is given by the Fifth Amendment which says, inter alia, that no person shall be compelled in any criminal case to be a witness against himself. In India, Article 20 (3) which embodies this privilege reads: "No person accused of any offence to a person 'accused of an offence'; (2) it is a protection against 'compulsion to be a witness'; (3) it is a protection against such 'compulsion' resulting in his giving evidence against himself.

Who is an Accused?

The protection of Article 20 (3) is available to a person 'accused of an offence'. This means a person against whom a formal accusation relating to the commission of an offence has been leveled, which in the normal course may result in his prosecution.

The privilege of Article 20(3) is unquestionably in effect in the courtroom during the trial stage. However, it is available even before a trial, that is, during the course of a police investigation if the person in question can be considered an accused. NandaniSatpathy was summoned to the police station to be questioned in relation to a case filed against her under the Prevention of Corruption Act. Investigations were launched against her based on the FIR, and she was interrogated by the police about a long list of questions, but she refused to answer, claiming protection under Art. 20. (3). The Supreme Court ruled that Section 160(1) of the Criminal Procedure Code, which prohibits women from being summoned to a police station, was violated in this case. However, the court used the opportunity to expand the scope of Art. 20. (3). The Supreme court's decision, delivered by K. Iyer J., considered whether Art. 20 (3) applies only to the stage of a court trial or also to stages prior to that. Iyer J. held that Art. 20 (3) should apply to police investigations as well because inquiries under criminal statutes with quasi-criminal investigations are accusatory in nature and will almost always result in prosecution if the offence is serious and the evidence gathered is sufficient. Denying a suspect the protection of Art.20 (3) because the investigation is preliminary and may not reach the court is eroding the substance. Art. 20 (3) is not limited to court proceedings. It covers "any mandatory process for producing evidentiary documents" that is reasonably likely to lead to a prosecution against him. Not only is compelled testimony excluded, but "pre-court testimonial compulsion also suffers a preventive blow." The court also ruled that the prohibition on self-accusation and the right to remain silent during an investigation or trial extends beyond that case and protects the accused in any other pending or imminent criminal case.

"He is entitled to keep his mouth shut if the answer sought has a reasonable prospect of exposing him to guilt in some other accusation, actual or imminent, even though the investigation underway is not with reference to that". Further, the court held that the police must invariably warn, and record the fact, "about the right to silence against self-incrimination; and when the accused is literate, take his written acknowledgment."

[18] Robert. D. Pursley, *Introduction to Criminal Justice*, Macmillan, 1980, p.177.

What is compulsion?

Art. 20 (3) comes into operation only when the accused is compelled to give evidence against himself. Duress is where a man is compelled to do an act by an injury, beating or unlawful imprisonment. It also includes threatening, beating or imprisoning of the wife, parent, of child of a person.[19]

It's worth noting that in the early years of judicial history, following the enactment of the Constitution, this point of self-incrimination protection did not appear to be viewed favourably by the courts. The judicial response to this protection was more likely to weaken it than to strengthen it. Compulsion was viewed as a narrow concept by the courts. There was no presumption that the accused made an involuntary statement while in police custody. The Supreme Court, however, rediscovered and resurrected the privilege against self-incrimination in 1978. This decision gave new life to a privilege that had previously been little more than a piece of paper.

The Supreme court, through Krishna Iyer J., argued for a broad interpretation of the term "compelled testimony." It's evidence obtained "not just through physical threats or violence," but also through psychological torture, atmospheric pressure, environmental coercion, exhausting interrogative prolixity, overbearing and intimidatory methods, and other means. “Any form of pressure used by the police to obtain information from an accused that strongly suggests guilt, whether subtle or crude, mental or physical, direct or indirect, but sufficiently substantial, is compulsion.

Admission of the tape record statements of an accused taken without his knowledge but without any compulsion is not barred under Art.20 (3).[20]

The article enacts a measure of protection against testimony compelled through police torture, violence or overbearing methods. Art. 20 (3) is not violated when the accused volunteers evidence against himself. Since the article only gives a privilege, the accused may waive it if he so likes.[21]

The Meaning of “to be a witness”

To be a witness” means making of oral or written statements in writing, made or given in as court or otherwise. If means imparting knowledge in respect of relevant facts by an oral statement or a statement in writing.

To be a witness” is not the same as “providing evidence” in its broadest sense, which includes not only making an oral or written statement, but also producing documents or giving materials that may be relevant at a trial to determine the accused's guilt or innocence. The term "to be a witness" has polarised judicial opinion. “To be a witness means to furnish evidence, and this could be done through lips, by producing a thing or a document, or by giving oral evidence, but also by producing documents or making intelligible gestures as in the case of a dumb witness,” the Supreme Court explaine.

[19]State of Bombay vs. Kaltu Ralu Oghad, AIR 1961 SC 1808.
[20]Usufali Ismail Nagree vs. State of Maharashtra, AIR 1968 SC 147; R.M. Malkan vs. State of Maharashtra, AIR 1973 SC 157.
[21]Smt. Kalawati vs. State of H.P, AIR 1953 SC 131.

Several types of evidence are excluded from the purview of Art.20 (3). This is done with a view to draw a balance between the exigencies of investigation of crimes and the need to safeguard the individual from being subjected to third degree methods.

The search of a person's possessions under a search warrant and the seizure of documents are not on the same footing as compelled production of documents from whom they were seized for the purposes of Art. 20 (3). Because a search warrant is issued to a police officer, search and seizure cannot be considered acts of the occupier of the premises in question; rather, they are acts of a different kind to which the occupier is obligated to submit and thus are not his testimonial acts in any sense. The Supreme Court has said that search and seizure under a search warrant do not have even the remotest testimony to compel the accused to incriminate himself.

Under Section 26 of the Evidence Act 1872, no confession made by a person while in police custody is to be used against him unless it has been made in the immediate presence of a magistrate. Section 27, however, says that the information furnished by an accused person after his arrest to the investigating officer, which leads to the discovery of incriminating articles like the weapon of offence, it is admissible in evidence and does not in any way offend Art.20 (3).

The Supreme Court held [22] that when a murder charge, the accused has stated to the police officer that he would give the clothes of the deceased, which he had placed in a pit and thereafter he, in the presence of a witness, dug out the pit and took out the clothes belonging to the deceased which were identical to the clothes belonging to the deceased, the statement of the accused was held to be admissible.

[22]Pershadi vs. State of U.P, AIR 1957 SC 211.

Administrative Proceedings:

Art. 20 (3) is not applied to administrative investigations, even though the primary aim of these proceedings may be to find out whether the individual has committed an offence or not. Under Section 45-g of the Banking Companies Act 1969, after an order for winding up of a banking company has been made, the official liquidator has to submit a report on whether in his opinion any loss has been caused to the company by any act or omission of the directors, etc. and after considering the report, the High Court can publicly examine the directors. Section 45-G has been held valid because the object of the enquiry thereunder is to collect evidence and decide whether any act is to collect evidence and decide whether any act or omission have caused loss to the company. If as a result of the enquiry, the court comes to the conclusion that the acts or omissions did cause loss to the company, then some action might be taken against the persons examined. Thus, an accusation may or may not follow the enquiry, but there is no accusation at the time of the enquiry. The accusation of an offence is a condition precedent for the application of Art. 20(3) and this essential condition is lacking in cases covered by S. 45-G of the Banking Companies Act.[23]

From the above, it becomes clear that the immunity under Art. 20 (3) cannot be claimed by a person in proceedings before administrative bodies on the narrow ground that there is no criminal accusation. The aim of administrative investigations is not only to find out facts, but also to collect evidence upon which a prosecution may be based later. This means what cannot be achieved through formal criminal proceedings can easily be achieved through administrative proceedings, and evidence thus collected can be used against the person thus concerned when formally prosecuted later in a criminal court.

2.2 Right to Life and Personal Liberty (Article 21)

Of all the rights of an accused provided in our Constitution and the Criminal Procedure code, the most important one is enshrined in Article 21 of our Constitution[24] which goes as:

“No one shall be deprived of his life or personal liberty expect according to procedure established by law”.

For a long time, Art. 21 was a lifeless embodiment of the right to life and personal liberty with little positive content. For nearly two decades after the Constitution's enactment, the Supreme Court held that it merely embodied a facet of the Diceyean concept of the Rule of Law, namely, that no one can be deprived of his life and personal liberty by executive action that is not supported by law. It was a safeguard against executive action that lacked legal authority. It was enough to deprive a person of his life and persona liberty if there was a law that provided some sort of procedure. As an example, Justice S.R. Das stated that a law requiring the bishop of Rochester's cook to be boiled in oil would be valid under Art. 21. However, in the famous declaration in Maneka Gandhi, which many jurists regard as a watershed moment in the country's constitutional law, the Supreme Court for the first time held that Art. 21 provides protection not only against executive action but also against legislation, and that no law can deprive a person of his life and personal liberty unless it prescribes a procedure which allows him to do so.

[23]R. Joseph Angusthi vs. Narayan , AIR 1964 SC 1552.
[24] *Supra* n. 17 at p.19.

Art.21 was not written on a clear slate. Its birth in the World history can be traced back to 1215, as it was in that year that the Magna Carta saw the light of the day.[25] This great Charter of liberties was issued by King John under people's threat of Civil War. It consists of 63 clauses. Clause 29 goes as:

"No freeman shall be taken and imprisoned or disseized of any free tenement or of his liberties or free customs, or outlawed, or exiled, or in any other way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land."[26]

It means that no member of the executive branch can interfere with a citizen's liberty unless he can back up his actions with a legal provision. However, no country can guarantee complete individual liberty. The premise of English common law is that it is the people's representatives assembled in Parliament who will decide how far individual rights should go and how far they should be curtailed in the collective interest or for the security of the State itself, according to time constraints. The history of this change in view is worthy of mention here:

1. Until the 1978 decision in Maneka's case,[27] the view which prevailed in our Supreme Court was that there was no guarantee in our Constitution against arbitrary legislation encroaching upon personal libertyAs a result, if competent legislation enacts a law allowing for the deprivation of a person's liberty in specific circumstances and in a specific manner, the law's validity cannot be challenged in a court of law on the grounds that it is unreasonable, unfair, or unjust. The court has assumed the power to declare unconstitutional any law that deprives a person of his liberty other than in accordance with the court's notions of "due process," i.e. reasonableness and fairness, under the "due process" clause of the American Constitution (5th and 14th Amendments.
2. "Although our Constitution imposes the same limitations on legislative authorities, our Constitution has left our Parliament and the State Legislature supreme in their respective fields, both within and outside of these limitations. In general, our constitution has favoured legislative supremacy over judicial supremacy. It was also decided that, aside from Art. 21, there was no other safeguard for personal liberty in our Constitution, such as natural law or common law. As a result, when a competent law takes away a person's personal liberty, the person affected has no recourse.

3. It is a striking feature of India's constitutional law development that the minority view in Gopalan's case has come to triumph in the 7-judge decision in Maneka's case, which we have already noted, after a long struggle that can be said to have tangibly begun in 1971. Case has categorically stated the following arguments in support of overturning the Gopalan majority:

(a)Arts. 19 and 21 are not water tight compartments. On the other hand, the expression 'personal liberty' in Art. 21 is of the widest amplitude covering a variety of rights, of which some have been included in Art. 19, and gives additional protection. Hence there may be some overlap between Arts.19 and 21.

[25] *Supra* n 18 at p.20.
[26] *Supra* n 17 at p.19.
[27] *Supra* n 13 at p.15.

(b)As a result, a law coming under Art.21 must also satisfy the requirements of Art. 19. in other words, a law made by the State which seeks to deprive a person of his personal liberty must prescribe a procedure for such deprivation which must not be arbitrary, unfair or unreasonable.

(c)Once the test of unreasonableness is imported to determine the validity of a law depriving a person of his liberty, it follows that such law shall be invalid if it violates the powers of natural justice e.g. if it provides for the impounding of a passport.[28]

From Gopalan to Maneka, the interpretation of Art.21 has completed its trek from the North Pole to the South Pole. The decision in the Maneka case is being followed by the Supreme Court in subsequent cases.

2.3 Right to be Informed of Grounds of Arrest (Article 22)

The right to be informed of the grounds of arrest is a precious right of the accused person. Article 22 of the Constitution as well as Section 50 of the Code of Criminal Procedure, 1973 have adequately protected this aspect of personal liberty of an accused. Timely information of the grounds of arrest serves him in many ways. It enables him to move the proper court for bail or in appropriate circumstances for a writ of "habeas corpus" or to make expeditious arrangements for his defense.[29]Art.22 (1) guarantees 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".

Section 50 of the new Code which requires the arresting authorities to furnish forthwith the grounds of arrest for those arrested without warrants. According to Section 50 (1), every police officer or any other person arresting any person without warrant shall forthwith communicate to him full particulars of the offence for which he is arrested or other grounds for such arrest. Section 50 (2) lays down that if arrest is made without warrant in a bailable case, the accused should be informed of his right to be released on bail after furnishing sureties.

In the leading case of Madhu Limaye,[30] the Supreme Court observed: "Art. 22(1) embodies a rule which has always been regarded as vial and fundamental for safeguarding personal liberty in all legal system where Rule of law prevails. The two requirements of clause (1) of Art.22 are meant to afford the earliest opportunity to afford the earliest opportunity to the arrested person to remove any mistake, misapprehension, or misunderstanding in the minds of the arresting authority and also to know exactly what the accusation against him is so that he can exercise the second right namely of consultancy a legal practitioner of his choice and to be defended him"

The words "as soon as may be" in Art.22 (1) would mean as early as is reasonable in t he circumstances of the case, however, the word "forthwith" in Section 50 (1) of the Code creates a stricter duty on the part of the

[28]*Supra* no. 3 at p.11.
[29] S. P. Dwivedi, *Procedural Privileges of the Accused10*, Indian Advocate, 1970, p.75.
[30] AIR 1969 SC 1014.

police officer making the arrest and would mean 'immediately'. It appears reasonable to expect that the grounds of arrest should be communicated to the arrested person in the language understood by him; otherwise, it would not amount to sufficient compliance with the Constitutional requirement.[31]

The deprivation of a person's liberty by legal authorities is known as arrest. In a free society like ours, the law is very protective of each individual's individual liberty and does not tolerate the detention of anyone without legal authority. The right to know the reasons for an arrest and detention, as enshrined in Art.22(1), is an inalienable right of a person accused of a crime, and it allows the accused to apply for bail or 'habeas corpus,' as well as prepare for his defence.

Because of Section 60 of the Code of Criminal Procedure, 1898, which specifically does not provide for informing the arrested accused of the grounds of arrest; and partly because of the expression "as soon as may be" used in Art.22, there has been maximum transgression of this right (1). The expression provided ample opportunity for delaying the provision of the arrest grounds to the arrested person. In fact, the accused person was kept in secrets from the grounds of arrest until he was charge sheeted under Section 173 of the Code of Criminal Procedure. It can be filed in the Court only after the competition of the investigation into the case; and thereafter a copy thereof shall be furnished to the accused.

Whatever the reasons or causes, an arrest is an arrest. It is argued that the right to know the reasons for an arrest applies to all arrests, as well as any sentence or imprisonment imposed by a competent judicial tribunal. With the addition of Section 50 of the new Code of Criminal Procedure, which requires the arresting authorities to provide the warrantless arrestees with the grounds of arrest "as soon as possible," no further violations of this right are expected. With the recognition of a person accused of a crime's civil liberty, this section has opened up a new vista in the field of personal liberty promotion.

2.3.a Accused Person's Right to Counsel:

A person who has been accused of a crime is morally and mentally depressed. Segregated from his friends and family and imprisoned behind the police station, he feels helpless and fearful of his fate. It would be foolish to expect offenders in India, where the majority of offenders are from the poor and illiterate strata of society, to seek legal advice for the preparation of their defence. As a result, they receive extremely shabby treatment from police officers, jail officials, and our judges. 'Hussainara Khatoon' is a glaring example of "scores of men, women and children reeling behind bars for petty offences only because of the inability to arrange for their defense and release on bail.[32]

This despite the Constitutional guarantee laid down in Art. 22 (1) which reads as:

> "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".

[31]Harkishan vs. State of Maharashtra, AIR 1962 SC 911.
[32] AIR 1979 SC 1369.

The right of the accused to have a counsel of his choice is fundamental and essential to fair trial. The right is recognized because of the obvious fact that ordinarily an accused person does not have the knowledge of law and the professional skill to defend himself before a Court of law wherein the prosecution is conducted by a competent and experienced prosecutor.

Code of Criminal procedure, 1973 has specifically recognized a right of a person against whom the proceedings are instituted to be defended by a counsel. According to Section 303,

> "any person accused of an offence before a criminal court or against whom proceedings are instituted, may, of right to be defended by a pleader of his choice."

The right to consult a lawyer for the purpose of defense begins from the time of arrest of the accused person. The accused must therefore get reasonable opportunity to communicate with his lawyer while in police custody. According to Section 126 of the Evidence Act, 1872, the communications between the accused and his lawyer at the circumstances are privilege and confidential.

This section does not confer a right on the accused person to be provided with a lawyer by the state or by the police or the magistrate. This is a privilege given to him and it is his duty to ask for a lawyer, if he wants to engage one himself, or get 'his relations' to engage for him.

Despite this ominous-sounding provision of our constitution, we know from statistics that a large number of people in the country who are affected by poverty, ignorance, and illiteracy are unable to seek relief from the courts due to a lack of awareness, assertiveness, and access to machinery.

If the right to counsel is critical to a fair trial, it is also critical to ensure that the accused has the financial means to hire a lawyer to defend him. It doesn't take a deep understanding of the legal system to see how an indigent defendant in a criminal case risk being denied a fair trial if he doesn't have equal access to the legal services available to the other side. With the addition of Article 39-A to the Constitution, it is now recognised that it is the State's responsibility to provide free legal assistance to disadvantaged people.

2.3.b Equal Justice and Free Legal Aid: The State shall ensure that the legal system operates in a manner that promotes justice on an equal footing, and shall, in particular, provide free legal aid, through appropriate legislation or schemes, or in any other manner, to ensure that no citizen's right to justice is denied due to economic or other disabilities. However, the Article only contains a state policy directive principle. It imposes a legal obligation on the state to provide free legal assistance, but it is not a legal obligation that can be enforced in a court of law, and it does not confer a constitutional right on the accused to obtain free legal assistance. The Supreme Court has filled this Constitutional gap through creative judicial interpretation of Art.21 following the Maneka Gandhi Case. It is held in *M.H. Hoskot vs. State of Maharashtra*[33] and *HussasinaraKhatoon vs. State of Bihar*[34] that a procedure which does not make legal services available to accused person who is to poor to afford a lawyer and who would, therefore, have to go through trial without

[33] M.H. Hoskot vs. State of Maharashtra AIR 1978 SC 1548.
[34] *Supra* n26 at p.25.

legal assistance cannot be possibly regarded as reasonable, fair and just. The provision of legal services to a prisoner who must seek his release through the court system is an essential component of the reasonable, fair, and just procedure guaranteed under Art.21. The right to free legal representation is an essential component of any reasonable, fair, and just procedure for a person accused of a crime, and it must be included in Art. 21's guarantee. From the language of Art.21, the court spelled out the right to Legal Aid in a criminal proceeding and held:

> "This is a Constitutional Right of every accused person who is unable to engage a lawyer and secure Legal Services on account of reasons such as poverty, indigence as incommunicable situation and the State is under a mandate to provide a lawyer to an accused person if the circumstances of the case and the needs of justice so require, provided of course the accused person does not object to the provision of such lawyer"[35]

In another case, it has been categorically laid down by Supreme Court that the Constitutional Right of Legal Aid cannot be denied even if the accused failed to apply for it. It is now therefore, clear that unless refused, failure to provide Legal Aid to an indigent accused would vitiate the trial, entailing setting aside of conversation and sentence.[36]

2.3.c Right to Be Produced Before a Magistrate without Delay: Art. 22 (2) of the Constitution provides that:

> "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 the in custody beyond the said period without the authority of a Magistrate".

Under Art.22 (2), every person arrested and detained in custody by an arresting officer must be produced before the nearest Magistrate within 24 hours of his arrest. This is a Fundamental right of very great importance, for it ensures that the executive cannot arbitrarily keep a person under detention at its own sweet will and pleasure for an indefinite period. Apart from this, the production of arrestee before a judicial officer ascertains judicial examination of the legality of the arrest. The right to be brought before a magistrate within a period of 24 hours of arrest has been created with a view:

(1) to prevent arrest and detention for the purpose of extracting confessions or as a means of compelling people to give information.

(2) to prevent police stations being used as though the were prisons – a purpose for which they are unsuitable.

(3) to afford an early recourse to a judicial officer independent of the police on all questions of bail or discharge.

[35] Id at 13.
[36] Suk Das vs. U.T. of Arunachal Pradesh, [1986] 2 SCC 401.

The Code has incorporated this right in Sections 56 and 57:

"No police officer can detain a person without warrant in police custody for more than twenty-four hours without an order of a magistrate. When investigation cannot be completed within the period of 24 hours, as provided by Section 57 of the Code, the investigating officer shall forthwith forward the accused to a judicial magistrate".

It is true that in practice there is occasionally violation of these rights because cases are not unknown where persons are arrested by the police but no entry of the arrest is made in the register and it is only when the police decide to produce the person arrested before the Magistrate that they make an entry of arrest in the register thus creating a record showing that they have complied with the requirements of production within 24 hours. But this violation goes unnoticed and undressed because quite often the person arrested does not know that the Constitution and the law give him protection against detention by the police that is the reason why, when produced before the Magistrate he is unable to point out to the Magistrate that this right of his has been violated. Moreover, the Magistrate before whom the person arrested is produced also does not care to enquire from him as to how long has he been kept in police custody.

2.3.d Right of an Accused to Bail: Bail is the release of a person who has been arrested or imprisoned on the condition that security be provided to ensure his appearance at his trial. It's a word that's synonymous with a monetary amount. The court holds the bail money or a bond in lieu of bail until the accused is released and appears in court for his trial. This money will be forfeited if the accused fails to show up for the trial. Release on bail may sometimes necessitate the posting of a surety bond in addition to the accused's bond. Whereas the recognizance (or bond) of the accused comprises a promise to forfeit the deposited sum on failure to comply with the conditions set by the court, the surety's recognizance expresses the promise to produce the accused at the time and place specified or to forefeet the named sum failure to do so.

(1) The Genesis of The Modern Institution of Bail: The modern institution of bail pending trial has evolved from a practice that goes back to pre- Norman England. At that time, that time, somewhere around 12th century A.D. trials were held infrequently because the judges travelled from jurisdiction to jurisdiction. It was financially difficult to maintain prisons. The sheriff preferred to have someone else take care of the defendants while they were awaiting trial and would often relinquish them to other people, usually friends or relatives. These people would serve as sureties. The party furnishing the bail would be reminded that he had the powers of a jailor and was expected to produce the body for trial.[37]

Henry de Bracton laid down significant guidelines regarding bail in his influential manuscript 'De LegibusAngelie'. These were to affect that the Sheriff must exercise discretion in regard to bailing the

[37]Ronald. L. Goldfarb, *Bail: An Ancient Practise Re-examined*, Yale Law Journal, Vol 70, 1961, p.966.

accused persons having regard to the importance of the charge, the character of the person and the gravity of the evidence against him.[38]

It was about the 12th Century when bail acquired its distinctive role in Criminal Procedure.[39] The Sheriff's discretion to grant bail was often abused. This abuse of power resulted in the enactment of the 'Statute of Westminister the First' in 1925A.D. to deal with the situation. This Statute limited the Sheriff's discretion by laying down classes of persons not to be bailed.

This Statute can be said to be "an attempt to standardize the practice of bail.[40]it specified the conditions under which pre-trial release was permissible.

(2) The Rationale of Bail: having studied the meaning and the origin of bail, the question that props into our mind is "why a bail system"? This question explains the rationale of bail. Release on bail is justified on the following grounds:

(a)The accused can prepare his defense and look after his case.

(b)Everyone is presumed to be innocent till his guilt is proved. Pre- trial incarceration becomes punishment prior to proof of guilt.

(c)The liberty of a mere suspect cannot be unjustifiably curtailed.

(3) Preparation of Defense: The system of criminal trial investigated by almost all the civilized countries today is the adversary system based on the accusatorial method. This system of criminal trial assumes that the state using its investigative resources and employing competent counsel will prosecute the accused who in turn, will employ equally competent legal services to challenge the evidence of the prosecution. How can the accused do so when he is in prison?

The "Audi Alteram Partem" rules assures that no one should be condemned unheard. It is the first principle of civilized jurisprudence that a person whose right or interest is being affected must be given a reasonable opportunity to defend himself.

(4) Presumption of Innocence: The principle underlying release on bail is that an accused person is permitted in law to be innocent till his guilt is proven. This is a fundamental point of criminal jurisprudence. In the Indian law, apart from this principle being of cardinal importance in the administration of criminal justice it has been formally incorporated under section 101 of the Indian Evidence Act as 'Right to have the benefit of presumption of innocence till one's guilt is proven'. Bail is allowed to the accused to retain this presumption and the refusal to so release would constitute punishment before conviction, a notion abhorrent to our democratic system. And as a presumably innocent person the accused is entitled to freedom and every opportunity to look after his case provided his attendance is secured by proper security.

[38] *Supra* no. 26 at p.25.
[39] R.K. Narula, *Jail or Bail,* Himalaya Publishing House, 1979, p.2.
[40] Zander Micheal, *Bail: A Reappraisal,* Criminal Law Review, 1967, p.100.

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CHAPTER - 3

RIGHTS OF AN ACCUSED AT THE TIME OF ARREST

The criminal procedure systems of the world use three main methods of regulating events before trial. At one extreme, the pre-trial stage is left entirely in the hands of the police, as in our system. At the other extreme, as in the French, Belgian and German systems, the pre-trial stage is subject to the control and guidance of a magistrate. A third solution is that adopted in Scotland, where a public prosecutor has charge of the police investigation and of the actual prosecution, the judicial officer merely rubber-stamping the decision to send the accused for trial.[41]

The principal problems arising in that part of the criminal process which governs events before trial relate to the nature of police powers and procedure in the investigation of offences.

The Code of Criminal Procedure 1973 confers wide powers upon our police of making arrests. In addition to the power of arrest, the Code bestows upon the police powers parallel to the magistrate to release an arrested person on bail. It is regrettable though that the police do not, in practice, exercise the powers of granting bail as freely as they are entitled to or expected to do by the law.[42] There are many complex factors behind this attitude which will become clear as we study further:

3.1 Police Power to Arrest

Bail is always preceded by the arrest. Therefore, the law of bail must take into account the law regarding arrest or detention.

Wide powers have been conferred upon the police for making arrests without warrant under circumstances mentioned in S.41 of the Code.[43] Chapter VIII entitled Security for Keeping the Peace and for Good Behaviour also gives unlimited powers to the police to make arrests. The provisions under Section 106-124 dealing with security proceedings are aimed at persons who cause a reasonable apprehension of conduct likely to lead to a breach of peace or disturbance of public tranquility. Section 108 provides for taking security for good behaviour from persons disseminating seditious matters. Section 110 provides for security for good behaviour from habitual offenders.

Section 46 of Cr.P.C reads as “Arrest how made”, which lays down the manner in which the police has to make arrest. It is mandatory for the police officers making arrest to follow it.

Similarly Section 49 of Cr.P.C reads as ”No unnecessary arrest” which makes it clear that no person shall be arrested without a conclusive reason, which lays down a firm ground to believe and make the arrest necessary.

[41] J.A.Coults,*The Accused – A Comparative Study*, British Insttt. of International Comparative Law.

[42] K. Krishnamurthy, *Police Diaries, Statements, Reports, Investigation and Arrest*, 2nd Edn. 1968, p.336.

[43] S. 41 (When police may arrest without warrant) This section which falls under Chapter V of the Code entitled ‘Of Arrests’ enumerates situations in clauses (a) to (i) of sub sec.(1) of S.41 under which any police officer has got the power to arrest a person without any order from the Magistrate or without a warrant of arrest.

Section 151 of Cr.P.C provides: Arrest to prevent the commission of cognizable offencesa police officer knowing of a design to commit any cognizable offence may arrest without a warrant, the person so designing. In the wake of such wide powers, it is not surprising that our police make thousands of arrests in a day. They include those in unlawful assemblies, riotous mobs, petty offenders, and serious offenders, those threatening to disrupt the peace and so on.

There's also the strange case of the U.P. police. Insiders say it has hit upon an ingenious law-maintaining method; random arrests to "fill the quota of each police station" and maintain pretence of "efficiency". Many of the arrests are made under the Narcotics Act. The modus operandi; plant 5 gm of narcotics on the local rickshawalla, then pounce on him. The number may not decline in a hurry since under this Act, the onus of proving innocence lies with the accused.[44]

3.2 Parallel Powers of Bail Given to the Police

It is interesting to note that law gives parallel powers to release on bail to the police and magistracy in its provisions relating to bail. Section 436 Cr. P.C., for instance, lays down that (1) when any person other than a person accused of a non-bailable offence is arrested or detained without warrant by an officer-in-charge of a police station or appears or is brought before a court, and is prepared at any time while in the custody of such officer or at any stage of the proceeding before such court to give bail, such person shall be released on bail. Form nos. 12 and 13 under the Second Schedule of the Code of Criminal Procedure (reproduced below) are bonds to keep the Peace and for Good behaviour required to be executed by an accused arrested by the police.

Form No. 12

Bond to Keep the Peace

(See Section 106 and 107)

Whereas I, (name) inhabitant of (place) have been called upon to enter into a bond to keep the peace for the term of ..... or until the completion of the inquiry in the matter of ..... now pending in the court of ....., I hereby bind myself not to commit a breach of the peace, or do any act that may probably occasion a breach of the peace, during the said term or until the completion of the said inquiry and, in case of my making default therein, I hereby bind myself to forfeit to Government the sum of rupees.

Dated, this day of , 20

(Signature)

Form No. 13

Bond of Good Behaviour

[44] India Today, *Hell's Prisoners*, 17 August 1998, p.48.

(See Section 108, 109 and 110)

Whereas I, (name), inhabitant of (place), have been called lupon to enter into a bond to be of good behaviour to Government and all the citizens of India for the term of (state the period) or until the completion of the inquiry in the matter of ..... now pending in the Court of ....., I hereby bind myself to be of good behaviour to Government and all the citizens of India during the said term or until the completion of the said inquiry; and, in case of my making default therein, I hereby bind myself to forfeit to Government the sum of rupees .....

Dated, this day of , 20

(Signature)

Section 437 says (1) when any person accused of or suspected of the commission of any non-bailable offence is arrested or detained without warrant by an officer in charge of a police station or appears or is brought before a court, he may be released on bail. The following discussion about bail apply only where a police officer arrests a person without a warrant, where he arrests under a warrant from a court, he will have to strictly follow the directions in the warrant.

3.3 Officer-in-charge of Police Station, Meaning

"Officer-in-charge of police station" has been defined in section 2(o), Cr. P.C. It includes, when the officer-in-charge of the police station is absent from the station-house or unable from illness or other cause to perform his duties, the police officer present at the station-house who is next in rank to such officer and is above the rank of constable or, when the State Government so directs, any other police officer so present. Therefore, what the officer-in-charge of a police station as defined in section 2(o), Cr. P.C. is authorised to do under the Code of Criminal Procedure can be done by any police officer superior in rank to the officer-in-charge of the police station. Whereas any policeman may exercise the power to arrest, the power to grant bail can be exercised only by an officer-in-charge of the police station or higher officer.

3.4 Power of Police to Grant Bail In Case of Bailable Offence

Any person arrested by police without any order from the Magistrate and without a warrant under the circumstances mentioned in section 41 has to be release him on bail if the offence with which he is concerned is a bailable offence.

In respect of the offences which are bailable under Schedule I to the Code of Criminal Procedure, the accused in view of section 436, Cr. P.C. has the right to be released on bail. Therefore, when any person accused of a bailable offence is arrested or detained without warrant by an officer-in-charge of a police station and is prepared at any time while in the custody of such officer to give bail, such person shall be released on bail. The officer-in-charge of a police station if he thinks fit, may, instead of taking bail from such person, release him on his executing a bond without sureties for his appearance. It is no part of his duty to inform the person arrested that he is entitled to be released on bail. The officer-in-charge of a police station

if he thinks fit, may, instead of taking bail from such person, release him on him executing a bond without sureties for his appearance. It is no part of his duty to inform the person arrested that he is entitled to be released on bail or to release him on bail without any move by or on behalf of the arrested person. If the arrested person is not so informed, police custody of such a person is not illegal.[45]

When a person is arrested in connection with a bailable offence, the only discretion vested with the police officer is to decide on the number and value of sureties on the production of which he will release him.[46] There is a statutory duty upon a police officer and a court to release a person arrested for a bailable offence on bail as soon as he is prepared to offer bail. They are even authorised to direct his release on a personal bond by the arrested person without search. The section contemplates that persons hauled up for a bailable offence cannot be taken into custody unless they are unable or unwilling to offer bail or execute personal bonds. An improper refusal on the part of an officer-in-charge of police station to grant bail in a bailable case is to be regarded as a violation of duty. No needless impediments should be placed in such cases in the way of being admitted to bail. There is no question of imposing any condition in the case of a bailable offence.

3.5 Bails under Sec. 56, Cr. P.C

A police officer making an arrest without warrant shall, without unnecessary delay and subject to the provisions contained as to bail take or send the person arrested before a magistrate. As per the provisions laid under Section 57 Cr. P.C no person can be detained for more than 24 hrs, he has to be presented before the Magistrate. So if the accused so arrested is accused of a bailable offence then the police officer arresting him has to release him on bail in view of sec. 436, Cr. P.C. if such a person is prepared to give bail. A police officer arresting a person cannot keep him in confinement in any place which the police officer might select but he should be sent immediately to the police station and be placed in the custody of the officer-in-charge of the police station who is the person entrusted by the Code of Criminal procedure to investigate the case. If the offence for which he is arrested is bailable and the accused is unable to furnish bail, the police officer has to send him before a Magistrate within 24 hours of his arrest.[47] When a person arrested under Section 56 is accused of a bailable offence and his bail is refused, he is entitled to a writ of habeas corpus.[48]

3.6 Person Arrested not to be Discharged Simply

Sec. 59 clearly provides as follows:

“No person who has been arrested by a police officer shall be discharged except on his own bond or on bail or under the special order of Magistrate.” It has been said the word ‘discharge’ used in sec. 59 means release from detention in custody. The police officer can release him from custody either on his own bond or bail.

3.7 Release on Bail by Police in Non-Bailable Offence

[45]Supdt. and Remembrancer of Legal Affairs, *Bengal VS. Zahir Ali*, 63 CAL 189, 37 Cr. L.J. 1070.
[46]Mir Hasham Ali vs. Emperor, 1918 Bom. 254.
[47]State vs. Gulam, AIR 1959 M.P. 147.
[48]*Supra* n34 at p.39.

The difference between bailable offence and non-bailable offence so far as the release of the accused is concerned is that a person accused of a bailable offence has the right to be released on bail. But the grant of bail to a person accused of a non-bailable offence is in the discretion of the officer-in-charge of a police station or the Magistrate under section 437, Cr. P.C. The officer-in-charge of police station when arresting a person without warrant cannot release on accused on bail if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life. However, sub-section (2) of S. 437 Cr. P.C. provides:

"If it appears to the officer-in-charge of a police station at any stage of the investigation that there are not reasonable grounds for believing that the accused has committed a non-bailable offence, but that there are sufficient grounds for further enquiry into his guilt, the accused shall be released on personal bond without demanding any sureties for his release."

This is one of the very few sections in the Code under which the police officer or the court has no power to demand furnishing of sureties from the accused. However, in order to exercise this power, the officer-in-charge of a police station has to make proper scrutiny of the evidence so far collected to be satisfied about it and while exercising the power under section 437 (2) Cr. P.C. the police officer has to record sufficient reasons in the case diary. Therefore, the recording of the reasons in writing is mandatory as it puts the history of the case on record for superior police officer and the court for review and for passing comments.[49]

3.8 Offence Subsequently Becoming Non-Bailable

The officer-in-charge of a police station released the accused on bail under section 436, Cr.P.C when he was initially charged with committing the offence punishable under section 324, I.P.C. which is a bailable offence. Subsequently on the basis of the medical report the offence was converted into one under section 326, I.P.C., which is a non-bailable offence. As soon as the offence was discovered to be one under section 326, I.P.C., section 436, Cr. P.C. ceases to be applicable to the case of the accused. The investigating officer can in such circumstances take appropriate action to arrest the accused if he desires to do so fare investigating the case as a non-bailable offence.[50]

3.9 Bail by Police: Magistrate does not have Jurisdiction to order Furnishing of Fresh Bail Bonds

There is no provision in the Code of Criminal Procedure officer to furnish fresh bail bonds. The bail bonds for asking an accused already released on bail by police submitted before the police officer are for the purpose of appearing before the Court and when this undertaking has already been given, fresh undertaking for the same effect is not be asked for. Such a bond should ordinarily be for appearance before the Court of Magistrate but also if the case is triable before the Court of Sessions before that Court.[51] But according to Allahabad High Court bail granted by police except for bailable offences is not coextensive with that of the

[49]Gurcharan Singh vs. State, AIR 1978 SC 179.
[50]BabuBombaj vs. State of Rajasthan, 1986 R&W 699.
[51]Monit Malhotra vs. State of Rajasthan, 1991 CLJ 806 (Raj).

Court and such a grant of bail come s to an end with the conclusion of the evidence. In the instant case,[52] the FIR was lodged against the accused persons under Ss. 147, 323, 324, 336, 337 and 426 I.P.C. at Police Station Rai Bareilly. The accused were granted bail at the police station. Thereafter a charge sheet was submitted. On the date fixed, the petitioners filed applications to the effect that they were already on bail granted by the police and were putting appearance through their advocates and prayed for personal exemption. The Magistrate turned down their prayer and held that they were under a misconception that they were not required to take fresh bail from the Magistrate. He thereby served a non-bailable warrant against them. The High Court in revision upheld the order of the Magistrate and found no illegality in the order as after filing of the charge-sheet against the accused, they could not continue on bail granted by the police.

3.10 Release of Accused When Evidence Deficient

Section 169, Cr. P.C. reads thus:

"If upon an investigation under this Chapter, it appears to the officer-in-charge of the police station that there is not sufficient evidence or reasonable ground of suspicion to justify the forwarding of the accused to a Magistrate, such officer shall, if such person is in custody, release him on his executing bond, with or without sureties, as such officer may direct, to appear, if and when required, before a Magistrate empowered to take cognizance of the offence on a police report, and to try the accused or commit him for trial."

Section 169, Cr. P.C. empowers the officer-in-charge of the police station to released the accused if in custody on his executing a bond with or without sureties with a direction to appear if and when so required before the Magistrate empowered to take cognizance of an offence on a police report and to try the accused or commit him for trial. This section in terms applies only to the case of an accused who has never been forwarded to a Magistrate. So this report by the officer-in-charge of the police station during investigation contemplates a stage prior to that when under section 57, Cr. P.C. the officer-in-charge of the police station has to forward the accused in custody before the Magistrate within 24 hours of the arrest. If during this period of twenty-four hours the officer-in-charge is satisfied that there is not sufficient evidence or reasonable grounds of suspicion to justify the forwarding of the accused to a Magistrate, then section 169 contemplates that such an officer-in-charge of the police station shall release him on his executing a bond with or without sureties.

3.11 Arrests by Private Person and Release on Bail by Police

Section 43, Cr. P.C. empowers any private person to arrest or cause to be arrested any person who in his presence commits a non-bailable and cognizable offence. Any private person can also arrest any proclaimed offender. But in case of such arrest by a private person, the person arrested has to be made over to a police officer, take such person or cause him to be taken in custody to the nearest police station. When there is reason to believe that such person comes under the provisions of section 41, Cr. P.C. then a police officer before whom such person is made over shall re-arrest him. If it is found that the alleged offence is a bailable

[52]Joginder Singh v State 1992, CLJ 1302 (All.).

one, then the provisions of section 436, Cr. P.C. will be attracted and he shall be released on bail with or without sureties if he is prepared to give the bail or can be released by the police officer on his executing a personal bond.

3.12 Bails by Any Police Officer

The power of bail can be exercised under the Code by any police officer under sections 41, 42, 43, 55, 56 and 76.

From the above discussions, it will be seen that the law relating to bail, i.e. Sections 496 and 497, Cr. P.C. do not make any distinction between the court and an officer-in-charge of a police station in the matter of exercise of the powers of granting bail. It is, of course, regrettable that the police do not, in practice, exercise their powers of granting bail as freely as they are entitled to or expected to do by the law. It might be that the police being posted with all the aspects of investigations, are reluctant to take the responsibility for freely releasing arrested person on bail or perhaps they have the impression that as the law has strictly forbidden them to keep arrested persons in custody longer than twenty-four hours, except by judicial sanction and under judicial authority, releasing is more a responsibility on Magistrate than on them. This way they can on one hand, wash their hands off all unfounded suspicious and arbitrary arrests and on the other maintain a track record of being vigilant officers of their beat areas.

3.13 Police Views

Prof. D.C. Pandey in his depth book "Bail – Law and Practice"[53] has conducted a sample study on the basis of interviews with field officers and police officers with a view to ascertain police attitudes on issues arising out of pre-trial release of offenders. This sample study shows the current thinking of the supervisory staff of the police on bail.

(1) The new law on bails worked smoothly in the initial stages, but at later stages the system began to be misused both by law enforcing agencies and the habitual criminals.

(2) In practice the police does not administer the law of 'bailable' and 'non-bailable' offences. It dispenses the law according to the status of the offender and not according to the nature and gravity of the offence.

(3) If or when an arrested individual is involved in a serious offence or he happens to have a serious brush with the law, and if his release takes place at the police station it may be due to some factors, other than an exercise of will and authority on the part of the local police station. Such releases are largely due to pressures applied upon local police officers through their superiors. The release of such person on bail, at a local police station, is generally because of the discretion exercised on behalf of the local police by their superior officers at the headquarters. However, local officers too do not fail to encash upon the use of power simultaneously in similar other cases.

[53]D.C. Pandey, *Release on Bail: Criminal law and Procedure*, ASIL, 1976, p.53-54.

(4) Offences which are bailable are committed more in number than non-bailable ones. Hence if more discretion to disallow bail in bailable cases is given to police, subject to strict disciplining by supervisory police authorities, the mechanism of bail as granted by the police with perhaps work better in the interest of society.

(5) Misuse of the provision of bail has come to notice on account of an accused jumping bail. But an observable fact is that those who jump bail are persons who generally get released on bail through the court. A police officer who releases a person on bail has to incur responsibility of producing the person later in the court. Thus, there are less chances of jumping bail where the release has been obtained on police bail.

(6) Police Officers are given the authority not to release a person on bail, unless he is able to produce sound sureties. In such cases, the accused try for bail through the courts. The verifications are done properly by the police officers which minimizes chances of bogus sureties being produced.

(7) A lawyer is the medium through which bail application is moved. A prescribed Performa is the only document that has to be filled. On the reverse of the Performa an affidavit is written down. An oath is taken from the surety about his having the property (moveable and the immovable), which are noted down by the lawyer. A routine and perfunctory verification is made by the court. The soundness of the surety can hardly be checked. Thus, sometimes serious deception is practiced on the court. This practice and procedure have resulted in the growth of a system of professional sureties who operate fearlessly in the system and are well entrenched.

(8) There should be proper investigation of sureties. It should preferably be done through the police agency. This will reduce the incidence of jumping bail. In most cases, where an accused jumps bail, the releases have been obtained through court bail.

(9) The release on bail is abused for seeking adjournments in a trial obviously to delay disposal of cases in courts. The general practice of getting a date of hearing adjourned and getting it extended further and further is a common practice. The accused has a main interest in such adjournments. After being released on bail, an accused tries to win over witnesses and tamper with evidence. Till then he manages to secure adjournments of hearing.

(10) Criminals are dangerous to the society. There is awareness that it is the duty of the law-enforcing agencies to maintain peace and security in the society against evil designs of these persons. Accordingly, it is necessary to restrict the use of bail in cases of repeat offenders and hardened criminals, bail jumpers, etc., even if they might be charged with bailable offences.

In addition to their views on the matter of bail, policemen as a group have provided a critical expose of the system of release on bail and have also corroborated the existence of such facts as have been defiling the system. In the working of bail, there is collusion between the professional wrongdoer and the police authority. Bail is granted or is refused not in pursuance of the exercise of discretionary power but largely on

the basis of the offender's status in the social strata. The perfunctory verifications of sureties as to their soundness and reliability; the growth of professional sureties with a vested interest in criminality; the short-circuiting of the judicial process by bail jumpers who utilize the liberal judicial discretion to secure release only to snub the judicial power by their deliberate disappearances from the court, are some of the disconcerting features of the bail system, of which the law enforcing men are aware.

And rightly so, the non-appearance in the court by accused persons and fleeing from justice by jumping bail or by absconding altogether are common experiences of the policemen. Hence there is apprehension in the mind of the police on the release of an accused. The release keeps the policeman on guard as once the police is seized with a jurisdiction in a criminal case, it continues to be its responsibility to oversee the entire proceedings including the behaviour and conduct of the accused during the period of release. All these make a policeman feel exasperated. So when it comes to police bail a refusal of bail in bailable case in achieved by way of granting bail to a person but by not releasing him because of not getting satisfied with the soundness of sureties furnished by the accused.

3.14 Fake Encounters

While the Constitution of India has erected an impressive edifice of Fundamental Rights and Directive Principles of State Policy, the existence of colonial repressive legislations and oppressive police structures have prevented the Indian people from asserting their basic right to social justice. Custodial killings and extrajudicial executions emerge as easily available alternatives to the painstaking investigation and prosecution of cases by the police, who are empowered by lawless laws such as POTA and TADA. Human rights agencies perceive extrajudicial executions as virtually a part of state policy in India. The number of such executions in Andhra Pradesh is said to go into the hundreds. The other States such as Gujarat and Jammu and Kashmir, not to speak of the northeastern region and the central tribal belt are not far behind.[54]

The 2002 genocide in Gujarat witnessed a massive violation of human, rights by the State Police who participated in and facilitated the violence. 'We have no orders to save you were the words used by many police officers when beseeched for help by the victims of violence. The Concerned Citizens' Tribunal on Gujarat 2002, led by the former Supreme Court judge V.R. Krishna Iyer, documented the violence prodigiously and submitted a three-volume report titled 'Crime against Humanity'. The Central and state governments were unmoved. The orders of the Supreme Court of India were required to compel the Gujarat Government to reopen and investigate thousands of closed cases and arrest hundreds of culprits. However, the mysterious murder of Haren Pandya, a prominent Minister in the Modi Cabinet who had dared to depose before the Concerned Citizens' Tribunal, remained unsolved. The dramatic revelations about the fake encounter killings led by supercop D.G. Vanzara must come as a confirmation of what has always been known about the happenings in Modi-dominated Gujarat, which are not yet fully documented. Vanzara is said to have carried out several earlier fake encounters as well. The remarkable feature in the present case is that the Government of Gujarat itself has been compelled to admit before the Supreme Court the encounter

[54] D.G. Vanzara and the Culture of Fake Encounters: A Rapid Appraisal https://www.mainstreamweekly.net/article240.html

killing of Sohrabuddin and the murder of his wife, Kauser Bi. Consequently, supercop D.G. Vanzara and his associates, Rajkumar Pandian and Dinesh Kumar have had to be placed under arrest much to the embarrassment of the Modi Government. Geeta Johri, IG of Police, and Rajneesh Rai, another officer of the same rank, seem to have done a commendable job. IT is interesting that supercopVanzara should cite 'Desh bhakti' ('devotion to the nation') as his reason for eliminating people like Sohrabuddin allegedly linked to the Pakistani ISI and a terrorist outfit across the border. This is reminiscent of Davinder Singh, Deputy Superintendent of the Special Task Force (STF) of the J&K Police, admitting on TV that he had tortured Mohammed Afzal, prime accused in the Parliament attack case of 2001, that torture is the remedy for terrorism and that he had tortured Afzal and others for the sake of the 'nation'. Such 'nationalist' sentiments are quite widespread in the police forces.[55]

A perverse form of devotion to the 'nation' also appears to motivate many policemen to justify the killing in fake encounters of so-called 'Naxalites', most of whom are poor peasants and agricultural laborers from the Dalit and Adivasi communities. Since the Naxalites do not believe in the rule of law, the police also do not need to follow the rule of law norms, argue many policemen during training interactions. Government approval for such killings often comes in the shape of the awards of medals to 'meritorious' policemen who eliminate the Naxalite threat to the Indian nation. During a training session on 'social tensions' at a rural development training institute, some 'surrendered Naxalites' had been invited to participate. One of them began by narrating his experiences of police torture in graphic detail. The atmosphere in the training hall became tense. Suddenly, a woman IPS officer in uniform, a participant from an adjoining police training organization, burst out and shouted at the Naxalites: "When I hear you people talk like this, I wish I had brought my revolver" Later when questioned, the officer said that she was serving the 'nation' and it annoyed her to hear Naxalite 'anti-nationals' attacking the 'nation' in the name of police torture. This seems to be a fairly representative view not only in the police organizationbut also in the larger society.

In a North Indian State, the number of those killed in a series of incidents of the violencountersnter was said to be 12 by both State and Central intelligence agencies but the Chief Sectary of the State, when summoned to the Union Home Ministry, revealed that over 60 persons had been killed and that none of them had been a Naxalite.[56]

The fight of the state government against the Maoist insurrection in the state of Chhattisgarh has always been connected with the police strategy of extrajudicial killings, known in India as 'fake hassles', as a means to destabilize the Naxalite movement. During this process, numerous innocent men and women were killed by the government security forces. People who had nothing to do with any kind of violent insurrection against the state of India and who weren't involved in any supporting or aiding conduct for the Maoist groups were slaughtered by extrajudicial killings. The events in the townlets of Santoshpur, BaludNayapara, and Tursani are evidence of the deteriorating state of mortal rights in Chhattisgarh. The state- run crusade against the Naxaliteslooses its legality if innocent ethnical townies are boggled by the police forces.

[55] https://www.mainstreamweekly.net/article240.html

[56] *D. G. Vanzara and the Culture of Fake Encounters: A Rapid Appraisal*, Mainstream, VOL XLV, No 31, 2007.

On March 31 2007, 12 tribals were killed in an 'hassle' in Santoshpur vill near Bijapur in Chhattisgarh. Residers of Ponjer vill say the tribals were picked up by members of the Chattisgarh Armed Police and SalwaJudum (a so- called' peace movement', which in fact is another militaristic and brutal security force explosively supported by the government) and taken to near Santoshpur, and eventually killed. The police claim that these tribals were Sangham members (Naxalite backers). The townies further stated that at least four of them were addressed to death and the rest shot.

Reliable FFDA sources revealed that the District Force killed two ethnical labourers around 11AM on 17 of May 2007 in BaludNayapara, located near Dantewada. On May 16 five labourers from Awapalli and Basaguda reached BaludNayapara towards the evening in hunt of a job and earning. On the coming day at around10.30 AM the District Police got the information that five unidentified people are staying in BaludNayapara. A group of ten District Force officers moved to the position, fired and shot dead two of the five ethnical labourers. Frighted by the events, the others fled and managed to run down. A original called Gangi Bai did confirm that these labourers were there in order to look for employment and were neither involved in any direct naxal conditioning nor – as the police claimed – sympathizers of the Naxalites. The victims who were killed have been linked. In this case the notice was given to DGP on May 20 2007.[57]

Different Human Rights Organisation brought to light cases where the police have claimed that it killed Naxalites, when in fact those killed were ordinary tribals whose only fault was that they didn't join the SalwaJudum. Similar cases are delicate to bring to light because they frequently take place in the remote areas of Chhattisgarh.

The tragedy at Santoshpur vill is a typical case. There was no FIR and the killings weren't publicised or reported, not indeed in the original media. The statement of the Bijapur SP shows how the police reply by stating defective allegations. " These were Sangham members and we had gone to these townlets to conduct a hunt charge. There was an hassle and we were forced to act," said SP Bijapur, RatanLalDangi.

The below given incidents makes one believe, that police in India are all but useless for the forestallment of crime, sorely hamstrung in its discovery and are authoritarian in the exercise of the power vested in them. They've, also, a generalised character for corruption and oppression.

[57] https://www.mainstreamweekly.net/article240.html

3.15 Bail in Bailable Offences

The daily average prison population is a reflection of the activities of the courts. Given the increasing numbers committed by the courts, the judiciary by sending more people to prison for longer periods of time bears responsibility for the sharp increase in prison figures.

The Prison Institution can control neither the volume nor the flow of the intake of prisoners. A prison can never put up a sign 'No room at the inn'. The courts determine the daily average prison population.[58]

In the union Territory of Delhi, there is one central jail, popularly known as 'Tihar Jail' and one district camp jail. Total sanctioned capacity of these is 2023 prisoners. The following table shows the prison population and ratio of convicts to undertrials in Delhi jails on various dates from 1978 to 1988.

As on December 31, 1996, there were a total of 7523 prisoners in Delhi against the total sanctioned capacity of 2,500 prisoners.[59]

This, despite our expansive bail provisions where the tilt is in favour of bail and not jail. Statistics show that a large number of undertrial populations of prisons are made up of those arrainged for minor bailable offences, whom courts are hesitant to release them on bail largely because of their inability to raise the monetary security for bail.

Today, when bail has entered into the arena of jurisprudence to occupy the mind of state polity and the rule is bail and not jail. Only our courts can be held responsible for our unprecedented undertrial population of our jails. For nothing seems to be grossly unreasonable in the law on bailable offences (S. 436 Cr. P.C.)

A brief analysis of this section would be relevant. Section 436 of our Code deals with bail in bailable offences. The police in India are all but useless for the prevention of crime, sadly inefficient in its detection and are authoritarian in the exercise of the power vested in them. They have, moreover, a generalised reputation for corruption and oppression.

This description fully fits the present-day Indian Police. The institution of the District Magistrate (DM), set up by the British, who controlled the police mechanism by overseeing the criminal justice administration in the district, has now ceased to exist. The DM today is mainly concerned with development administration. The colonial Indian Police, modelled on the Irish colonial paramilitary police with its undemocratic political-organisational features, has continued. The rulers of independent India have done no more than follow their predecessors in maintenance of 'order with or without law' and collection of political intelligence against their opponents, neglecting the investigation, detection and prosecution of cases

3.16 In What Cases Bail to Be Taken (Section 436)

[58] Louis Cooper, *Progress in Penal Reform*, Clarendon Press, Oxford, 1974, p.25.
[59] *Supra* no. 4 at p.11.

(1) When any person other than a person accused of a non-bailable offence is arrested or detained without warrant by any officer in-charge of a police station, or appears or is brought before a court, and is prepared at any time while in the custody of such officer or at any stage of the proceeding before such court to give bail, such person shall be released on bail.

Provided that such officer or court if he or it thinks fit, may instead of taking bail from such a person discharge him on his executing a bond without sureties for his appearance as hereinafter provided.

Provided further that nothing in this section shall be deemed to affect the provisions of sub-section (3) of S. 116 or section 446A.

(3) Notwithstanding anything contained in sub-section (1) where a person has failed to comply with the conditions of the bail bond as regards the time and place of attendance the court may refuse to release him on bail, when on a subsequent occasion in the same case he appears before the court or is brought in custody and any such refusal shall be without prejudice to the powers of the court to call upon any person bound by such bond to pay the penalty thereof under section 446.

In all bailable offences bail can be claimed as of right by the accused person.[60]
The broad principles adopted in the code is regard to bail are:

1. Bail is a matter of right if the offence is bailable
2. Bail is a matter of discretion if the offence is non-bailable.
3. Bail shall not be granted by the Magistrate if the offence is punishable with death or imprisionment for life.....".

3.16.a Bail right absolute

If a person accused of a bailable offence is arrested without warrant, he has a right to be released on bail. An arrest without warrant means that the arrest has been effected otherwise than after judicial scrutiny.

The provisions of the section are mandatory and the court or the officer-in-charge of the police station, as the case may be, is bound to release the person in custody who is accused of a bailable offence on bail provided he is prepared to give it or on recognizances. It may be recalled that section 50 (2) makes it obligatory for a police officer arresting without warrant any person other than a person accused of a non-bailable offence, to inform the person arrested that he is entitled to be released on bail and that he may arrange for sureties on his behalf.

3.16.b "Accused" for the purpose of Section 436

Section 436 does not merely refer to an accused person but generally to "any person other than a person accused of a non-bailable offence". The section covers all cases of persons accused of bailable offences, cases of persons though not accused of any offence but against whom security proceedings have been initiated under Chapter VIII of the Code, and all other cases of arrest and detention which are not in respect

[60]RatilalBhangiMitham vs. Asstt.Collector of Customs, Bombay, AIR 1967 SC 1639, p.1640.

of any non-bailable offence. The provisions of the section are wide anough to cover the case not only of an accused person but also of a person complained against who is present before the court, although he may not have been hauled up as an accused person.[61]

The provisions of this section are applicable not only to persons who are arrested or detained by an officer-in-charge of a police station but also to persons who appear or are otherwise brought before a court. The word "appears" in section 436(1) is wide enough to include voluntary appearance of the person accused of an offence even where no summons or warrant has been issued against him. There is nothing in section 436 either to exclude voluntary appearance or to suggest that the appearance of the person accused must be in obedience to a process issued by the court. The surrender and physical presence of the accused with submission to the jurisdiction and orders of the court is judicial custody, and the accused may be granted bail and released from such custody.[62]

3.16.c Police Bail in bailable offences

The only discretion vested in the police officer is to decide whether a person accused of a bailable offence could be released on his own bond or with sureties. In the case of a bailable offence, bail is a matter of right and not a favour by the police officer or court. There is no right for the court or for the police officer to refuse bail in bailable offences; seriousness of the offence will not justify such refusal.

3.16.d Bail mandatory at any stage of court proceedings

The option to furnish bail remains with the accused all the time during his detention in custody and at any stage of the court proceedings against him. The court has jurisdiction to grant bail where the applicant is in the lock-up under arrest, and it is not necessary in order to invest the court with such a jurisdiction that the accused must be put up before the court. The detained accused can apply for bail even if his earlier application for bail has been rejected or is pending in the court. An order on a bail application does not finally determine the guilt or innocence of a person accused or convicted on an offence. All that such an order postulates is that pending an enquiry or trial and in the case of a convicted person, pending an appeal by him, it is not absolutely necessary that his liberty should be curtailed.[63] Such an order is not a judgment and will not prevent hearing of fresh application for bail giving more material, further development and different considerations. Where an accused is prepared to give security for bail in a bailable offence his right to be released on bail asserts itself all the time during his custody until he is so released.

As said earlier, the provisions of the section are mandatory. As soon as it appears that the accused person is prepared to give bail, the police officer or the court before whom he offers to give bail is bound to release him on such terms as to bail as may appear to the officer or the court to be reasonable. It would even be open to the officer or the court to discharge such a person on his executing a bond as provided in the section before

[61]State vs. Santokh Singh Samund Singh, AIR 1960, Punjab 31.
[62]B. Narayanappa vs. State of Karnataka, 1982 L.J. 1334.
[63] In re Balasundra Pavalar AIR 1951, Madras, 7, p.9.

taking bail from him.[64] In a case of Orissa High Court,[65] it has been held that if the accused at any stage is prepared to furnish security, a police officer has not discretion to refuse bail. Moreover, refusal to grant bail in contravention of the provision of section 436 will make the detention illegal and the police officer causing such detention may be held guilty of wrongful confinement under section 342 of the Indian Penal Code.

3.16.e Bail must be unconditional

There is no question of discretion in bailable offences. Not only this, the court or the police officer releasing the accused cannot impose any conditions on such release. In re Kota Appalakonda[66] the accused were charged by the police under sections 147, 148, 447, 324 and 323 of the Indian Penal Code, all of which are bailable offences. When they applied for bail, the Magistrate ordered it on condition that they should not enter the disputed land till the disposal of the case. The question arose whether such a condition was valid. Justice Horwill of the Madras High Court held:

"the imposition of this condition is illegal on the ground that if the condition is not fulfilled the Court would have to refuse bail which is not permitted under Section 496 (436 new)".

In *Public Prosecutor Vs. Raghuramaish*[67] also Justice Chandra Reddy had to consider this question. The accused were charged with bailable offences but when they moved for bail under Section 496 Cr. P.C., the Magistrate imposed a condition that the accused should appear before the Commissioner of Police, Madras, whenever required to do so. This condition was challenged as being repugnant to Section 496 (S.436 new) of the Code of Criminal Procedure, 1989. In deciding this question, his Lordship observed thus :

"I shall next see whether such a condition is permissible under Section 496 Cr. P.C. That section envisaged an accused person being released on bail when the charge against him is in regard to a bailable offence. The words used are "such person shall be released on bail" thereby denoting that it is mandatory on the Magistrate to admit him in that behalf. He has not discretion to impose any conditions, the only discretion left in him being only as to amount of the bond or whether the bail could be on his bond or with sureties. Any condition subject to which bail should operate infringes the provisions of Section 496 Cr. P.C." The police officer can require the accused released on bail to appear only before the Magistrate, at the time andplaced mentioned in the bail bond. He has no power to ask him to appear before the police.[68]

3.16.f Bond of accused and sureties

'Bond' is another form mentioned in the code to bail out an accused person. The execution of a bond is meant for the appearance of the accused before the court. In practice a bond is taken to be meaningful only when such bond is reinforced with an undertaking from the surety. Bond is a form of bail which has come to stay as wra itten instrument executed by an accused with a promise of good conduct along with a stipulation to pay a sum of money in default of the conditions set out for his release. Bond is generally from the accused

[64]Talab Haji Hussain vs Madhukar Purshottam Mondkas, AIR 1956 SC 376, p.378.
[65]Bharmu Naik vs. Rabindranath Acharya, 1978, Cr. L.J. 864 (Cri. H.C.).
[66] AIR 1942 Mad. 740: 44 Cr. L.J. 1943.
[67] (1957) 2 Andls. W.R. 383.
[68]JayantilalPurshottamdas vs. State of Gujarat, 1966 C.L.J. 209.

person but a surety may also be asked to furnish a similar undertaking. A bond can be treated as a penalty in the event of forfeiture. An accused can be exempted from furnishing a bond, and the bond of the surety may be good enough for that purpose if the accused is a minor.

In practice, the release is effected only after a bond is given by an accused together with money-based pledges from the accused himself and also from their sureties.

Before any person is released on bail or his own bond, there is a requirement of executing a sufficient bond by such person or by one or more sufficient sureties conditioned that such person shall attend at the time and place mentioned in the bond and shall continue to attend until otherwise directed by the police officer or court, as the case may be. This provision is contained in Section 441 of the Code of Criminal Procedure which reads as follows:

"Section 441. Bond of accused and sureties :

(1) Before any person is released on bail or released on his own bond, foir such sum of money as the police officer or court, as the case may be, thinks sufficient shall be executed by such person, and when he is released on bail, by one of more sufficient sureties conditioned that such person shall attend at the time and place mentioned in the bond, and shall continue so to attend until otherwise directed by the police officer or court, as the case may be.

(2) Where any condition is imposed for the release of any person on bail, the bail shall also contain that condition.

(3) If the case so requires, the bond shall also bind the person released on bail to appear when called upon at the High Court, Court of Session or other Court to answer the charge.

(4) For the purpose of determining whether the sureties are fit or sufficient, the court may accept affidavit in proof of the facts contained therein relating to the sufficiency of the sureties, or, if it considers necessary, may either hold an enquiry itself or cause on inquiry to be made by a Magistrate subordinate to the court, as to such sufficiency of fitness."

3.16.g Release on own recognizance

The first proviso to sub-section (1) of section 436 lays down that if the detaining authority considers it fit to do so, it may release the accused on his own recognizance instead of taking bail from him. Release on bail is different from release on recognizance. Bail means 'security with sureties'. A recognizance is a form of bail bond that allows the release of an accused on a solemn promise in writing to the court without deposit of money or property.[69] Release on recognizance is usually effected in cases when the crime involved does not appear to be a particularly serious one or the accused seems to have substantial ties in the family. Sometimes when an order of the court releasing an accused on bail is passed, he cannot secure his release because of his

[69] Charles. F. Hemphill, , *Criminal Procedure : The Administration of Justice*, Goodyear Publishing Co., Inc., Santa Monica, California, p.79.

inability to find appropriate surety for the requisite amount. This happens in cases when the amount of the bond is excessive in relation to the means and the social standing of the accused. It is to cover such cases that his proviso has been enacted. Though a few other provisions in the Code authorize the release of a personal bond, their scope is limited. So deeply ingrained in the psyche of our police and courts is the module of monetary bail that these provisions are applied very rarely. What practically happens is that the officer or the court after tallying the offeoffenseh the Schedule providing for the bail amount for offences, mechanically and in a routine manner fixes the bail amount. It is upon the luck of the accused then. If he has the means to fulfill the amount, he is released. The poor accused remains luckless.

Recognizance as a mode of release is an accepted form in some Common Law jurisdictions. It is essentially a release on personal undertaking given by an accused to the satisfaction of the magistrate.[70] Such mode is not prevalent in practice in the Indian bail system although section 123 of the code can be said to contain a mode of release corresponding to recognizance. Under this provision, a person who has been remanded to prison and has not been able to give a security, can be discharged under section 123 (1) of the code by a magistrate. In the marginal note of the code the term 'recognizance' also appears. Form No. 28, as prescribed in the second schedule of the Code, which is prescribed under section 169 of the code to furnish bond and bail bond on a preliminary inquiry before a police officer calls upon the person to be released to enter into personal recognizance (without sureties) to appear before a court.[71]

3.16.h Amount shall not be excessive

Section 440 (1) of the Criminal Procedure Code, 1973, provides that "the amount of every bond executed under this chapter shall be fixed with due regard to the circumstances of the case and shall not be excessive. There is no dearth of instances where this specific directive has been ignored by courts.

A glaring example is Moti Ram.[72] 'The petitioner a poor mason from M.P. pending his appeal in the Supreme Court obtained an order of bail in his favour "to the satisfaction of the Chief Judicial Magistrate." The direction of the Supreme Court did not mention the details of the bail and so the Magistrate ordered that a surety in the sum of Rs. 10,000 be produced, which is actual impact was a double denial of bail benefit. The petitioner could not afford to procure that huge sum or manage a surety of sufficient property. Further the Magistrate demanded sureties from his own district. The petitioner moved the Supreme Court again to modify the order "to the extent that the petitioner be released on furnishing security to the tune of Rs. 2000/- or on executing a personal bond".

Justice Krishna Iyer delivering the judgementsiad in para 31:

"It shocks one's conscience to ask a mason to furnish sureties for Rs. 10,000. The Magistrate must be given the benefit of doubt for not fully appreciating that our Constitution enacted by 'we, the People of India' is meant for the butcher, the baker, the candlestick maker, the bonded labourer and the pavement dweller'. Bail

[70] *The Manhattan Bail Project conducted by the Vera Foundation* : NULR (New York Univ. Law Review) Vol. 38: 67, Jan. 1963, p.93.
[71] Form No. 28.
[72] Moti Ram vs. State of M.P., AIR 1978 SC 1594.

covers both release on one's own bond, with or without sureties. When sureties should be demanded and what sum should be insisted upon are dependent on variables.'

The Supreme Court in HussainaraKhatoon has laid down guiding principles where accused can be released on personal bond without sureties.

"If the Court is satisfied, after taking into account, on the basis of the information placed before it, that the accused has his roots in the community and is not likely to abscond it can safely released the accused on his personal bond".

The Law Commission of India has made a very weighty recommendation in this respect, which has, unfortunately, not received the attention of our law-makers so far. According to the Commission, in case of bailable offences, if a person cannot furnish sureties within one month of arrest, that circumstances, in the absence of reasons to be recorded, should constitute a fit case of release on personal bond. If after one month a person cannot furnish sureties, it can be safely presumed that the failure was due to genuine inability to find appropriate sureties.

3.16.i Procedure when the accused fails to comply with the conditions of the bail bond

Sub section (2) of Section 436 says that a person who absconds or has broken the condition of his bail bond when released on bail in a bailable offence, he will not as of right be entitled to bail when brought to court on any subsequent occasion in the same case even though the offence be bailable. It empowers the Court with the discretion to release or to commit to custody any person who breaks the conditions of his bail bond as regards the time and place of attendance when released in a bailable offence. And rightly so, when the Majesty of law in its magnanimity confers a right upon you, you cannot make it a privilege and are duty bound to comply with the nominal conditions antecedent to it.

The refusal of bail under such circumstances shall be without prejudice to any action that may be taken under Section 446 which imposes penalty for forfeiture of the bail bond. However, this power of cancellation traditionally vests with the higher courts alone.

3.16.j The plight of Undertrials held for bailable offences

The fact that persons accused on 'bailable' offences can be refused bail, while cases falling under 'non-bailable' offences can be shown indulgence to secure concessional freedom suggests that, in practice, the distinction between these two categories is not of much significance in the total operation of the bail mechanism. The classification, at best, can be treated as an applicative norm suggested by the legislature. For release from custody is a factor largely dependent upon the capacity of the accused to furnish security (with sureties sometimes) as required by the courts.

It is a fact that our jail population comprises very largely of people from the deprived and underprivileged sections of the society. Afflicted by poverty, ignorance and illiteracy, they are unaware of their rights as human beings. Helpless in front of odds, they always remain at the receiving end if caught in the web of our

criminal justice system. Justice P.N. Bhagwati's[73] enlightened essay on the subject is worthy of reproduction here:

The pathetic aspect of criminal justice administration in India has been an unduly large number of undertrial prisoners languishing in jails. The statistics of the last few years show that at any given point of time the percentage of undertrial prisoners has always exceeded that of convicts. Out of a total jail population of 1,41,767 as on 30 June 1981 there were as many as 887, 144 undertrial prisoners representing 61.5 per cent of the total jail population. These undertrial prisoners consisted principally of two categories: one representing those who were denied bail by the courts on account of their involvement in serious offences and the other consisting of those who could not furnish bail for one reason or the other. The position indeed was so deplorable in the State of Bihar that many of these undertrial prisoners were languishing in jails for years without even their trial has commenced. The Law Commission of India studied this problem in its report *Congestion of Under-trial Prisoners in Jails*[74]. But the real breakthrough came when a lady lawyer practicing in the Supreme Court brought a public interest litigation in the court based on a report appearing in *The Indian Express*. The court examined the matter in great depth and gave various directions in a series of decisions which have come to be known as HussainaraKhatoon decisions.[75] It is necessary to make detailed reference to this decision because they have evolved a new dimension of criminal jurisprudence in the country.

The court found that the major impediment in the way of providing access to justice to the deprived and vulnerable sections of the community was the traditional rule of locus standi. This rule which was evolved in the context of private right-duty pattern required that if a legal injury was caused or a legal wrong was done to any person, he alone could bring an action in a court of law for judicial redress and none else could do so on his behalf. But the disastrous effect of this rule was that large numbers of people in the country, afflicted by poverty, ignorance and illiteracy, could not seek relief from the courts on account of lack of awareness, assertiveness and availability of machinery. This restrictive rule of locus standi, therefore, operated to close the doors of justice to large masses of people in the country. The court, with a view to providing easy access to justice to the underprivileged segments of society, enlarged the doctrine of locus standi by providing that where legal injury is caused or legal wrong is done to a person or class of persons who, by reason by poverty or disability or socially or economically disadvantaged position, cannot approach a court of law for justice, any member of the public or social action group acting bona fide can bring any action seeking judicial redress for the legal injury caused or legal wrong done to such person or class of persons. And this can be done even by addressing a letter to the court. Thus, came into being public interest litigation in the Supreme Court and the High Court and a new jurisdiction was evolved in the Supreme Court, namely, epistolatory jurisdiction. Much of the Development of human rights jurisprudence in the country, particularly in favour of the weaker sections of Indian humanity, has taken place as a result of public interest litigation.

[73] P.N. Bhagwati, *Human Rights in the Criminal Justice System*, Journal of the Indian Law Institute Vol. 27:1 (1985), p.8-11.
[74] (78th report) (February 1979).
[75] Hussainara Khatoon & Others vs. State of Bihar, 1979 AIR 1369.

With this brief intervention in regard to public interest litigation, let me once again go back to HussainaraKhatoon.[76] The Supreme Court found from the counter affidavit filed by the State of Bihar in this case that there were quite a few undertrial prisoners who had been in jail for periods longer than the maximum term for which they could have been sentenced, if convicted, and yet their trials had not commenced. It reprimanded the administration as well as the judiciary in the State of Bihar for this shocking state of affairs which betrayed complete lack of concern for human values and directed that these undertrial prisoners should "be released forthwith, as their further detention would be unlawful and in violation of their fundamental right under Article 21."[77]

The Supreme Court then proceeded to consider why it was that large numbers of undertrial prisoners were rotting in jails for years without their trail having commenced. Why were they not at bail, particularly those who were charged with offences which were bailable? The court observed that these undertrial prisoners were still in jail presumably because no application for bail had been made on their behalf either because they were not aware of their right to obtain release on bail or on account of their poverty, they were unable to engage a lawyer to apply for bail and in quite a few cases, being too poor, they were unable to furnish bail.

The next question which arose in HussainaraKhatton was as to when and under what circumstances should bail be granted and what should be the nature of such bail. Now on reason why our legal and judicial system continually denies justice to the poor by keeping them for long years in pre-trial detention is our highly unsatisfactory bail system. If suffers from a property-oriented approach which seems to proceed on the erroneous assumption that risk of monetary loss is the only deterrent against fleeing from justice. The Code of Criminal Procedure, even after its re-enactment in 1973, continues to adopt the same antiquated approach as the earlier code enacted towards the end of the last century and where an accused is to be released on his personal bond, it insists that the bond should contain a monetary obligation requiring the accused to pay a sum of money in case he fails to appear at the trial. Moreover, as if this were not sufficient deterrent to the poor, the courts mechanically and as a matter of course insist that the accused should produce sureties who will stand bail for him and these sureties must against establish their solvency to be able to pay up the amount of the bail in case the accused fails to appear to answer the charge. This system of bail operates very harshly against the poor and it is only the non-poor who are able to take advantage of it by getting themselves released on bail. The poor find it difficult to furnish bail even without sureties because very often the amount of the bail fixed by the courts is so unrealistically excessive that in a majority of cases the poor are unable to satisfy the police or the magistrate about their solvency for the amount of the bail and where the bail is with sureties, as is usually the case, it becomes an almost impossible task for the poor to find persons sufficiently solvent to stand as sureties. The result is either they are fleeced by the police or revenue officials or by touts and professional sureties and sometimes they have even to incur debts for securing their release or, being unable to obtain release, they have to remain in jail until such time as the court is able to take up their cases for trial, leading to grave consequences.

[76] Hussasinar Khatoon vs. State of Bihar, 1979 SCR(3) 532.

[77] *Ibid*

It is here that the poor find out legal and judicial system oppressive and heavily weighted against them and they find themselves hopelessly in a position of inequality with the non-poor. The Legal Aid Committee appointed by the Government of Gujarat under my chairmanship pointed out in its report how the practice of fixing the amount of bail with reference to the nature of the charge without taking into account relevant factors, such as the individual financial circumstances of the accused and the probability of his fleeing before trial, is harsh and oppressive and discriminates against the poor. It is necessary to appreciate that the risk of monetary loss is not the only deterrent against fleeing from justice, but there are other factors which act as equal deterrents against fleeing. It the court is satisfied, after taking into account, on the basis of information placed before it, that the accused has his roots in the community and is not likely to abscond, it can safely release the accused on his personal bond. The Supreme Court laid down these principles in HussainaraKhatoon and ordered the release of a number of undertrial prisoners who were in jail for long years, on their personal bond without insisting on monetary obligation. But the validity of these principles has to be tested by empirical or socio-legal research in this area of criminal jurisprudence.

3.17 Discretionary Bail in Non-Bailable Offences

In the midst of the debate on the administration of criminal justice, generated by the Law Commission of India on Criminal Procedure, it may seem totally out of place to propose that we should turn out minds aside from the hurly burly of police powers and civil liberties and should devote some time to reflection on the theory behind it all. But, theory is essential because social and legal arrangements – especially in so sensitive an area as justice – need to be justified if they are to be acceptable.

In this chapter we shall deal with the rationale behind discretionary bail in non-bailable offences and prevalent court practices.

The Code lays down that when a person is arrested for a non-bailable offence, his release on bail is a matter of discretion with the court. Generally speaking, all serious offences are considered as non-bailable.

3.17.a Definition of a Non-bailable Offence

The definition of a non-bailable offence appears in Section 2(1) of our Code of Criminal Procedure, 1974.

S.2 (a) “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 offences.

By and large, offences, punishable with imprisonment for not less than three years are taken as serious offences and are made non-bailable.

When a person is accused of a serious offence and is likely to be convicted and punished severely for such a crime, he would be prone to abscond or jump bail in order to avoid the trial and consequent sentence. If released on bail, he is likely to put obstructions to a fair trial by destroying evidence or by tampering with the prosecution or is likely to commit more offences during the period of his release on bail. Indiscreet,

unconditional bail is such cases would be undesirable and dangerous. Yet it cannot be overlooked that a person arrested or detained for an offence remains innocent till his trial and judgment is pronounced. Resultantly, his seeking trial even in a serious offence is justified.

3.17.b Legal framework of bail in non-bailable offences

The law relating to bail in non-bailable offences is contained in Section 437 of the Code of Criminal Procedure 1973:

S. 437 when bail may be taken in case of non-bailable offence –

(1)When any person accused of, or suspected of the commission of any non-bailable offence is arrested or detained without warrant by an officer-in-charge of a police station or appears or is brought before a Court other than the High Court or Court of Session, he may be released on bail, but -

(i) Such person shall not be so released if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment of life;

(ii) Such person shall not be so released if such offence is a cognizable offence and he had been previously convicted of an offence punishable with death or imprisonment for life or imprisonment for seven years or more, or had been previously convicted on two or more occasions of a cognizable offence:

Provided that the Court may direct that a person referred to in Cl. (i) or Cl. (ii) may be released on bail if such person is under the age of sixteen years or is a woman or is sick or infirm;

Provided further that the Court may also direct that a person referred to in Cl.(ii) be released on bail if it is satisfied that it is just and proper so to do or for any other special reason:

Provided also that the mere fact that an accused person may be required for being identified by witnesses during investigation shall not be sufficient ground for refusing to grant bail if he is otherwise entitled to be released on bail and gives an undertaking that the shall comply with such directions as may be given by the Court.

(2) If it appears to such officer or court at any stage of the investigation, inquiry or trial, as the case may be, that there are not reasonable grounds for believing that the accused has committed a non-bailable offence, but that there are sufficient grounds for further enquiry into his guilt, the accused shall subject to the provisions of Sec.446-A and pending such enquiry, be released on bail or, at the direction of such officer or court; on the execution by him of a bond without sureties for his appearance as hereinafter provided.

(3) When a person accused or suspected of the commission of an offence punishable with imprisonment which may extend to seven years or more or of an offence under Chapter VI, Chapter XVI or Chapter XVII of the Indian Penal Code (45 of 1860), or abetment of, or conspiracy or attempt to commit any such offence

is released on bail under sub-section (1), the court may impose any condition which the court considers necessary -

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

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

(c) otherwise in the interests of justice.

(4) An officer or a court releasing any person on bail under sub-section (1), or sub-section (2), shall record in writing his or its reasons or special reasons for so doing.

(5) Any court which has released a person on bail under sub-section (1) or sub-section (2), may, if it considers it necessary so to do, direct that such person be arrested and commit him to custody.

(6) If in any case triable by a Magistrate, the trial of a person accused of any non-bailable offence is not concluded within a period of sixty days from the first date fixed for taking evidence in the case, such person shall, if he is in custody during the whole of the said period, be released on bail to the satisfaction of the Magistrate, unless for reasons to be recorded in writing, the Magistrate otherwise directs.

(7) If, at any time after the conclusion of trial of a person accused of a non-bailable offence and before judgement is delivered, the court is of opinion that there are reasonable grounds for believing that the accused is not guilty of any such offence, it shall release the accused, if he is in custody, on the execution by him of a bond without sureties for his appearance to hear judgement delivered.

At first glace, the reader can make out that S. 437 (1) favours released on bail in non-bailable offence. Though S. 437(1) is strict in its content in putting an absolute ban on release if the offence is punishable with death or life imprisonment, the remaining sub-clauses relate to various stages of the trial where if there is insufficient evidence or extended delay or any other plausible reason then release on bail is mandatory. The section seems to have been enacted to protect an accused from unnecessary incarceration due to police high handedness and court's apathy.

3.17.c May be released on bail

Sub-section (1) of S.437 which says that when any person accused or suspected of the commission of a non-bailable offence is arrested or detained without warrant by an officer-in-charge of a police station or is brought before a court, he may be released on bail. The word 'may' clearly indicate that the police officer or the court has got discretion to grant bail.

The words "or suspected of the commission of any non-bailable offence" make the discretionary power available to not merely an accused person but also a suspect who has been arrested or detained for the

commission or a non-bailable offence.[78] Practically, before a person is formally charged by the Investigating Officer, he remains a suspect.

3.17.d S. 437 applies to the Court of Magistrate alone

From the word "a Court other than the High Court or court of Session, it is inferred that the section primarily addresses itself to the Court of Magistrate either in its capacity as a committing court or as a trial court. In the view of the Supreme Court, Section 437 is concerned only with the Court of Magistrate. It expressly excludes the High Court and the Court of Session.[79] The word 'Court' means the competent court having territorial jurisdiction concerning the offence.[80]

3.17.e Death or Imprisonment for Life

Earlier, the phrase "death or imprisonment for life" was interpreted as referring only to offences which were punishable with death or as a minor alternative, with imprisonment for life, and not to offences punishable with imprisonment for life, but not in the alternative with death.[81] But these decisions have been over-ruled and it is well settled that the words "death or imprisonment for life" should be read disjunctively so as to mean "offences punishable with death or punishable with life imprisonment".[82] However, the Kerala High Court has taken the view that the prohibition against granting bail in Section 437 is confined to cases where the sentence is either death or alternatively, imprisonment for life and that the prohibition does not extend to offences punishable with life imprisonment only.[83] The decision, though intended to liberalize the bail law, does not seem to be a sound one.

3.17.f Restricted bail to habitual offenders

Clause (ii) to sub-section (1) provides that if any person who has been previously convicted of an offence punishable with death or imprisonment for life or has been previously convicted on two or more occasions of a non-bailable offence, is arrested without warrant for the commission of a non-bailable offence by a police officer he shall not be released on bail. The clause restricts the discretion to grant bail to habitual offenders who have been previously convicted of serious offences. In *Kartar Vs. State of Haryana*,[84] on two earlier occasions, the accused had been convicted under the Excise Act – which offences were bailable. On another occasion he has been convicted under Section 457/511 of the I.P.C. which is a non-bailable offence. The Magistrate refused bail on the mistaken impression that the offences under the Excise Act were non-bailable. As the Magistrate was wrong, S.437 (1) was held inapplicable and the accused was granted bail.

3.17.g Exception for minors, women and sick persons

[78]SubeTundiKachi v State, 1963 (2) Cri. L.J. 97 (M.P.).
[79] *Supra* no. 9 at p.21.
[80]Ravinder Singh Vs. Desh Raj,1983 (U.P.) Cri. L.R. 307.
[81]Mohammed Yusuf vs. King Emperor, AIR 1926, Rang. 51, p.52-53.
[82]Naranji Premji vs. Emperor, AIR, Bom. 244, p.245.
[83]Satyan vs. State, 1981, Cri. L.J. 1313 (Ker.).
[84] (1981) 1 Crimes 341.

The first proviso to sub-section (1) constitutes exceptions to the clauses (i) and (ii) of the sub-section. It says that the court may direct that a person referred to in cl.(i) or cl. (ii) be released on bail if such person is under the age of sixteen years, or is a woman or is sick or infirm. A female or a person below 16 years of age or a sick or infirm person, because of their physical handicap or immaturity, are not likely to interfere with the investigation or delay the trial by abscondence or interference[85] (Proviso not inconsistent with Arts. 14 and 15 of the Constitution). In view of the proviso, it is open to a court to grant bail to a woman even in cases where she is accused of an offence which is punishable with death or imprisonment for life.[86] The proviso giving special treatment to cases of children and women is neither inconsistent with Article 15 of the Constitution nor is it violative of Article 14 of the Constitution. Article 14 is to be read subject to Article 15(3) under which the State is empowered to make special provisions for women and children. Similarly, the proviso permits such a course that the accused who is a minor of only 14 or 15 years of age should be allowed to remain on bail as it is not likely that he would tamper with the prosecution evidence or abscond.[87] It is not every sickness that entitles the accused person to the grant of bail under the first proviso to Section 437(1). It is sickness which involves a risk or danger to the life of the accused that counts.[88] Sickness – of an accused supported by a medical certificate is sufficient for grant of bail.[89] Too old a person comes within the scope of 'infirm' under the first proviso to S.437(1).[90]

It is a common practice among our politicians to escape judicial custody by producing fake medical certificates and getting bail. This has become so common that the police and the judiciary sometimes act with suspicion and do not allow genuinely ill people to make use of it. Rajan Pillai's case is an example of death in custody due to sickness. The biscuit magnate from Hong Kong was arrested on charges of embezzlement. Pleading cirrhosis of the liver, he approached the court and the jail authorities a number of times to be released on bail for seeking medical advice from his doctors. He was cynically refused. He died in prison on 7.7.1995 within a few weeks of his arrest.

It may be noted that the power to grant bail under the proviso is discretionary and has been given to the court and not to any police officer and the court releasing any person under it will have to record in writing its reasons for so doing.[91]

"For any special reason"

The second proviso to Section 437(1) reads as "provided further that the court may also direct that a person referred to in clause (ii) be released on bail if it is satisfied that it is just and proper so to do or for any other special reason." It gives discretion to the court trying a habitual offender to grant him bail for any special reason other than for reasons mentioned in the first proviso. It reflects the zeal of our legislature for safeguarding the liberty of its citizens. A person previously convicted of a serious offence may be granted

[85]Nirmal Kaur Banerjee vs. State 1972, Cri. L.J. 1582, p 1583 (Cal.).
[86]Choki (Mst.) vs. State, AIR 1957 Raj. 10, p 11: 1957 Cri. L.J. 102.
[87]MaibenBidhur Singh vs. Manipur Administration ,AIR 1959, Manipur, p.48.
[88]State vs. Sardool Singh, 1975 Cri. L.J. 1348.
[89]Khandra Nath Bayan vs. State of Assam, 1982, Cr. L.J. 2109 (Guah.).
[90]*Ibid*
[91] Section 437 (4) Cr. P.C.

bail in a subsequent case even though he may not be a woman, a child, a sick or an infirm person. The cases of Babu Singh,[92] Kashmira Singh etc. are instances of convicts released on bail despite the charge of murder.

3.17.h Bail not to be refused on the ground of identification parade

The third proviso to this section lays down, "provided also that the mere fact that an accused may be required for being identified by witnesses during investigation shall not be sufficient ground for refusing to grant bail if he is otherwise entitled to be released on bail and gives an undertaking that he shall comply with such directions as may be given by the court." In providing this proviso to sub-section (1), the Joint Select Committee[93]observed :

"It was brought to the notice of the Committee that sometimes bail is being refused by courts on the sole ground that the accused may be required by the Investigating Officer for an identification parade which may or may not be imminent. In the committee's opinion this should not be permitted if otherwise the accused person is entitled to be released on bail. An additional proviso has therefore been incorporated in sub-clause (1)".

The object of inserting this new proviso is obvious. In our police procedure investigation of cases is habitually delayed and the practice of putting up challans in courts is usually after a couple of months. In such a scenario, bail ought not be refused to a mere suspect on the ground that he may be required for the purpose of identification. Bail cannot be refused only on the ground that the accused is wanted for the purpose of identification.[94]

3.17.i Whether express ban on release on bail in case of any offence punishable with death is valid under Art. 21

Section 437 (1) lays down two categories of non-bailable offences for the purpose of bail (1) non-bailable offences punishable with imprisonment for life or death, (2) non-bailable offences not entailing punishment for imprisonment for life-or-death penalty. In the first category the police or the court has not discretion at all in the matter of release on bail. The law expressly lays down that the accused shall not be released on bail. In the second category it is the discretion of the police and the court to release the accused on bail.

(a)"not sound law"

The question that arises here is whether an express ban on release on bail to one accused of an offence punishable with death penalty or life imprisonment justified. Besides offences entailing capital punishment or life imprisonment are essentially serious offences potent of causing wide public outcry, apprehension and a sense of personal retribution in the mind of the society. Allowing the release of an accused of such an offence would be jeopardising public safety and well being. Both the contentions are weighty and are often

[92] AIR 1978 SC 527.
[93]*Report of the Joint Select Committee on the Code of Criminal Procedure Bill*, 1970 (1972).
[94]*State of Assam vs. Mobarak Ali*, 1982, Cri. L.J., 1816 (Gau.).

relied upon while refusing bail to an accused of a serious offence.[95] But precedent and the practice that has evolved therefrom does not give a clear picture. Is the express command, "such person shall not be so released" good law? Under the American and English law, though discretion for release on bail in such cases is limited but it is not altogether negated. In USA the system for release on bail was established by the Judiciary Act 1789 and became a Constitutional guarantee when the first Ten Amendments were adopted in 1791. The law provides in substance as follows:

"Upon all arrests in criminal cases, bail shall be admitted except where the punishment may be death, in which case bail is discretionary depending upon the nature and circumstances of the offence."[96]

Similarly, under English law, if the charge is homicide or some other grave offence the release of the offender becomes discretionary. In our country where "the wide sweep of Article 21" recurrently extends to shield the accused from procedural excesses, such an express provision commanding complete curtailment of liberty, in our view, is not sound law.

Refusing bail to undertrials obviously results in the deprivation of their personal liberty within the meaning of Article 21. As a result of Maneka Gandhi, hailed by many as the Magna Carta of our right to personal liberty. Francis Coralie Mullin [97], *M.H. Hoskot*[98], etc., it is settled now that deprivation of liberty is permissible only when the law authorising it is reasonable, even-handed and geared to the goals of community god and State necessity as spelt out in Article 19.[99] A law providing for refusal of bail resulting in consequential deprivation of personal liberty, in order to survive the constitutional scrutiny, must satisfy the requirements of Article 21, Article 19 and Article 14, namely, such a law providing for refusal of bail must be, (a) a law made by a competent legislature on a matter within its legislative competence, (b) a law made in the interest of the general public and (c) a law which is reasonable, right, just and fair.

(b)Whether it satisfies the twin requirement of Arts. 19 and 14

Now the law relating to bail as contained in Chapter XXXIII of the Cr. P.C., 1973 may be regarded to have satisfied to joint requirement being a law made by a competent legislature on a subject within its legislative competence. But the question that has been raised is whether that part of the law relating to bail in case of non-bailable offences punishable with death or imprisonment for life, as contained in Section 437(1) mandating automatic refusal of bail only because "there appear reasonable grounds for believing" that the undertrial has been guilty of such an offence can be regarded to have satisfied the second and third requirements, noted above? In other words, can such a law be regarded to be "a reasonable restriction" imposed "in the interests of the general public" within the meaning of clauses (5) and (6) of Article 19 and to

[95]K.N. Joglekar v Emperor, AIR 1931 All. 504.
State V Captain Jagjit Singh, AIR 1962 SC 253.
Giani Mehar Singh v Emperor, AIR 1939 Cal. 713.
State v Sardool Singh, 1975 Cr. L.J. 1348 (J&K).
State v Veerapandy, 1979 Cri. L.J. 455 (Mad.).
[96] *Supra* no. 49 at p.54.
[97] AIR 1981 SC 746 at p 750: 1981 Cri. L.J. 306.
[98] *Supra* no. 43 at p.48.
[99]*Supra* no. 51 at p.67.

be "reasonable, right, just and fair" within the meaning of Articles 14 as interpreted in Maneka Gandhi[100] and later cases?

"Interest of the general public" may embrace a variety of concepts like public order, public morality and the like. The general public or the society in general is obviously interested in the prosecution of offenders and in everything that may be reasonably necessary for the fair and effective investigation and trial of offences.

3.17.j Section 437 (2): if there are no reasonable grounds for believing

If the accused is not released at the initial stage of his appearance in a court, he can still be released subsequently during investigation, inquiry or trial if there are no reasonable grounds for believing that he has committed a non-bailable offence. The principle to be deduced from these sections is that grant of bail is the rule and refusal is the exception.

3.18 Greater Powers of the high court and court of session on matters of bail

S. 439 of the code confers special powers upon the High Court and the Court of Session in the matter of bail. The section reads as:

S.439 Special Powers of High court or Court of Session Regarding Bail.

(1) A High Court or Court of Session may direct:-

(a) that any person accused of an offence and in custody be released on bail, and if the offence is of the nature specified in sub-section (3) of Sec. 437, my impose any condition which it considers necessary for the purposes mentioned in that section;

(b) that any condition imposed by a Magistrate when releasing any person on bail be set side or modified:

Provided that the High Court or the court of session shall, before granting bail to a person accused of an offence which is triable exclusively by a court of session or which though not so traible, is punishable with imprisonment for life, give notice of the application for bail to the public prosecutor unless it is, for reasons to be recorded in writing, of opinion that it is not practicable to give such a notice.

(2) A High Court or Court of Session may direct that any person who has been released on bail under this chapter be arrested and commit him to custody.

[100] *Supra* no. 30 at p.22

CHAPTER-4

RIGHT OF DETAINED PERSON

4.1 Introduction

It is not an unknown practice in the Police Stations that detention precedes arrest of the accused. In some cases, the person is detained and interrogated, and when the police make up its mind to register a case that he is formally arrested and put on record. It is only on this formal arrest that a person can avail of different statutory protections promised under Sections 56, 57, 436, 167 and 358 of the Code of Criminal Procedure, 1973. Besides these protections, there are Constitutional protections available under Articles 226 and 32 which entitle a person to seek judicial intervention through the writ of habeas corpus for his release from unlawful detention. Even judicial intervention can be sought for arrest on insufficient grounds through the writ of mandamus under the said Articles and also through inherent jurisdiction of the High Court under Section 482 of the Code. However, these legal protections can only be available of if someone is aware of the unlawful detention of the person concerned and the information of arrest and its ground are duly notified and passed in custody. This further calls for giving of information to some other legal aid agency where no one comes to the rescue of the detained persons. The situation is more demanding in India where half of its population is living below poverty line and over 95% of persons wrongfully confined, belong to this category. There is no gainsaying the fact that human rights relating to personal liberty and dignity of a person can only be protected if the lawful procedure stipulating arrest is faithfully and honestly followed by the police. This call for awareness of the police regarding human rights enshrined in Part III of the Constitution and supplemented and strengthened by the Higher Judiciary from time to time.[101]

4.2 Supreme Court of India on Law of Preventive Detention 1950 Till Date

India became free in 1947 and the Constitution was adopted in 1950. It is extraordinary that the tramers of the Indian Constitution, who suffered most because of the Preventive Detention Laws, did not hesitate to give Constitutional sanctity to the Preventive Detention Laws and that too in the Fundamental Rights chapter of the Constitution. Some parts of Article 22 are not Fundamental Rights but are Fundamental Dangers to the citizens of India for whom and allegedly by whom the Constitution was framed, to usher in a new society, with freedom of expression and freedom of association available to all.[102]

In 1950 itself, a Prevention Detention Act was piloted by Sardar Patel, who said that he had several “sleepless nights” before he could decide that it was necessary to introduce such a Bill. And in 1950, under this Act, ordinary disturbers of order and peace were not arrested, but a political leader of A.K. Gopalan's eminence was an-estcd. Even from that initial action, it was evident that these Acts were meant to curb political dissent, and that legacy has been and is being followed.[103]

[101] 6th Amendment to the United States Constitution.
[102] Human Rights Features voice of Asia Pacific Human Rights Network
[103] AIR 1976 SC 1241-1277

It is worth bearing in mind that no other civilized country, including Britain which brought Preventive Detention laws here, felt compelled to introduce such laws during peace time. Even during the last World War, most European countries and the USA, who were all directly involved in the war, had no such law. During the War, England introduced a Preventive Detention Law to the effect that a person could be detained only on the subjective satisfaction of the Home Minister of Great Britain and not on the subjective satisfaction of a puny magistrate, as it the case here. Further, only one person. Sir Osward Mosley, a rabid Nazi, was detained under this Act. In 1971, because of tremendous political tumioil which resulted in assassinations and destruction all over Ireland, the British Government introduced PD Act for Ireland. But it immediately fornied a committee headed by Lord Gardiner to probe and to find out if it was necessary to have such an Act even in Ireland. The Gardiner Committee Report reads: "Preventive Detention can only be tolerated in any democratic society in the most extreme circumstances. It must be used with the utmost restraint and retained only so long as it is strictly necessary".[104]

The solution is simple; scrap all laws of preventive detention. It is, however, difficult to see that happening in the near future. I would suggest a first step which would remove some of the more undesirable features of preventive detention. The only justification for preventive detention is to safeguard society from persons who are out to destroy it. If that is the justification and that is the only justification officially given, let it be provided that all those detained under any detenfion law be kept either in the ordinary jails or in special detention centres run by the jail authorities.

Such a change does not require fresh legislafion. Both the National Security Act and Cofeposaauthorise the State to specify the place and conditions of detenfion. The state must be directed to ensure that detenus must be taken to ordinary jails within 24 hour of detention and be kept there. In the past that was the pattern of preventive detention. Thousands of nationalists rounded up by the British during the Indenendence movement were so detained.[105]

The state cannot have any rational objection to such a change. Both the National Security Act and Cofeposa merely authorise detention of persons who see. It is argued, a danger to society if free. If the state does object to such changes it will expose its true motive and also the manner in which detention laws are being abused, persons are detained so as to extract information from them.[106]

4.3 Protection against Arrest and Detention:

Article 22 of the Constitution of India is as below: (1) No person who is an-ested shall be detained in custody without being infonned, 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. (2) Every person who is arrested and detained in custody shall be produced before the nearest Magistrate within a period of twenty-four hours of such airest excluding the time necessary for the journey from the place of airest to the Court of the

[104] Dr. L.M. Singhvi, "The Times of India", February 15,1978
[105] C.G. Raghvan, "Indian Constitution: Trends and Issues", p. 271 (ILI, 1978)
[106] Rajeev Dhavan, On ihe Future of Western Law and Justice in India: Reflections on the Predicament of the Post-Emergency Supreme Court", Journal of the Bar Council of India, Vol 8, No. I, January-March 1981, pp. 71-73

Magistrate and no such person shall be detained in custody beyond the said period without the authority of Magistrate.[107]

(3) Nothing in Cls. (1) and (2) shall apply- (a) to any person who for the time being is an enemy alien; or (b) to any person who is arrested or detained under any law providing for preventive detention. (4) No law providing for preventive detention shall authorise the detention of a person for a longer period than two months unless and Advisory Board constituted in accordance with the recommendations of the Chief Justice of the appropriate High Court has reported before the expiration of the period of two months that there is in its opinion sufficient cause for such detention:

Provided that an Advisory Board shall consist of a Chaimian and not less than two other members and the Chainnan shall be a serving Judge of the appropriate High Court and the other members shall be serving or retired Judges of any High Court. Provided further, that nothing in this clause shall authorise the detention of any person beyond the maximum period prescribed by any law made by Parliament under sub-clause (a) of CI. (7). Explanation - In this clause "appropriate High Court" means –

(i) in the case of the detention of a person in pursuance of an order of detention made by the Government of India or an officer or authority subordinate to that Government, the High Court for the union tenitory of Delhi. (ii) In the case of the detention of person in pursuance of an order of detention made by the Government of any State (other than a Union Territory) the High Court for that State; and (iii) In case of detention made by the administrator of a union territory or an officer or authority subordinate to such administrator, such High Court as may be specified by or under any law made by Pariiament in this behalf (5) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority malcing the order shall, as soon as may be, communicate to such person the gi'ounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order. (6) Nothing in CI. (5) shall require the authority making such order as is referred to in that clause to disclose facts which such authority considers to be against the public interest to disclose. (7) Parliament shall by law prescribe - (a) the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention; and (b) the procedure to be followed by an Advisory Board in an inquiry under CI. (4)". 2. Constitutional changes - Clause (4) of this Article has been substituted for the original CI. (4); and the original sub-clause (a) of CI. (7) omitted, and the original subclauses (b) and (c) thereof re-lettered as (a) and (b); and the words CI. (4)" occurring at end of sub-clause (b) thereof, have been substituted for the original words "subclause (a) of CI. (4)" by Sec. 3 of the Constitution (Forty-Amendment) Act, 1978.[108]

4.4Person arrested not to be detained more than twenty-four hours U/s 57 Cr.P.C.

Scope and application.—Whena person is arrested under a warrant, S. 76 becomes applicable. ‘When he is arrested without a warrant, the police officer can keep him in custody for a period not exceeding twenty-four

[107] *Ibid*

[108] O. Chinnappa Reddy, judicial Process and Social Change, Journal of the Indian Lavi? Institute, Vol. 25, No. 2, April-June 1983, p. 155.

hours. Before the expiration of such a period, the arrested person has to be produced before the nearest Magistrate, who can, under S. 167, order his detention for a term not exceeding fifteen days on the whole,[109]or he can be taken to a Magistrate who has jurisdiction to try the case, and such Magistrate can remand the person into custody for a term which may exceed fifteen days but not more than sixty days. The intention of the Legislature is that an accused person should be brought before a Magistrate competent to try or commit with, as little delay as possible. S. 57 is a pointer to the intendment to uphold liberty and to restrict to the minimum the curtailment of liberty.[110]

Article 22 of the Indian Constitution, provides

(1)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.

(2)Every person who is arrested and detained in custody, shall be produced before the nearest Magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey, from the place of arrest to the Court of the Magistrate, and no such person shall be detained in custody, beyond the said period, without the authority of a Magistrate.

(3)Nothing in Clauses (I) and (2) shall apply—

(a) To any person who for the time being is an enemy alien; or

(b) To any person who is arrested or detained under any law providing for preventive detention

This section is mandatory.[111]

Where an arrestee is detained in police lock ups beyond 24 hours, the detention clearly violates the mandatory provisions of S. 57 Cr.P.C. and Art. 22 of the Constitution of India and is illegal.[112]Where accused was detained for 3 days without remand order, the detention was held illegal, in view of provisions of S. 57 and Arts. 21 and 22 of the Constitution and Rs. 10,000/- was awarded as compensation to the victim.[113]

Where the victim after arrest was brought to outpost at 9 am, and was sent out therefrom for medical examination on the next day at 8.30 am., as by that time 24 hours had elapsed, S. 57 was held not violated.[114]

Police custody of arrestee after expiry of initial period of 15 days of judicial remand is illegal.[115]

109 Engadu, (1887)11 Mad 98; O.K. Moopnar vs. State, 1990 Mad LW (Cr1) 113 (DB).

110 Mohd Ahmed Yasin Mansuri vs. State of Ma/arcs/nra, 1994 CrU 1854 (1859) (Bom-DB).

111 P.C. Kakar vs. Director General of Police, 1986 (I) Crimes 620, 626 (AP); Jayendragirivs. Narcotics Control Bureau, 2005 CrLJ 3190 (Born).

112 Amrik Singh vs. State of Punjab, 2000 CrLJ 4305 (P&H).

113 Iqbal Kaur Kwatra vs. Director General of Police, Jaipur, 1996 CrLJ 2600 (AI'-DB); see also Carbon Ali vs. Intelligence Officer, Air Intelligence Unit, NIPtSalor, 1996 CrLJ 2420 (Born).

114 Alok Deb Royvs. State of Assam, 2004 CrLJ 3048 (3071) (Gauh-DB).

115 Public Prosecutor, High Court of AP, Hydera bad vs. ThtikayolaVeeranna, 2003 CrLJ NOC 165 : (2003) I Andli LI (Cri) 337 (AP).

ii. Commencement and completion of arrest.— The word 'arrest' is a term of art. It starts with an arrester taking a person into his custody by action or words, restraining him from moving anywhere beyond the arrester's control, and it continues until the person so restrained is either released from custody or, having been brought before a Magistrate, is remanded to custody by the Magistrate.[116]

iii. Meaning of arrest—Arrest is the restraint on a man's personal liberty by the power or colour of lawful authority. In its natural sense arrest also means the restraint on or deprivation of one's personal liberty.[117]

iv.24 hours' custody.—Twenty-four hours time prescribed under this section is the outer most limit beyond which the arrested person cannot be detained in police custody. It is certainly not an authorisation for the police to detain him for 24 hours in their custody.[118]

v. Calculation of period of custody.—Detention in police custody under S. 167(2) for 15 days, cannot include prior custody under this provision.[119]The detention can be authorised by the Magistrate only from the time the order of remand is passed. The earlier period, when the accused is in the custody of a public officer in exercise of his powers under S. 57, cannot constitute detention pursuant to an authorisation issued by the Magistrate. The period of 90 days/60 days begins to run only from the date of order of remand.[120]

vi. Production of accused after 24 hours.—The production of the accused before the Magistrate after more than 24 hours does not render the custody illegal.[121]

vii. Legal Aid.—The obligation to provide legal aid to the indigent accused does not arise only when the trial commences but arises right since the accused is produced before the nearest Magistrate as required by S. 57 of the Code and Article 22(1) of the Constitution.[122]

4.5 Right Against Illegal Arrest and Detention and its Remedies

In India, arrests are governed by the statutory provisions contained in the Criminal Procedure Code, 1973. As already discussed, there are three stages leading to the invocation of investigatory process: (1) receipt of information regarding commission of a cognizable offence; (2) taking decision whether to enter into investigation or not; and (3) ascertainment of facts as to who is the offender and taking steps for his arrest.

After an officer in charge of a police station has decided to enter into investigation of an offence which he is empowered to investigate, he is to ascertain as to who the probable offender is and whether he should be arrested. Arrests are of two kinds: (1) accusatorial arrest (where a person is sought to be arrested for the commission of an offence punishable under the law); and (2) preventive arrest (where the arrest is meant or authorised as a preventive measure for the prevention of cognizable offences).

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116 Ashak Hussain Ahab Deta vs. Asst Collector of Customship,) Bombay, 1990 Cr14 2201, 2204 (Born).
117 Ashak Huassain Allali Detha vs. Asst. Collector of Customs (p,) Bombay, 1990 CrLJ 2201, 2204 (Born).
118 RajaniKantaMehetavs. State of Orissa, 1975 CrLJ 83 (On).
119 BatnaIbmvs. State of I.P., 1980 CrLJ 748 (IIP-DB).
120 C. Satyanaroyanavs. State of AP., AIR 1986 SC 2130(2135): (1986)3 SCC 141.
121 Manoj Kumar Agrawalvs.State of UP., 1995 CrLJ 646 (All); see also Kuthej Singh vs. Circle Inspector of Police, 1992 CrLJ 1173 (Kant-UB).
122 Khatrivs. Bihar, (1981) 1 SCC 635 :1981 CrLJ 470: AIR 1981 SC 928.

"Arrest" can be defined as putting restraint on the liberty of a person by a police officer for any act or omission which constitutes an offence and under the circumstances in which law authorises a police officer to exercise such discretion to put restraint on such person. Existence of a legally justifiable circumstances or requirement is a sine qua non for a legal arrest. Such officer can arrest a person if (1) he has been concerned in any cognizable offence; or (2) against whom a „reasonable complaint" has been made of his having been so concerned; or (3) a „credible information" has been received; or (4) against whom „reasonable suspicion" exists that he has committed a cognizable offence. [123]Such person can also be the one who has committed any act 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.[124] Such person can also be the one for whose arrest, any requisition, whether written or oral, has been received from another police officer. In such cases requisition is required to specify the person to be arrested and the offence for which he is to be arrested, and it appears there from to the officer arresting that the person might lawfully be arrested without a warrants by the officer who issued the requisition. [125]

The case of *SagwanPasi vs. State of Bihar*[126] is an instructive one on the scope of power of a police officer to arrest a person. S. 151 of the Code authorises a police officer to arrest any person designing to commit an offence which cannot be otherwise prevented. For making arrest of any person in a legal sense, therefore, a police officer is required to have a legal justification under the law and if discretion to arrest is exercised on the facts which either do not constitute an offence or do not furnish information of the circumstances justifying arrest, the arrest will be illegal.

In *Padam Dev case*, [127] where an accused was arrested by the police on the ground that he was creating nuisance under the influence of liquor, taken to the hospital and got medically examined. Since Sec. 34 of the Police Act, authorising arrest of such a person was not in force in that area, the accused was arrested under Sec. 510 IPC which is a non-cognizable offence and for which the police did not have power to arrest the person. In these circumstances, the arrest was held to be illegal.

The illegal detention can be classified into two categories: (1) ab initio illegal detention; and (2) suffering illegality at subsequent stage. In the first case where the person has been detained by the police without any legal justification or authority of law, the detention is ab initio illegal. In the second case a person may be arrested legally by the police initially but his further detention is either not authorised by law or if not dealt with in accordance with the provisions of law providing for his subsequent detention, the detention may be illegal. In Rudul Shah vs. State of Bihar[128] where the petitioner was acquitted by the Court of Session on 3.6.1968 but was released on 16.2.1982 i.e. after 14 years. Such detention was held to be illegal.

[123] Section 41(1) (a) of Cr.P.C.
[124] Section 41(1) (g) of the Code.
[125] Section 41(1) (i) of the Code.
[126] 1978 Cri.L.J. 1062 (Pat.) See also observations in ShyamDattaraybeturkar vs. Special Executive Magistrate, Kalyan, 1999Cri.L.J. 2676 (Bom.H C)
[127] 1989 Cri.L.J. 383 (H. P.)
[128] AIR 1983 SC 1086.

For the effective enforcement of Article 21 and 22(1) of the Constitution and in order to have transparency in the accused-police relations the following requirements should be complied with:

1. An arrested person being in custody is entitled, if he so requires 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 of arrest must be held to flow from Articles 21 and 22(1) and enforced strictly.
4. A person who has been arrested or detained and is being held in custody in the police station or interrogation centre 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.
5. 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.
6. 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.
7. 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.
8. 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.
9. The arrestee should be subjected to the 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.
10. Copies of all the documents including the memo of arrest, referred to above, should be sent to the illaqa Magistrate for his record.

2.6 Right to be produced before the Magistrate within 24 hours of Arrest and Effect of Non-Production of the Accused

Article 22(2) of the Constitution of India provides another procedural safeguard to an accused in the form of fundamental right that: “Every person who is arrested and detained in custody shall be produced before the nearest Magistrate within a period of twenty-four hours of such arrest to the court of Magistrate”. It is further

provided by the same Article that "no such person shall be detained in custody beyond the said period without the authority of a Magistrate." Thus, the maximum time limit for which the police can keep a person under detention is 24 hours at his own authority; even if the arrest and detention is malafide and contrary to law, the arresting officer may not be liable to be sued for damages for false imprisonment. Detention beyond 24 hours without being produced and authorized by a Magistrate shall be illegal. In this regard the actual time of arrest is material in order to judge whether the police authorities did or did not comply with the Constitutional requirements of Article 22(2) of the Constitution. This right has been recognized with three fold objectives in mind:

(1) To prevent arrest and detention for the purpose of extracting confession or as a measure of compelling people to give information.
(2) To afford an early recourse to a judicial officer independent of the police on all questions of bail or discharge; and
(3) To prevent police stations being used as if they were prisons.

CHAPTER-5

JUDICIAL INTERPRETATION

5.1 Introduction

Judicial Interpretation in Right to Life and Personal Liberty Under Article 21 of **Indian** Constitution, according to the Constitution, Parliament and the state legislatures in **India**have the power to make laws within their respective jurisdictions. This power is not absolute in nature.

The role of judiciary has been immensely significant and dynamic in the interpretation and evolution of labour laws in India. The noble principles enshrined in the Constitution such as equality, justice and dignity of labour have been reaffirmed by various judgments of courts. Judiciary not only interprets the existing laws but many a times paves the way for enactment of new laws by way of various decisions and directions. Contract Labour (Regulation and Abolition) Act, 1970 (hereinafter named as the Act) is such a case. The Act was enacted after the Supreme Court's landmark judgment in the case of *Standard Vacuum Refining Company of India Ltd. vs. It's Workmen and Others*[129]. This Judgment was considered at length by the legislature before the enactment of the Act. Section 10 of the Act relating to abolition of contract labour, more or less, is the verbatim of what Supreme Court ruled in this case. After the enactment, the law was further evolved by the higher judiciary.

The general affinity of the judicial activity has been in favour of the poor and the weak party which is undoubtedly, the labour. Judiciary, within the scope of the Act, has tried its best to protect the rights of contract workers. It is true particularly till the rise of the era of globalisation. However, the human rights approach taken by the judiciary in favour of labour in general and contract labour in particular, is said to have deviated after the adaptation of new capital centric economic policies by the Government. It has been argued that the courts are also being influenced by the capital driven growth syndrome and their decisions regarding contract labour particularly after the judgment in the case of The Steel Authority of India Ltd. vs. National Union for waterfront workers[130] (SAIL case for short) tell a similar story. From all around the economic world, there are arguments challenging the practicability and viability of the Indian labour legislations in the changed economic realities and their consequent interpretations by the courts. It is in this context that this chapter endeavours to analyse the scope of the role of judiciary under the existing framework of the Act (read with Rules) by extensively examining the specific reliefs granted in the cases involving contract labour. The broader object of the chapter is to find out the means to secure proper access to judicial action to the poor and vulnerable contract workers.

5.2 Article 21 of the Constitution of Indiafair Trial: Speedy Trial & Speedier Disposalof Criminal Cases

[129] (1960) SCR (3) 466.
[130] 2001 III CLR, 349.

Ambit & Scope Of Art. 21:

"No person shall be deprived of his life or personal liberty except to procedure established by law. This is the guarantee enshrined in Art. 21 of the Constitution."[131]

5.3 Life & liberty under article 21 of the constitution:

The scope & ambit of the words 'life' & 'liberty' used in Article 21 has been expanded considerably due to liberal interpretation by the Courts. The most noticeable feature of this expansion of Article 21is that many of the non-binding & non-enforceable Directive Principles enshrined in Part IV of the constitution have now emerged as enforceable fundamental rights by magical want of judicial activism, playing on the said article, e.g. right to clean environment, right to shelter, right to food, clothing, livelihood, etc. The Supreme Court in various cases has also imposed an obligation upon the state to take measures for ensuring the individual a better enjoyment of his life & dignity.

5.4 Constitutional philosophy of personal liberty:

- The constitutional philosophy of personal liberty enshrined in Article 21 is an idealistic one, the curtailment of liberty by way of imposing reasonable restrictions in the name of security of the State, public order & morality, etc. being envisaged as necessary evil to be administered under strict constitutional restrictions.
- In ***Ichhu Devi vs. Union of India, Bhagwati***, J. spoke of this judicial commitment & stated that
- "The court has always regarded personal liberty as the most precious possession of mankind & refused to tolerate illegal detention, regardless of the social cost involved in the release of a possible renegade."
- The constitution is all pervasive. All laws made by the State must, therefore, yield to constitutional protections & restrictions. The citizen's right to personal liberty is guaranteed under Articles 21 & 22 of the Constitution irrespective of his political beliefs, class, creed or religion.

5.5 Protection of personal liberty under Article 21:

Art. 21 of the constitution aims to prevent encroachment upon the personal liberty of an individual by the State except in accordance with law & in accordance with the provisions thereof & with the procedure established by law. The provisions of law must be strictly complied with before depriving a person of his personal liberty by the State & must not be deviated from to the disadvantage of the person affected.[132]

In *Vinod Narainvs. State of UP*, it was held that for disposal of a bail application, no time bound direction under Article 226 of the Constitution can be issued.

The said view has been reiterated in P.Ram Chandra Rao by the Supreme Court.

[131] The Prosecution-Comparative-Aspects, "crucihttp://law.jrank.org/pages/1855/ decisionprosecute.htmlal"(Date 10th April 208)and The prosecution system in India, "www.indiatogether.org/2005/jul/gov-prosecute.htm"
[132] Sec. 321 of the Code of Criminal Procedure, 1973

5.6 Deprivation of personal liberty if accused involved in a number of cases:

In a case where an accused is alleged to have deceived millions of countrymen, who have invested their whole life's saving in fabricated & frivolous companies promoted by the accused & when multiple cases are pending against him in different parts of the country, he cannot at all complain of breach of Art. 21, on the ground that he is not being able to be released out of bail custody due to different production warrants issued by different courts. Issuance of production warrants by the court & the production of accused in court, in case in which he is involved, is a procedure duly established by law & as a result, the accused cannot be allowed to complain of infringement of his rights under Art. 21 of the constitution. [133]

5.7 Personal liberty & due process of law:

It should be kept in mind that personal liberty should be in conformity with the provisions of Article-21 of the constitution of India which has widened the meaning & scope of life & personal liberty.

The expression "due process of law" has not been defined anywhere in the Constitution of India, but this expression has been well defined under Section 6 (3), Requisitioning & Acquisition of Immovable Property Act. 1952. In Hagar vs. Reclamation Distt., the Court observed:

"By 'due process of law' is meant that it must be adopted to the end to be attained, whenever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the justness of the judgment sought."

A procedure, prescribed by law, depriving an individual of his personal liberty, must adhere to the norms of justice failing which, it shall be deemed unreasonable & consequently, the action taken under it shall be vitiated. This view is well established.

Any action taken by a statutory authority must, therefore, be reasonable & within the scope of authority. Both these elements must be present. The absence of either of them renders the entire procedure invalid. The procedure prescribed by law & the law prescribing it cannot be separated from each other. If a law is found to direct the doing of an act which is forbidden by Constitution or to compel, in the doing of an act the adoption of a procedure which is impermissible under the Constitution, it would have to be struck down.

5.8 Purpose of criminal trial

The paramount purpose of criminal justice is the protection of the innocent & punishment of the offenders. A victim for securing this end has come to the Criminal Court for punishing the offenders. But prolonged pendency of cases has created an insurmountable barrier in the dispensation of criminal justice. This has cast a serious repercussion on the public at large. They have lost their faith in the present system of the criminal justice administration. Huge numbers of criminal cases pending for years together are creating unbearable

[133] Sec.321 of the Code of Criminal Procedure, 1973

mental & economic pressure on the litigants of the criminal justice system. The disposal rate in comparison with the institution of criminal cases is hopelessly meager.[134]

5.9 Illegal Incarceration & Compensation:

In *Rudul Shah vs. State of Bihar*[135], the Supreme Court held that in the exercise of the jurisdiction under Article 32 of the Constitution, it can order payment of monetary compensation in case of infringement of the fundamental right to life & liberty of a petitioner.

The Court pointed out as under:

"Article 21 will be robbed of its significant content if the power is limited only to passing orders of release from illegal detention. However, the violation of Article 21 can be prevented if its violators are made to pay monetary compensation. Administrative sclerosis leading to gross violation of fundamental rights cannot be corrected by any other method open to the judiciary to adopt. Right to compensation can help repair the damage to a certain extent & acts as an analgesic for the pain caused by infringement of the fundamental right to personal liberty. Respect of rights of individuals is the true spirit of democracy. Hence, the damage done by the officers of the State to the petitioner's rights must be repaired by the State though it may have recourse against its officers. "[136]

5.10 Rights To Speedy & Expeditious Criminal Trial

One of the most cherished fundamental rights of the accused is the right to speedy trial. This right is guaranteed by Article 21 of the Constitution as part of right to life & personal liberty. In a case where the proceedings had been lingering on for 10 years & proceedings were to commence de novo of the transfer of the Presiding Officer. On several dates, the witnesses had not appeared & the case did not make any progress. The court held that delay in trial is an infringement of his fundamental right to speedy & expeditious criminal trial. In necessary cases, the Court must exercise its inherent powers to quash the proceedings to meet the ends of justice.

The obligation to ensure implementation of constitutional guarantees lies on the State & in cases where speedy trial cannot be ensured, the citizen’s liberty cannot be curtailed endlessly & he will, therefore have to be released. Whether an accused who is facing a trial is in custody or whether he is on bail are matters of little consideration in this regard because the liberty of the citizen is still curtailed either completely or partially. [137]

5.10.1 Speedy trial:-

Section 309 of the Code of Criminal Procedure, 1973 (amended y the Act 13 of 2013) lays down that:

[134]P. Venkateh, ‘Police Diaries, Statements, Reports and Investigations’, Edition 1990 Premier, p .no. 182
[135] Rudul Shah vs. State of Bihar (1983) 4 SCC141.
[136] Committee on Reform of Criminal Justice System 2003, Home Ministry, Government of India, Vol. I.
[137] Section 225 of the The Code of Criminal Procedure , 1973

(1) In every inquiry or the trial the proceeding shall be continued from day-to-day until all the witnesses in attendance have been examined, unless the court finds the adjournment of the same beyond the following day to be necessary for reasons to be recorded:

Provided that when the inquiry or trial relates to an offence under section 376, section 376A, section 376B,, section 376C & section 376D of the Indian Penal Code, the inquiry or trial shall, as far as possible be completed within a period of two months from the date of filling the charge sheet.[138]

(2) If the court after taking cognizance of the offence, or commencement of trial, finds it necessary or advisable to postpone the commencement of, or adjourn, any inquiry or trial, it may from time to time, for reasons to be recorded, postpone or adjourn the same on such terms as it thinks fit, for such times it considers reasonable, & may by warrant remand the accused in custody.

Provided that no magistrate shall remand an accused person to custody under this section for a term exceeding fifteen days at a time.[139]

Provided further that when witnesses are in attendance, no adjournment or postponement shall be granted, without examining them, except for specific reasons to be recorded in writing.

Provide also that no adjournment shall be granted for the purpose only of enabling the accused person to show cause against the sentence proposed to be imposed on him.

Provided also that:--

(a) No adjournment shall be granted at the request of a party, except where the circumstances are beyond the control of the party.

(b) The fact that the pleader of a party is engaged in another court shall not be a ground for adjournment.

(c) Where a witness is present in court but a party or his pleader is not present or the party or his pleader though present in court, is not ready to examine or cross examine the witness, the court may, if thinks fit, record the statement of the witness & pass such orders as it thinks fit dispensing with the examination-in-chief or cross-examination of the witness, as the case may be.

Explanation 1:- If sufficient evidence has been obtained to raise a suspicion that the accused may have committed an offence & it appears likely that further evidence may be obtained by a remand; this is a reasonable cause for a remand.

Explanation 2:- The terms ones which an adjournment or postponement may be granted include, in appropriate cases, the payment of costs by the prosecution or the accused.[140]

[138] Section 137 of the Indian Evidence Act, 1872
[139] Section 143 of the Indian Evidence Act
[140] Section 235 of the Code of Criminal procedure, 1973

The legislature has brought certain significant changes in the Code of Criminal Procedure, 1973, to ensure that the accused person, the victim of the crime & the society at large get reasonable, just & fair trial. While drafting the code, the lawmakers also kept in view the three basic legal requirements that:

(1) the accused person, the victim of the crime & the society at large get a fair trial in accordance with the principle of natural justice;

(2) serious efforts should be made to avoid delay in the investigation & trial; &

(3) the procedure should not be complicated & full of technicalities & shall have provisions for providing free legal aid to the accused.

Considering this aspect, speedy trial & speedier disposal of criminal cases are now indispensable part in all criminal proceedings. The Supreme Court in *Hussainara Khatoon& Others vs. State of Bihar*[141] has made the following observations:

"We think that even in our constitution, though speedy trial is not specifically enumerated as fundamental right, it is implicit in the broad sweep & content of Article 21 as interpreted by this Court in *Meneka Gandhi vs. Union of India*[142] we have held in that case that Article 21 confers a fundamental right on every person not to be deprived of his life or liberty except in accordance with the procedure prescribed by law & it is not enough to constitute compliance with requirement of that Article that some semblance of a procedure should be prescribed by law, but that the procedure should be 'reasonable, fair & just'. If a person is deprived of his liberty under a procedure which is not 'reasonable, fair & just', such deprivation would be violative of his fundamental right under Article 21 & he would be entitled to enforce such fundamental right & secure his released. Now obviously procedure prescribed by law for depriving a person of his liberty cannot be 'reasonable, fair & just' unless the procedure ensures a speedy trial for determination of the guilt of such person.[143]

No procedure which does not ensure a reasonably quick trial can be regarded as 'reasonable, fair or just' & it would fail foul of Article 21. There can, therefore, be no doubt that speedy trial, & by speedy trial we mean reasonably expeditious trial, is an integral part of the fundamental right to life & liberty enshrined in Article 21".

In Kartar Singh vs. State of Punjab, a Constitution Bench observed thus:

"The concept of speedy & expeditious criminal trial is read as part of article 21 of the Constitution. Hence, it is a right guaranteed by the Constitution. This right encompasses at all stages of the trial namely investigation, enquiry, appeal, revision, etc so that any possible prejudice that may result delay from the time of the commission of the offence till it consummates into finality, can be averred. Section 309 of the Code of Criminal Procedure 1973 properly reflects this right. "

[141] Hussainara Khatoon & Others vs. State of Bihar, 1979 AIR 1369.

[142] Maneka Gandhi vs. UOI, AIR 1978 SC 597.

[143] State of U.P vs.Johrimal, AIR 2004 SC 3800

No length of time can be considered per se too long nor is the accused called upon to show the actual prejudice caused by delay in disposal of cases. The Court, therefore, has to adopt a balanced approach by considering the possible prejudices to be suffered by the accused by avoidable delay & to determine whether there has been a deprivation of the right to speedy trial. However, the fact of delay is dependent on the circumstances of each case because reason for delay will vary in each case.[144]

In *Abdul Rahman Antulay vs. R.S. Nayak*[145], the Constitution Bench of the Apex Court dealt with this aspect of the matter & laid down certain guidelines. These propositions are not exhaustive. It is difficult to foresee all situations. Nor is it possible to lay down any hard & fast rules. These propositions are:

(a) The accused is entitled to a right to speedy & expeditious criminal trial by way offair, just & reasonable procedure enshrined in article 21. Quick determination of the guilt of the accused is in the interest of all concerned.

(b) The accused is entitled to right to speedy trial at all stages- investigation, inquiry, trial, revision, etc. Hence, there is no reason to restrict the scope of this right.

(c) An accused has certain concerns with respect to right to speedy trial namely period of remand& pre-conviction incarceration, impairment in the ability of the accused to defend himself due to undue delay causing disappearance or non-availability of the witnesses or otherwise.

(d) At the same time, an important fact which cannot be ignored is that it is usually the accused who is interested in delaying the proceedings. Since the burden of proving the guilt of the accused lies on the prosecution, delay ordinarily prejudices the prosecution. However, there may also be cases where the Prosecution might be interested in delaying the proceedings for whatever reason.

(e) Hence, the question as to who is responsible for the delay needs to be answered in every case where there is an allegation of infringement of right to speedy & expeditious trial.[146]

(f) Though the obligation of ensuring a speedy trial lies upon the State but a realistic & practical approach needs to be adopted in such matters & factors like nature of offence, number of accused & witnesses, the workload of the Court concerned, prevailing local conditions &, the systemic delays need to be considered in order to determine whether the delay was unnecessary (resulting in breach of fundamental right under article 21).[147]

(g) Ordinarily, upon conclusion by the Court, of infringement of the right of accused under Article 21, the charges or conviction, as the case may be, shall be quashed. But if in a given case, the circumstances are such that it may not be just & equitable to quash the proceedings, such other appropriate orders namely an order to

[144]Ghanashyam Kishore Bajapayee vs. State of Uttar Pradesh,2005 CriLJ 1985.
[145] Abdul RahmanAntulay vs. R.S. Nayak, AIR1988 SC 153.

[146]SairamSanath Kumar, Dr.V.KrishnaAnanth, The prosecutorial system in our criminal justice administration – A close look, Vol.II,NULAS Law Journal ,page 14 at 17
[147] The qualtieis of prosecutor are narrated by Mr.Justice Rama Swamy of the High Court of Andhra Pradesh in V.Ramachandra v. M.C.Jagadhodhara Gupta, 1986 Crl.LJ 1820.

conclude the trial within a fixed time where the trial is not concluded or reducing the sentence where the trial has concluded—as the Court may deem fit may be passed.

(h) Fixing of any time limit for trial of cases is not practicable & neither does it guarantee a right to speedy trial. Reasons for delay vary in different cases. Hence, the Court must weigh all circumstances in a given case before pronouncing the judgment.

5.10.2 154th report of the Law Commission of India

The Law Commission of India which undertook a comprehensive review of the criminal procedure code, 1973, has in its 154th report made several recommendations with regard to speedy disposal of criminal cases. The recommendations are as under:

(1) Listing of cases should be done in such a way that the witnesses who are summoned are examined on the day they are summoned & adjournments should be made meticulously. The list should be prepared in such a way that a day or two are devoted continuously to all cases of a particular police station & cases should not be proceeded mechanically just according to the chronological order regardless of the fact of the likelihood of their being tried or not. The courts also should proceed with trial on a day to day basis & the listing of the cases should be on those lines. The High Courts should issue necessary circulars to all the criminal courts giving guidelines to listing of cases.[148]

(2) The court can take the assistance of the prosecutor &defence counsel in preparing the questions which are to be put in a concise form to the accused under section 313. The court can also permit the filing of written statements y the accused as sufficient compliances with sections 313.

(3) There is a general complaint that is undue delay in the serving of summons or execution of warrants issued by the court which in turn results in the delay of the trial. Likewise, service is not made at the correct residential address which again results in delay. At present the service system is completely in the hands of police in criminal cases who take they are otherwise “employed”. It is a common experienced that more than 25 % cases are adjourned due to non-appearance of the accused. It is therefore, highly desirable that a separate process agency directly under the control of the courts is established so that these delays can be avoided.[149]

(4) In order to minimize the long pending cases, it is necessary to adopt the directions given y the Supreme Court in Common Cause VS. Union of India... Further the direction given by the Supreme Court should not be made applicable to cases where the accused has been convicted more than once or against whom more than one case is pending. Moreover, the direction of the Supreme Court should be made applicable only to pending cases & not in respect of future cases. However, there should be a periodical review from time to time preferably every three years.

[148] A.I.R. 1980SC 423

[149]R.V.Kelkars, Lectures on Criminal Procedure, 4th Edition by K.N.ChandrashekharanPillai, Eastern Book Company, p. no.11

(5) A special machinery should be provided in order to procure vehicles for producing the accused before the court on each date & time.

Section 309 of The Code of Criminal Procedure, 1973, mainly relates to criminal proceedings in inquiries & trials conducted by the court & it is the only proviso which confers power on the trial court for granting adjournments in criminal proceedings. The section expressly provided that a court to enquire & try the case expeditiously as possible soon after it takes cognizance of the offence & when examination of the witness has once begun, such examination shall be continued from day to day basis until all the witnesses in attendance have been examined, unless the court finds the adjournment of the proceeding beyond the following day to be necessary for reasons to be recorded. It also imposed another stringent condition that when witnesses are in attendance, no adjournment or postponement shall be granted without examining them, except for special reasons to be recorded in writing.[150]

However, adjournment of cases despite attendance of the accused as well as the prosecution witnesses in the court, are now being held regularly in various courts in complete ignorance of the compliance procedure.

The Supreme Court in the ***State of U.P. vs. Sambhu Nath Singh & others***[151] held that:

"Witnesses tremble on getting summons from courts, in India, not because they fear examination or cross examination in courts but because of the fact that they might not be examined at all for several days & on all such days they would be nailed at the precincts of the Courts awaiting their chance of being examined. The witnesses, perforce, keep aside their avocation & go to the courts & wait & wait for hours to be told at the end of the day to come again & wait & wait like that. This is the infelicitous scenario in many of the courts in India so far as witnesses are concerned. It is high time that trial courts should regard witnesses as guests invited (through summons) for helping such courts with their testimony for reaching judicial findings".

It is further held that a witness if present in Court must be examined on the same day as they could attend the court only at the heavy cost to them, after keeping aside their own avocation. Certainly, they incur suffering & loss of income. The diet money paid to the witness is also of very meager amount. It is harassment for the witnesses who are called in Courts & made to stand at the doorstep from morning till evening only to be told at the end of the day that the case is adjourned to another day, there is a need for the judges to keep a check on this malpractice. The Presiding Officers must take care not to grant adjournments in a casual manner.[152]

5.10.3 Fair Trial:

- Fair trial is an integral part of Article 21 of the constitution of India. It is also a norm of international human rights law & adopted by many countries like U.S.A., Canada, U.K. & India. Some of the basic features of fair trial preserved in Universal Declaration of Human Rights, 1948 are as under:
- Article 10(i) — Everyone is entitled in full equality to a fair & public hearing by an independent & impartial tribunal in the determination of his rights & obligations & of any criminal charge against him.

[150] Surendra Prakash Tyagi, Session Trial Practice and Procedure, Vinod Publication, 1989, p. no136
[151]Criminal Appeal No. 392 of 2001
[152] BikramJeetBatra,,PublicProsecutioninneedofreform,"www.amanpanchayat.org," (Date of visit 21st March 2024)

- Article 1 1(ii) — (1) Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defense.
- No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time, at the time it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.[153]
- Article 14 of the International Covenant on Civil & Political Rights reaffirmed these objects of the Universal Declaration on Human Rights.
- The concept of fair trial is based on the principle that the legal procedure adopted by the state in relation to the trial of any of the accused person for his alleged commission of any offence must be just, fair & reasonable. The Supreme Court in Zahira Habibullah Seikh's case[154] held that:-
- "Each one has an inbuilt right to be dealt with fairly in a criminal trial. Denial of a fair trial is as much injustice to the accused as is to the victim & the society. Fair trial obviously would mean a trial before an impartial judge, a fair prosecutor & an atmosphere of judicial calm. Fair trial means a trial in which bias or prejudice for or against the accused, the witness, or the cause which is being tried, is eliminated."

[153] BritannicaConciseEncyclopedia:prosecutorwww.answers.com/topic/prosecutor?cat=biz-fin, date 25th April 2024
[154]Zahira Habibulla Sheikh & others vs. State of Gujarat, (2006) 3 SCC 374: AIR 2006 SC 1367

5.11 Historical Background

The true test of a democracy is how its laws stand with regard to the life and liberty of its people. In England, charters of liberties are set out in the Magna Carta of 1215. In the same vein.

The development of the Fundamental Rights in India was inspired by England's Bill of rights (1689), the United States Bill of Rights (1791), France's Declaration of Rights of Man (1789). Under Rowlett Act, 1919 extensive powers were given to the British Government and the police which resulted in arrest and detention of the individuals, warrant less searches and seizures and also restriction on public gatherings. Eventually this resulted in mass campaigns of non- violent civil disobedience throughout the country. The people of the country demanded civil freedoms and limitations on government powers. These were influenced by the Independence of Ireland. The Constitution of Ireland and the Directive Principles of the State Policy were an inspiration for the people of India for the demand of independent government. The Nehru Commission in 1928 composing of representatives of Indian political parties proposed constitutional reforms for India. The Constituent Assembly of India composing of elected representatives was given up the task of developing a Constitution for the nation. The Constituent Assembly first met on 1946, who were in large majority appointed persons from diverse political backgrounds for developing the Constitution of India, chairpersons of committees and sub-committees responsible for different subjects. A notable development during that period having significant effect on the Indian constitution took place on 10 December 1948 when the United Nations General Assembly adopted the Universal Declaration of Human Rights.

The framers of Indian constitution were deeply influenced by the international document i.e. Universal Declaration of Human Right (UDHR) 1948 which had a great impact on the drafting of Indian constitution. The Article 9 of UDHR provides for 'protection of life and personal liberty' of every person. As India was signatory to the declaration, the constituent Assembly adopted the similar provision as a fundamental right therein. The Hon'ble Supreme Court observed that the UDHR may not be a legally binding instrument but it show how Indian understood the nature of Human Rights at the time when Constitution was adopted. Article 21 is the celebrity provision of the Indian Constitution and occupies a unique place as a fundamental right[155].

5.11.1 Constituent Assembly Debate Summary

Draft Article 15 was introduced and debated in the Constituent Assembly on the 6th and 13th of December 1948. There was conflict in the Assembly regarding the term 'procedure established by law'. Members argued that this term was insufficient[156] as the legislature of the day could potentially pass a law establishing a procedure which might significantly erode civil liberties. In such a situation, the judiciary can only check if an established procedure has been followed and cannot review the law itself for adherence to fundamental rights. The inclusion of the 'due process' term into the provision, would allow the judiciary to investigate if the law itself is consistent with provisions of fundamental rights and would be in a position to protect civil liberties. Members defending 'procedure established by law' argued that allowing for judges, who are not

[155] International Journal of Law - ISSN: 2455-2194, RJIF 5.12 A Volume 3; Issue 3; May 2017; Page No. 98-100
[156] Constituent Assembly Debates http://cadindia.clpr.org.in/

immune to prejudices and biases , to sit in judgment of laws passed by the legislature would be undermining the authority of the legislature and hence, un-democratic. When the Article was put to vote, the assembly passed the Draft article with the term 'procedure established by law' intact. When the draft Committee finally completed and submitted to Constituent Assembly. Clause 9 or Draft Art.15 read as the present Art.21.[157]

5.11.2 Meaning of 'right to life'

'Everyone has the right to life, liberty and the security of person.' The right to life is undoubtedly the most fundamental of all rights. All other rights add quality to the life in question and depend on the pre-existence of life itself for their operation. As human rights can only attach to living beings, one might expect the right to life itself to be in some sense primary, since none of the other rights would have any value or utility without it. There would have been no Fundamental Rights worth mentioning if Article 21 had been interpreted in its original sense. The notion that certain rights are inalienable was embodied in the American Declaration of Independence (1776) in the following terms: We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness.

In the case of **Munn vs. State of Illinois**, 94 U.S. 113 (1876) the US Court referred to the observation of Justice Field, wherein he stated that by the term 'life' as here used something more is meant than a mere animal existence. Thus, it embraces within itself not only the physical existence but also the quality of life. It was the first case on the definition of word 'LIFE'.

Meaning of Personal Liberty: Liberty of the person is one of the oldest concepts to be protected by national courts. As long as 1215, the English Magna Carta provided that, No freeman shall be taken or imprisoned but by the law of the land.

The right to personal liberty as understood means in substance a person's right not to be subjected to imprisonment, arrest, or other physical coercion in any manner that does not admit of legal justification. Dicey, This Constitution guarantees to every citizen of India full freedom and liberty from any sort of harassment, repression or exploitation from any government or any authority of the government and hence this constitution assures to every citizen of India free, fearless and happy life with dignity of every person.[158]

Even our preamble of the constitution has a special significance for Liberty which assures every citizen of India the freedom of speech and expression, religious independence and choice of going by one's own belief. The fundamental rights of life and personal liberty have many attributes and some of them are found in Art. 19. In other words, 'personal liberty' means freedom from physical restraint and coercion which is not authorized by law.

[157] Constituent Assembly Debates http://cadindia.clpr.org.in/ last visited on 25th March2024
[158] A.K. Gopalan vs. State of Madras, AIR 1950 SC 27

The smallest Article of eighteen words has the greatest significance for those who cherish the ideals of liberty. What can be more important than liberty? In India the concept of 'liberty' has received a far more expansive interpretation.

Article 21, - Protection of Life and Personal Liberty: No person shall be deprived of his life or personal liberty except according to procedure established by law

Concept of Right to Life And Personal Liberty & Its Changing Dimensions: The Traditional Approach of the Supreme Court, It is hard to appreciate fully the extent of development of right to life without an overview of the traditional approach. Article 21 lays down that no person shall be deprived of his life and personal liberty except according to the procedure established by law. It was this procedure established by law that was first questioned and interpreted by the Supreme Court of India in the case of **A.K. Gopalan vs. State of Madras**[159] the validity of the Preventive Detection Act. 1950 was challenged. The main question was whether Art. 21 envisaged any procedure laid down by a law enacted by the legislature, or the procedure should be fair and reasonable. On behalf of the Appellant, an attempt was made to persuade the Supreme Court to hold that the courts can adjudicate upon the reasonableness of the Preventive Detection Act, 1950, or for that matter any law depriving a person his personal liberty.

Three arguments were presented from the Appellant side and the arguments were:
(1) The word law in Art. 21 does not mean merely enacted law but incorporates principle of natural justice so that a law to deprive a person of his life or personal liberty cannot be valid unless it incorporates these principles laid down by it.
(2) The reasonableness of the law of preventive detention ought to be judged under Art. 19.

(3) The expression procedure established by law introduces into India the American concept of procedural due process which enables the Courts to see whether the law fulfils the requisite elements of a reasonable procedure.

A.K. Gopalan vs. State of Madras[160] held the field for almost three decades, i.e., 1950 to 1977. This case settled two major in points in relation to Art. 21. One, Arts. 19, 21 and 22 are mutually exclusive and independent of each other. Two, a law affecting life or personal liberty of a person could not be declared unconstitutional merely because it lacked natural justice or due process. The legislature was free to lay down any procedure for this purpose. As interpreted in A.K. Gopalan, Art. 21 provided no protection or immunity against competent legislative action. Art. 21 gave a carte blanche to a legislature to enact a law or to provide for arrest of a person without much procedural safeguards. It gave final say to the legislature to determine what was going to be procedure to curtail the personal liberty of a person in a given situation and what procedural safeguards he would enjoy. The Supreme Court de linked Art. 19 from Art. 21 and 22. This view led to bizarre decision at that time. It was because of this view that in the case of *Ram Singh vs. Delhi*[161]. A

[159] A.K. Gopalan vs. State of Madras, AIR 1950 SC 27
[160] Ibid.
[161] Ram Singh vs. Delhi, AIR 1951 SC 270

person was detained under Preventive detention Act for making speeches prejudicial to the maintenance of public order, the court refused to assess the validity of detection order with reference to Art.19(1)(a) read with Arti.19(2) stating that even if right under Art. 19(1)(a) was abridged, the validity of preventive detention order could not be considered with reference to Art.19(2) because of the Gopalan ruling that legislation authorizing deprivation of personal liberty and did not fall under Art.19 and its validity was not to be judged by the criteria in Art.19.Though, in course of time this rigid view came to be softened and the beginning of the new trend was to be found in *R.C. Cooper vs. Union of India*[162], also popularly known as Bank Nationalization case, the Supreme Court applied Art.19(1) (f) to a law enacted under Art.31(2), to view the validity of the law. Before this case these two articles where considered mutually exclusive of each other. This case had such an impact on the view of the Supreme Court regarding the mutually exclusiveness of fundamental rights. That in the case of *Sambhu Nath Sarkar vs. State of West Bengal*[163] Supreme Court recognized the force of this logic that the bench said that the approach of the court in the Bank Nationalization[164] case had held majority of A.K. Gopalan[165] case was incorrect, this completely knocked out the Court's earlier argument in Gopalan.

5.11.3 Aspect of Personal Liberty

Maneka Gandhi vs. UOI[166] is a landmark case of the post- emergency period. This case shows how liberal tendencies have influenced the Supreme Court in the matter of interpreting Fundamental Rights, Particularly Art. 21, A great Transformation has came about in the judicial attitude towards the protection of personal liberty after the traumatic experiences of the emergency during 1975-77 when personal liberty had reached its lowest[167]. The period characterized as the darkest period in the Indian Constitutional history as become clear from the Supreme Court pronouncement in *A.D.M Jabalpur vs. Shiva Kant Shukla*[168]. Popularly known as Habeas Corpus Case and has been severely criticized by scholars in India. This case showed that 21 as interpreted in Gopalan could not play any role in proving any protection against any harsh law seeking to deprive a person of his life or personal liberty, after emergency it was realized that power to order preventive detention was misused by the official machinery during the emergency and something should be done so that such a situation might not be repeated in future. Accordingly Art.359 of the constitution was amended by 44th Amendment to nullify some amendment made in the 42nd,(Indira Constitution) thus by 44th amendmentArt.20 & 21 never be be suspended even during emergency and other fundamental rights won't suspend automatically. It needs separate order by president. Infact this case has acted as a accelerating agent for the transformation of the judicial view on Art.21[169]

[162] R.C. Cooper vs. Union of India, AIR 1970 SC 564
[163] Sambhu Nath Sarkar vs. State of West Bengal, AIR 1973 SC 1425
[164] *Supra* note 11
[165] *Ibid*
[166] Maneka Gandhi vs. UOI, AIR 1978 SC 597.

[167] M.P Jain, Indian Constitutional Law Vol-1, pp-1615
[168] (1976) 2 SCC 521; AIR 1976 SC 1207
[169]Prof.G.R.Jagadeesh, Conceptualization of personal liberty by KILPAR,2014 Pp-127-128

The court has reinterpreted Art.21 and practically overruled Gopalan case which can be regarded highly creative judicial pronouncement on the part of Supreme Court. Since Maneka Gandhi case the Supreme Court has given Art. 21, broader and broader interpretation so as to imply many more fundamental rights. In course of time, Art.21 has proved to be very fruitful source of rights of the people.

In Maneka Gandhi case[170], order under S. 10(3)(c) of the Passport Act which authorizes the passport authority to impound passport if it deems it necessary to do so in the interest of the sovereignty and integrityof India, security of India, friendly relations of India with any foreign country, or in the interest of general public was challenged. Maneka Gandhi's passport was impounded by the Central Government under Passport Act in the interest of general public. a writ petition challenging the order on the ground of violation of her fundamental rights under Art.21.One of the major grounds of challenge was that the order impounding the passport was null and void as it had been made without afford in gher an opportunity of being heard in her defence. The leading opinion in Maneka Gandhi case was pronounced by Justice Bhagwati. The Court reiterated the proposition that Art. 14, 19, and 21 are not mutually exclusive. This means that a law prescribing a procedure for depriving a person of 'personal liberty' has to meet the requirement of Art. 19. Also, the procedure established by law in Art. 21 must answer the requirement of Art. 14 of the Constitution of India.

The expression personal liberty in Art. 21 were given an expansive interpretation. The court emphasized that the expression personal liberty is of wide stamplitude covering a variety of rights which go to constitute the personal liberty of man. The expression ought not to be read in a narrow and restricted sense so as to exclude those attributes of personal liberty which are specifically dealt with in Art. 19. The attempt of the Court should be to expand the reach and ambit of the fundamental rights rather than attenuate their meaning and content by the process of judicial construction, and hence right to travel abroad falls under Art. 21. The most significant aspect of the case is the reinterpretation of the expression procedure established by law used in Art. 21. Art. 21 would no longer mean that law could prescribe some semblance of procedure, however arbitrary or fanciful, to deprive a person of his personal liberty. It now means that a procedure must satisfy certain requisites in the sense of being just, fair and reasonable. The process cannot be arbitrary, unfair or unreasonable. Thus, the procedure in Art.21 must be right and just and fair and not arbitrary, fanciful and oppressive. The Court reached it decision by holding that Arts. 21, 19 and 14 are mutually inclusive.

The reincarnation of Art.21 which Maneka Gandhi case[171] brought has been exerting a deep impact on contemporary constitutional jurisprudence. Maneka Gandhi case completely overrides the Gopalan'sview[172] which had held the field for nearly three decades. Since Maneka Gandhi case[173], the Supreme Court has again underlined the theme that Arts. 14, 19 and 21are not mutually exclusive, but they sustain, strengthen

[170] Maneka Gandhi vs. UOI, AIR 1978 SC 597.

[171] Maneka Gandhi vs. UOI, AIR 1978 SC 597.

[172] *Supra* note-1

[173] Maneka Gandhi vs. UOI, AIR 1978 SC 597.

and nourish each other. It has brought the Fundamental right of life and personal liberty into prominence which is now regarded as the heart Fundamental Rights. In quite a few cases in the post-Maneka era, the Supreme Court has given content to the concept of procedural fairness in relation to personal liberty. By establishing a nexus between Arts. 14, 19 and 21, it is now clearly established that the procedure contemplated by the Art. 21 must answer the test of reasonableness. Thus, Art. 21 emerged as the Indian version of the American concept of due process of law and has come to the source of many substantive rights and procedural safeguards to the people. The Court has observed that Art.21, though couched in negative language, confers the Fundamental Rights to life and personal liberty and has also deeply influenced the administration of criminal justice and prison administration.

of Art. 21 would not be satisfied. Accordingly the Court suggested certain modifications in the Special Court Bill 1978. The Court suggested that there should be provision for transferring case from one Special Court to another which is necessary to avoid trail of an accused by a judge who may be biased against him. The Court further emphasised that there is a duty of the State to preserve law and order. It is the duty of the state to see that the rule of law enunciated by the Art.21 is available to the greatest number. In Olga Tellis case,[174] the Supreme Court has again emphasised that the procedure prescribed by the law for the deprivation of rights conferred by Art.21 must be fair, just and reasonable. It must conform to the norms of justice and fair play. Procedure which is unfair or unjust or attracts the vice of unreasonableness, there by vitiating the law which prescribe that procedure and consequently, the action taken under it.

Sterile approach of Gopalan's[175] case, the Supreme Court has found a potent tool to seek improve matters, and to fill the vacuum arising from governmental inaction and apathy to undertake reform, in the area of criminal justice. The key to this judicial activism is the phrase procedure established by law in Art.21 which does not mean any procedure laid down in the statute but just, fair and reasonable procedure and that the term law in Art.21 envisages not any law but a law which is right, just, fair, and not arbitrary, fanciful or oppressive. Conducting a fair trial for those who are accused of criminal offences is cornerstone of democracy. It is beneficial for both to the accused and as well as to the society. A conviction resulting from an unfair trail is contrary to our concept of Justice.[176]

Rights. The law in its eternal youth grows to meet the demand of the society.[21] Since Maneka Gandhi[22] case, Art. 21 has proved to be multi-dimensional. The aspect of Art.21 is brought out by the following judicial pronouncements.Thisextension in the dimensions of Art. 21 has been made possible by giving an extended meaning to the word life and liberty in Art.21.These two words in Art.21 are not to be read narrowly. These are organic terms which are be construed meaningfully. After Maneka Gandhi, we can witness a period by term 'Constitutional Renaissance' in the Indian judiciary that recognized & upheld the various aspects of the right to personal liberty are discussed in the diverse facets of personal liberty that follow:

[174] Olga Tellis vs. Bombay Municipal Corp., AIR 1986 SC 180
[175] *Supra* note-1
[176] State of Punjab vs. Baldev Singh, AIR 1999 SC 2378

In BandhuaMuktiMorcha vs. Union of India[177] the Supreme Court expanded the horizon of Art. 21 and held that right to life includes right to live with human dignity, free from exploitation and to have equal opportunity. The judicial approach with time thus has led to two very important results, viz:

1. Many Directive Principles which, as such, are not enforceable have been activated and has become enforceable.
2. The Supreme Court has implied a number of fundamental rights from Art. 21.
3. In course of time, Art. 21 have come to be regarded as the heart of Fundamental Right.[178] Art. 21 has enough of positive content in it and it is not merely negative in its reach.[179] Over time, since Maneka Gandhi, the Supreme Court has been able to imply several Fundamental Rights out ofArt.21. This has been possible by reading Art.21 along with some Directive Principles. Art. 21 has thus emerged into a multi-dimensional Fundamental Right.

5.11.4 Right to Livelihood

In the beginning the Supreme Court was of the view that the right to life in rt. 21 would not include livelihood. In re Sant Ram,[180] a case in pre-Maneka era, the Supreme Court ruled that right to livelihood would not fall within the expression life in Art. 21. The Supreme Court reiterated this proposition in several cases even in post- Maneka era. But then the view of the Supreme Court underwent a change. With the defining of the word life in Art. 21 in a broad and expansive manner, the Court came to hold that the right o life guaranteed by Art. 21 include the right to livelihood.[181] The Supreme Court has argued in the Olga Tellis vs. Bombay Municipal Corp.[182] that the right to livelihood is born out of the right to life, as no person can live without the means of living, i.e., the means of livelihood.

Slum Dwellers: In *Olga Tellis vs. Bombay Municipal Corp.*[183], the Supreme Court has made a significant pronouncement on the impact of Art. 21 on urbanization. In this case the Supreme Court accepted the plea that the right to life guaranteed by Art. 21 include the right to livelihood. The Supreme Court ruled that the eviction of persons from pavement or a slum not only results in deprivation of shelter but would also inevitably lead to deprivation of their means of livelihood which means deprivation of their life.

Right to Shelter: In *Shantisar Builders vs. Narayan Khimlal Totame*[184] the Supreme Court has ruled that the right to life is guaranteed in any civilized society. That would take within its scope the right to food, the right to clothing, the right to decent environment and a reasonable accommodation to live in. The difference between the need of an animal and a human being for shelter has to be kept in view. For an animal, it is the bare protection of the body; for a human being it has to be a suitable accommodation which would allow his to grow in all aspect physical, mental and intellectual. This concept was further expounded in the case

[177]Bandhua Mukti Morcha vs. Union of India, AIR 1984 SC 802
[178] Unni Krishna vs. State of Andhra Pradesh, AIR 1993 SC 2178
[179] P. Rathinam vs. Union of India, AIR 1994 SC SC 1844
[180]Re Sant Ram, AIR 1960 SC 932
[181]Board of Trustees of the Port of Bombay vs. Dilipkumar R. Nandkarni, AIR 1983 SC 109
[182] *Id*
[183] *Supra* note-3
[184] (1990) 1 SCC 520.

of *Chameli Singh vs. State of Uttar Pradesh*[185]. In the case of *U.P. Avas Evam Vikas Parishad*[186] case the Supreme Court stated that the right to shelter is a Fundamental Right, which springs from the right to residence assured in Art. 19(1) (e) and right to life under Art. 21 of the Constitution.

Right to Environment: Apart from several personal rights, the Supreme Court has made a significant contribution to the welfare of the people by using Art.21 for the improvement of the environment. In *Subhash Kumar vs. State of Bihar*,[187]the Apex Court held that enjoyment of pollution free environment is included in the right to life under Art.21. Also in the case of *A.P. Pollution Control Board vs. M.V.Nayudu*,[188] the Supreme Court has made very valuable suggestions for the improvement of adjudicatory machinery under the various environmental laws. The Supreme Court has accepted the doctrine of public trust which rests on the premise that certain natural resources like air, sea, water are means for general use and cannot be restricted to private ownership. The state is a trustee, and general public is a beneficiary to such resources. These resources are gift of nature and State as a trustee is duty bound to protect them.[189]

The right to life enshrined in Art.21hasbeenliberallyinterpretedsoastomean something more than survival and mere animal existence or animal existence. It therefore includes all those aspects of life which go to make a man's life meaningful, complete and worthliving. Art.21istobereadnotonlywithdirectiveprinciplesbutalsofundamental duties.[190]

Right to Medical Care: In *Parmananda Katara vs. Union of India*[191] the Supreme Court pronounced that preservation of life is of paramount importance. Once life is lost, status quo ante cannot be restored. It is the duty of the doctors to preserve the life without any discrimination.

In *Paschim Banga Khet Mazdoor Samiti vs. State of West Bengal*[192] the Supreme Court ruled that the Constitution envisages establishment of a welfare state, and in a welfare state, the primary duty of the government is to provide to provide adequate medical facilities for the people. The Supreme Court has insisted that government hospitals and the medical officers employed therein are duty bound to extend medical assistance for preserving human life. Failure, by a government hospital to provide timely medical treatment to a needy person violates his right to life guaranteed by Art. 21. But in recent case even there were several legal provisions exist through which prisoners can secure medical care but none seem to have been used to ease the suffering of the 90% disabled professor.

Right Against Sexual Harassment: The Supreme Court ensured that the female workers are not sexually harassed by their male co-workers at their work places. In Vishaka vs. State of Rajasthan[193] the Supreme Court has declared sexual harassment of a working woman at her place of work as amounting to violation of

[185] Chameli Singh vs. State of Uttar Pradesh, AIR 1996 SC 1051
[186] U.P. Avas Evam Vikas Parishad vs. Friends Co-op. Housing Society Ltd., AIR 1996 SC 114
[187] Subhash Kumar vs. State of Bihar, AIR 1991 SC 420
[188] A.P.Pollution Control Board vs. M.V.Nayudu,AIR 1999 SC 812
[189] M.C.Mehta vs. Kamal Nath, (1997) 1 SCC 388
[190] Noise Pollution (V) In Re, AIR 2005 SC 316
[191] ParmanandaKatara vs. Union of India, AIR 1989 SC 2039
[192] Paschim Banga Khet Mazdoor Samiti vs. State of West Bengal, AIR 1996 SC 2426
[193] Vishaka vs. State of Rajasthan, AIR 1997 SC 3011

rights of gender equality and right to life and liberty which is a clear violation of Arts. 14, 15 and 21 of the Constitution. Rape has been held to be a violation of a person's fundamental rights guaranteed under Art. 21. The Supreme Court held that rape is a crime against basic human rights and is also violative of the victim's right to life contained in Art. 21.[194]

Right of Medical Confidentiality: In *X. vs. Hospital Z*[195] the Supreme Court argued that a lady proposing to marry a person is entitled to all the human rights which are available to humans. The right to life guaranteed under Art. 21 would positively include the right to be told that a person, with whom she was proposed to be married, was the victim of a deadly disease, which was sexually communicable. Moreover, when two fundamental rights clash, viz., right to privacy and right to live a healthy life, the right which would advance the public morality or public interests, would alone is enforced through the process.

Right of Legal Aid: In *Madhav Hayawandan rao Haskot vs. State of Maharashtr*a[196] the Supreme Court held that an accused who cannot afford legal action is entitled for legal aid at the cost of the State. Also, held in the case of HussainaraKhatoon vs. State of Bihar[197] the Supreme Court held that a prisoner shall not be imprisoned for a period longer than the sentence pronounced by the court else it will led to deprivation of the prisoner's right to life to life and liberty under Art. 21.

Right to Education: The right to education has also been held to be a part of Article 21. A series of decisions, including *Mohini Jain vs. State of Karnataka*[198], *Unnikrishnan J.P. vs. State of A.P.*[199] etc. culminated in an amendment to the Constitution being moved in 1997, leading to the incorporation of Article 21-A, which reads as under:

The State shall provide free and compulsory education to all children of 6 to 14 years in such manner as the State, may by law determine Following this, the Right of Children to Free and Compulsory Education Act, 2009 was enacted.

Right to speedy trial: Speedy trial is a fundamental right implicit in the guarantee of life and personal liberty enshrined in Art. 21 of the Constitution and any accused who is denied this right of speedy trial is entitled to approach the Court for the purpose of enforcing such right. The Supreme Court held in HussainaraKhatoon vs. Home Secretary, State of Bihar that speedy trial is a fundamental right implicit in the guarantee of life and personal liberty enshrined in Art. 21 of the Constitution and any accused who is denied this right of speedy trial is entitled to approach Supreme Court under Art. 32 for the purpose of enforcing such right and the Supreme Court in discharge of its constitutional obligation have the power to give necessary directions to the State.

[194] Chairman, Railway Board vs. Chandrima Das, AIR 2000 SC 988
[195]Madhav Hayawandanrao Haskot vs. State of Maharashtra, AIR 1978 SC 1548
[196]HussainaraKhatoon vs. State of Bihar, AIR 1979 SC 1369
[197]HussainaraKhatoon vs. State of Bihar, AIR 1979 SC 1369
[198] (1992) 3 SCC 666
[199] Unni Krishna vs. State of Andhra Pradesh, AIR 1993 SC 2178

Right To Free Legal Aid: In state of *Maharashtra vs. ManubhaiPragajiVashi&ors*[200]. That will in turn enable the State and other authorities to provide free legal aid and ensure that opportunities for securing justice are not denied to any citizen on account of any disability. These aspects necessarily flowing from Articles 21 and 39A of the Constitution. In M.H Hoskot vs. State Of Maharashtra, Justice Krishna Iyer observed that providing free legal aid is the State's duty and not Government's charity. Held that a prisoner was entitled to a copy of the judgement and free legal aid if he was unable to secure legal assistant.

Right to life under Article 21 does not include right to die: Human life is precious one. The Supreme Court has shown radical change in its view. In Gian Kaur vs. State of Punjab[201] while deciding the validity of Sec.309 of I.P.C, the Court overruled the earlier view which was taken in P. Rathinam's case[202] and held that right to life does not include right to die and the extinction of life is not included in protection of life thus provision penalizing attempt to commit suicide is not violative to Art. 21 of the Constitution. But in landmark judgement Supreme Court reverse the arlier view and approves passive euthanasia, and upholds right to die with dignity, Supreme Court permits creation of a living will that will allow individuals to decide against artificial life support[203].

[200]1996 AIR 1 1995 SCC (5) 730
[201](1996) 2 SCC 648
[202](1994) 3 SCC 394
[203]Aruna Ramachandra Shanbaug vs. Union of India and others 5 (2011) 4 SCC 454

Article 21 includes Right to claim Compensation

The Supreme Court of India has also shown its dynamic and activist role in compensatory jurisprudence. For the first time in **NilabatiBehera v State of Orissa**[204], The Supreme Court directed the respondent-State of Orissa to pay the sum of Rs.1,50,000 to the petitioner and a further sum of Rs.10,000 as to be paid to the Supreme Court Legal Aid Committee. the Supreme Court held right to compensation as a fundamental right under Article 21 of the Constitution. Earlier in **Katri VS. State of Bihar** 1981, it was the discretion of the Court wherein it has awarded compensation to the victim. In **Rudal Shah v State of Bihar**[205] the Supreme Court awarded Rs. 35000/- to the petitioner who was kept in jail for 14 years despite of his acquittal order. In C**hairman, Railway Board v Chandrima Das**[206] the employees of the Railway Board had gang raped a Bangladeshi Women for which the Central Government was directed to award compensation under Article 21 of the constitution Smt. HanuffaKhatoon, who was not the citizen of this country but came here as a citizen of Bangladesh was, nevertheless, entitled to all the constitutional rights available to a citizen so far as right to life was concerned. She was entitled to be treated with dignity and was also entitled to the protection of her person as guaranteed under Article 21 of the Constitution.

Right to Privacy: For the first time, the issue was raised in Kharak Singh v State of Tamil Nadu 1993. Justice Subba Rao in his minority judgment said that the right to privacy flows from the expression personal liberty. This minority judgment paved path for the further development. In R. Rajgopal vs. State of Tamil Nadu 1995. the Supreme Court observed that right to privacy is nothing but 'right to be let alone and it is implicit in right to life and personal liberty guaranteed under Art.21 of Indian Constitution. And also in Lillu @ Rajesh and Anr vs. State of Haryana,[207] the Supreme Court held that Medical procedures should not be carried out in a manner that constitutes cruel, inhuman, or degrading treatment and health should be of paramount consideration while dealing with gender-based violence. The State is under an obligation to make such services available to survivors of sexual violence. Proper measures should be taken to ensure their safety and there should be no arbitrary or unlawful interference with his privacy. Two finger test on rape victims violates her Right to Privacy. Last Year unanimous judgment by the Supreme Court of India (SCI) in Justice K.S. Puttaswamy (Retd) vs Union of India is a resounding victory for privacy. The ruling is the outcome of a petition challenging the constitutional validity of the Indian biometric identity scheme Aadhaar. The judgment's ringing endorsement of the right to privacy as a fundamental right marks a watershed moment in the constitutional history of India.

5.12 Concept of Due Process& Procedure Established By Law

According to Article 21, there are two core points to be discussed about: -
(1) Procedure established by law; and

(2) Due process of law.

[204] smt nilabati behera alias lalita behera v state of orissa and others, AIR 1993 SC 1960
[205]Rudul Shah v State of Bihar, AIR 1983 SC 1086
[206]Chairman Railway Board vs. Chandrima Das (2000) 2 SCC 465
[207]Lillu @Rajesh &Anr vs. state of Haryana,2013 SCC.643

Procedure Established by law: (This Doctrine is originated under British Constitution and India follows it.)

As per this concept, any right of any person can be taken away by law, but, only one situation to take rights from the people and that condition lies in the name itself which is the system established by law which means proper procedure shall be followed. This principle has a main flaw. It does not asses if the laws made by Parliament are fair, just, and not arbitrary.

The procedure established by law states a law duly enacted is valid even if it's different from the principles of justice and equity. Procedures that are followed strictly are established by law that may increase the risk of compromise to the life and personal liberty of individuals due to unjust laws made by the law-making authorities. Thus, the procedure established by law protects the individual against the arbitrary action of only the executive.

Due Process of Law: (This Doctrine is originated under the US Constitution): This doctrine not only checks if there is a law to deprive the life of personal liberty of a person, but also see whether the law made is fair, just and not arbitrary. If the Supreme Court comes to know that any law as unfair, it will declare it as null and void. This doctrine leads to more fair treatment of individual rights. It gives the judiciary to judge the fundamental fairness, justice, and liberty of any legislation. Thus, Due process protects the individual against the arbitrary action of both executive and legislature. In India, there is no mention of the word 'Due Process.

This concept is based on three main things: Justice, Equity and Good Conscience. But in the case of Maneka Gandhi vs. Union of India, the Supreme Court has overruled the A.K.Gopalan's case and held that procedure established by law meant procedure that eventually was reasonable, fair and just. The decision rendered avoid the plain and simple meaning of procedure established by law' and introduced for the first time the grand canon of 'due process of law'.

In **Sunil Batra vs. Delhi Administration**, Justice Krishna Iyer has observed: 'Truly our Constitution has no 'due process clause' as the VIIIth Amendment (of the American Constitution) but in this branch of law, after Cooper and Maneka Gandhi's case the consequence is the same.

In the case of **RamleelaMaidan Incident**[208] Justice B.S. Chauhan in his opinion wrote that when police disturbed the crowd at night at 1:00 a.m., their right to sleep was violated. He held that right to sleep forms an essential part of Article 21 which guarantees personal liberty and life to all. Sleep forms an essential part of living a peaceful life, hence it is a fundamental right. And In *Selvi vs. State of Karnataka* (the landmark judgment in as much as it deals with the evidence given by narco-analysis, FMRI and polygraphs to be inadmissible & Violates personal liberty and privacy)., the Supreme Court have repeatedly held that substantive due process and due process generally are a part of Indian Constitutional law under Article 21 of the Constitution. But in the year of 2015, in the case of Rajbala vs. Haryana[209], the constitutional validity of

[208]Ramlila Maidan incident case* (2012) 5 SCC 1
[209]Rajbala vs. State of Haryana (2015)1 SCC 463

the Haryana Panchayat Raj (Amendment) Act 2015 was in question and the two-judge bench of the Supreme Court India strongly rejected the doctrine of substantive due process in India.

Recent Cases under Art.21:SC allows women entry to Sabarimala temple, says exclusionary practices violate right to worship under Art.25, 14, and 21. Rules disallowing women in Sabarimala are unconstitutional and violative of Article 21, Supreme Court Struck down Victorian era Section 497 of IPC as Unconstitutional, Plea filed in the Supreme Court challenging the constitutional validity of Section 497 of IPC, by an NRI from Kerala, Joseph Shine, who in his petition said Section 497 was "prima facie unconstitutional on the ground that it discriminates against men and violates Article 14, 15 and 21 of the Constitution".

The Supreme Court on Sept,2018-pronounced that Section 377 of the Indian Penal Code is unconstitutional. The five-judge bench read out four judgments, all of which held that the law, which criminalizes 'unnatural sex' between consenting adults and has been used to target the LGBTQI+ community in India[210], has been struck down in so far as it criminalizes same-sex intercourse. LGBTQ rights.[211]

[210] Navtej singh johar & ors. (petitioner(s)) versus Union of India thr. Secretary ministry of law and justice WRIT PETITION (CRIMINAL) NO. 76 OF

[211] National Legal Services Authority versus Union of India (2014) 5 SCC 438

CHAPTER-6

CONCLUSION & SUGGESTION

6.1 Conclusion

The Constitution of India reflects the hunt and aspiration of humanity for justice when its preamble speaks of justice in all its forms social, profitable, and political. Those who have suffered physically, mentally, or economically, approach the Courts, with great stopgap, for redressal of their grievances. Justice Delivery System is under an obligation to deliver prompt and affordable justice to its consumers, without compromising on the quality of justice in any manner or the rudiments of fairness, equivalency, and equity. The success of the Indian Judiciary on the Indigenous front is unparallel. Its donation to enlarging and administering mortal rights is extensively appreciated. Lord Chief Justice of England & Wales in his farewell speech delivered at the conclusion of Indo British Legal Forum meeting in Edinburg in 2006, intimately appreciated the enormous work done by the Supreme Court of India in developing the conception of rule of law and due process of law elevated in Composition 21 of our Constitution and enlarging its compass to the extent of encompassing the right to live in a healthy terrain. Mortal rights are occasionally called abecedarian rights or introductory rights or natural rights. As abecedarian or introductory rights they're the rights that can not, rather must not, be taken down by any legislative or any act of the government and which are frequently set out in a Constitution. As natural rights, they're seen as belonging to men and women by their veritable nature. They may also be described as “common rights” for their rights that all men and women in the world would partake, just as the common law in England, for illustration, was the body of rules and customs which, unlike original customs, governed the whole country. Since mortal rights aren't created by any legislation, they act veritably much the natural rights. The legal duty to cover mortal rights includes the legal duty to admire them.

It's generally believed that in malignancy of the colorful safeguards in the Cr.P.C. as well as the in the Constitution, the power of arrest given to the police is being misused to this day. It's also believed that the police frequently use their position of power to hang the arrested persons and take advantage of their office to wring plutocrats. There have also been in numerous reports on custodial violence that lead numerous to believe that privation of introductory rights of the arrested persons has come commonplace currently.

The Mallimath Committee in its Report on the reforms in the Criminal Justice System has stated that the indicted has the right to know the rights given to him under the law and how to apply similar rights. There have also been examines that the police fail to inform the persons arrested of the charge against them and hence, let the arrested persons flounder in guardianship, in complete ignorance of their contended crimes. This has been attributed to the social nature of our Felonious Justice System where the duty of arrest was thrust upon the Indian officers while the Britishers drew up the charge against the indicted. Therefore, it's entirely possible that the English origins of the Indian Criminal Justice system may have redounded unwittingly in the rights of the arrested persons falling through the cracks.

There's an imminent need to bring in changes in Criminal Justice Administration so that the state should fete that its primary duty isn't to discipline, but to fraternize and reform the malefactor and overall, it should be easily understood that socialization isn't identical to discipline, for it comprises forestallment, education, care and recuperation within the frame of social defense. Therefore, in the end, we find that the Rule of law regulates the functionary of every organ of the state ministry, including the agency responsible for conducting execution and disquisition which must confine themselves within the four corners of the law.

It's the duty of the police to cover the rights of society. It must be remembered that this society includes all people, including the arrested. Therefore, it's still the police's duty to cover the rights of the arrested person. Hence, in light of the bandied vittles, a police officer must make sure that bind isn't used unnecessarily, that the indicted isn't wearied needlessly, that the arrested person is made apprehensive of the grounds of his arrest, informed whether he's entitled to bail and of course, produced before a Magistrate within twenty-four hours of his arrest.

The right of particular liberty is a introductory mortal right honored by the General Assembly of the United Nations in its Universal Declaration of Human Rights. This has also been prominently included in the Convention on Civil and Political Rights to which India is now a party. Our Constitution recognizes it as a abecedarian right. There's no mistrustfulness that indeed an indicted/ jailed person has precious mortal rights. The term' arrest'isn't defined either in the procedural Acts or in the colorful substantial Acts, though Section 46, Criminal Procedure Code, 1973 lays down the mode of arrest to be affected. Arrest consists in the taking into guardianship of another person under authority empowered by law, for the purpose of holding or detaining him to answer a felonious charge or of precluding the commission of a felonious offence. The Law gives ample power to police officer for easing and making of arrest of indicted persons. Still, the powers are subject to certain conditions. The conditions are primarily handed for the protection of the interests of the person to be arrested and also of society at large because a fair trial implies that it should be fair to both the execution as well as the indicted person. The duty of the conditions can be considered, to an extent, as the recognition of the rights of the arrested person. There are still, some other vittles which have rather more expressly and directly created important rights in favour of arrested persons.

Conclusion: Article 21 of the Constitution says, no person shall be deprived of his life or personal liberty except according to procedure established by law. Maneka Gandhi's case is not only a landmark case for the interpretation of Article 21 but it also gave an entirely new viewpoint to look at the Chapter III of the Constitution. Prior to Maneka Gandhi's decision, Article 21 guaranteed the right to life and personal liberty only against the arbitrary action of the executive and not from the legislative action. Broadly speaking, what this case did was extend this protection against legislative action too. In Maneka Gandhi's case, the meaning and content of the words 'personal liberty' again came up for the consideration of the Supreme Court. In this case the Supreme Court not only overruled A.K. Gopalan's case but also widened the scope of words 'personal liberty'. After that the meaning Art. 21 right to life & personal liberty has changed multidimensional approaches and reached the new horizon. But Judicial activism leads to some SUPREME ERROR and sometimes it also mirrors that when judicial activism crosses its limits and starts becoming

judicial adventurism and it takes the form of judicial overreach. Moreover, Indian Court deliberately failed to recognise essence of LIFE in True Indian version. i.e Life in Hinduism embraces Dharma, Artha, Kama, Moksha- without which meaningless. Article 21, Right to Life without other Article just an alive human flesh.

6.2 Suggestions

For the proper implementation of human rights in the Criminal Justice system, the following suggestions are submitted:

(i) Minimization of Arrest A person is not liable to arrest merely on the suspicion of complicity in an offense.[212] There must be some reasonable justification in the opinion of the officer affecting the arrest that such arrest is necessary and justified. Except in heinous offenses, an arrest must be avoided. An arrest during the investigation may be considered justified in one or other of the following circumstances:

(a) The case involves a grave offense 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.

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

(c) The accused is given to violent behavior and is likely to commit further offenses unless his movements are brought under restraint.

(d) The accused is a habitual offender and unless kept in custody he is likely to commit similar offenses again.

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

(f) The need to prevent the continuation or repetition of that offence;

(g) The need to protect the arrested person himself or other persons or property;

(h) 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

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

(ii) Strict Compliance of Post Arrest Procedure

(a) The person under arrest must be produced before the appropriate court within 24 hours of the arrest (Section 56 and 57 Criminal Procedure Code). but it is the common practice among police officials that they do not make entries in their registers at the time the person is arrested, that practice can only be removed by strict compliance of the laws by concerned authorities.

[212] It was a committee on reforms of criminal justice system headed by Mr. Justice V. S. Malimath, it presented its report in march 2003.

(b) The person arrested should be permitted to meet his lawyer at any time during the interrogation.

(c) The interrogation should be conducted in a clearly identifiable place, which has been notified for this purpose by the Government. The place must be accessible and the relatives or friend of the person arrested must be informed of the place of interrogation taking place.

(d) The methods of interrogation must be consistent with the recognized rights to life, dignity and liberty and right against torture and degrading treatment.

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