INTRODUCTION

The Criminal Justice System "revolves around the accused". The object of the criminal trial is to dispense justice according to law of the land. The accused person faces the accusation for commission of some offence. The Law is set in motion from the moment of receipt of information about commission of an offence by police and lodging First Information Report in the Police Station. The police is expected to investigate the commission of the offence in accordance with procedure established by law. The objective of investigation is to collect evidence and to trace out and arrest the offender to face the accusation. The conviction or acquittal of the accused depends on the gravity and reliability of evidence. The criminal justice system thus starts from the police station and ends up in jail where offender undergoes the sentence.

The accused person is presumed to be innocent unless proved otherwise. This principle runs like a golden thread through the entire fabric of our criminal jurisprudence. Equally vital principle of criminal jurisprudence is that burden of proving beyond reasonable doubt the guilt of accused lies on the prosecution. These two cardinal principles are foundation of the criminal justice system and inherited from British legal system.

The offenders are human beings and they deserve to be treated so. The attitude of the society towards the offenders have also undergone a change with the passage of time. In ancient times accused persons were punished with all brutalities and treated like animals, though some rights were available to the accused person. Now person behind the bars have all Constitutional rights. The basic fundamental rights and freedom cannot be denied even to the person in police lock up or jail. The Magna Carta declared basic rights for the people of U.K. in 1215 but the concept of

2. The complaint can also be filed before the Magistrate under Section 190 Cr.P.C. for commission of an offence. Magistrate of First Class or Second Class specially empowered can take cognizance of any offence (i.e. cognizable or non-cognizable).
"human rights" at universal level came through the Universal Declaration of Human Rights in 1948 which affirmed the "faith in fundamental human rights in the dignity and worth of human person, in the equal rights of man and woman ....". This Universal Declaration also affected the minds of makers of the Indian Constitution who were drafting the Constitution at the contemporary period. Therefore all "human rights" find place in Part-III (Fundamental Rights) of Indian Constitution.

The term 'accused' is though used in the Constitution of India and the Code of Criminal Procedure, but it has not been defined. Term "accused of any offence" has been used in Article 20 (3) of the Constitution. It is clear that there is always a "accusation", against the "accused person." Kautilya in ancient times used the term "accused" in Arthasastra. The concept of 'Rule of law' was in existence though not in a refined form. The accused had some basic rights and with the passage of time new rights have emerged. The system for dispensation of justice keeps on changing. In the beginning the objective of trial of the person accused of an offence, was to punish the offender. For some time, 'tooth for tooth and eye for eye' rule also prevailed. Now offenders are treated like sick human beings who can be reformed and rehabilitated. The accused is also a person and citizen, therefore, he cannot be denuded of Constitutional rights and fundamental freedoms.

A right is a claim of an individual recognized by society and the State. Rights are those conditions of social life without which no person can survive in the society. History have witnessed many revolutions when people were denied basic rights.

The present rights of accused are a result of evolution through ages. Some minimal rights were available to the accused person in ancient times in India. Vedas are the earliest sources which provided "three basic rights that of Tana (body),

5. See Article 20(3); see also supra note 1, p. 9
6. The term is not defined in Section 2 of the Code. The term "accused" is used in several Sections of Cr.P.C., e.g. Secs. 207, 209, 228(2), 299, 303, 310, 313, 317, 318, 363, 379, 390, 391, 428.
7. See Kautilya (iv. 8.7, 8.8)
Dharma was the code of conduct which provided rules for everyone and violations were punishable. There are different theories pertaining to origin of rights. Even the natural law or dharma commands humane treatment of those in prison. Long before Hobbes, Locke and Rousseau, the Indian Vedas and epics in ancient times had provided for rights and duties of individuals, classes and communities.

The King was the fountain of justice but he alone never administered justice and councillors used to assist him in this regard. The rights of accused have been described by Manu in Manusmriti and Kautilya in Arthasastra.

The primary objective of criminal law was, "thus to punish offenders rather than paying compensation to the victims," as mere payment of compensation was not considered sufficient for ends of justice. In cases of "theft, assault, adultery, rape" there was provision for monetary compensation in addition to corporal punishment. Brihaspati prescribed fine for those who mixes bad and good articles together with compensation of double the quantity or value of article to the buyers. Similarly, Gautama prescribed compensation in cases of theft. Kautilya's Arthasastra is a treatise on various kinds of rights and he envisaged a sort of welfare State where King was to look after all sections of the society. The King used to dispose of the urgent matters expeditiously and basic rights like right to sleep, sitting down, meals, answering calls of nature, movement etc., were available to the accused inside prison house, besides the sanitary facilities and places of worship of respective deities. Penalties were laid for even law enforcement officials like Superintendent of Jails for torture of detenues, depriving food and water and beating the prisoner to death.

15. See Gautama X -46-7; see also Ling at Classical Law of Ancient India (1973), p.70.
17. Kautilya, Book (i) Chapter 19 Section 30.
19. Ibid. Book (ii) 5.56.
Kautilya even did not spare the King and punishment for him was also provided if some innocent accused was punished besides imposing fine on Magistrates and Judges. Two norms, viz. *Dharma* and *Danda* were the guiding factors of the administration and criminal justice system. The "Rule of Law" prevailed over "rule of man". In the Medieval period Muslim rulers ruled India and Muslim legal system continued till 1857. The source of Muslim Law is *Quran*, *Haddies*, *Sunnahas* and *Kiyas*. Punishments were divided in four categories viz., *Kisa*, *Hadd*, *Tazeer* and *Diya*. During Mohd. Tuglag period Sultan used to keep muftis inside the precincts of his palace to rule out possibility of muftis being bribed and influenced by anyone. Right of accused to be released on bail did exist during mughal rule in India. The accused could engage the vakil.

Britishers in India established administration in presidency towns and trial used to be held by the jury. Britishers transplanted their own criminal justice system in India and codified various laws in India. Lord Macaulay who drafted these laws considered mohammedan criminal law as defective and beyond reformation. The Code of Criminal Procedure, 1861 and Indian Evidence Act, 1872 provided several procedural rights for the accused person which was a progressive step in criminal jurisprudence.

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22. See Puri, S.K., *India Legal and Constitutional History* (1st Edn.)
23. *Kisa' meant retaliatory punishment; 'Hadd' meant specific punishments for specific offences; 'Tazeer' meant discretionary punishment depending on Judge's discretion; 'Diya' or 'Dyut' was a sort of penalty in the form of compensation on fixed scale to victim's next of kin.; see also Jain M.P., *Outlines of India Legal History*, N.M Tirpathi Ltd. Bombay (1981), p.317; see supra note 22 p.21.
26. The *Indian Penal Code, 1860*, the *Criminal Procedure Code, 1861*, Police Act, 1861 and *Indian Evidence Act, 1872* and many other laws were enacted during this period; see also Lord Macaulay's *Letter to Lord John Russel* Jan. 19, 1837.
27. Right to presumption of innocence, right against protracted confession, right to cross examination of prosecution witnesses and hostile witness, right to secrecy of communication with Counsel were provided under Sections 102-105, Sec 25, Section 136-138, Sec. 154 and Section 126 respectively of *India Evidence Act, 1872.* Similarly rights to get copies of statements of prosecution witnesses, production before magistrate, right to Counsel, trial in open court, right against double jeopardy, right to bail and right to appeal were provided under provisions of the *Code of Criminal Procedure, 1861.*
The Constitution makers have enshrined "human rights" in the form of fundamental Rights in Part-III of the Constitution.

The Constitution being source of all laws of the land is a supreme law. The Preamble of the Constitution aims to achieve the social justice, liberty of thought, expression and equality of status, among others to all citizens. Except the legal restrictions, imposed on him, other fundamental rights are available to accused and he can move the courts for enforcement of his rights. The basic Constitutional rights can't be halted at the prison gates and can be enforced within the prison campus.

In Sunil Batra (No.II) v. Delhi administration the Supreme Court had clarified that "Prisons are built with stones of law and so it behoves the court to insist that, in the eye of law, prisoners are persons, not animals, and punish the deviant guardian of the prison system where they go berserk. Convicts are not by mere reason of conviction denuded of all the fundamental rights which they otherwise possess. The Constitution enshrines fundamental rights in Part-III endeavours that "human liberty may be preserved, human personality developed and effective social and democratic life promoted." These Fundamental Rights are available against the State, for they are limitations upon all the powers of the Government, legislative as well as executive.

The Constitution commands that "The state shall not deny to any person equality before the law or the equal protection of the laws within the territory of India." Article 14 has been held to be the basic structure of the Constitution. The concept of "equality before law" is a negative concept which establishes the "Rule of Law." It is direction for the State to treat all persons alike and not to discriminate any person.

31. AIR 1980 SC 1579.
32. /b/d. p.1583.
35. Kumar, Narender, op. cit. p.53.
36. Article 14.
Article 14 guarantees equal protection as regards substantive laws but procedural laws also come within its ambit, so there cannot be separate procedure for the persons who have committed the same offence and are subject to same procedure for trial. Right to equality needs to be examined with reference to power of Public Prosecutor, Asstt. Public Prosecutor to withdraw cases under Section 321 Cr.P.C. against any accused.

The freedom of speech and expression is available to all citizens including the accused behind the bars and other freedoms available under Article 19 "cannot be enjoyed by prisoners because of the very nature of these freedoms and due to condition of incarceration." The freedom of expression thus includes the freedom of the propagation of ideas, their publication and circulation and includes the liberty of the press. The freedom of speech and expression is not absolute and reasonable restrictions can be imposed under Articles 19 (2). Article 20 provides protection against ex-post-facto laws, immunity against double jeopardy and protection against testimonial compulsion. The term "person" in Article 20 includes a corporation which is accused, prosecuted, convicted or punished for an offence. Clause (1) provides for limitation in respect of conviction and punishment of a person for an offence which when committed was not an offence by the law of the land. The second is in regard to the imposition of a greater penalty than that which ought to have been imposed under

41. Article 19 (1) (a) of the Constitution.
44. Article 19(2) provides that reasonable restrictions can be imposed in the interest of sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, in relation to contempt of Court, defamation or incitement of an offence.
45. See clause (1), (2) & (3) of Article 20.
46. *M.P Sharma v. Satish Chandra*, AIR 1954 SC 300.; see also *Kumar, Narender, op. cit. p.158.*
the existing law on the date of the commission of the offence.\footnote{47} Clause (1) however "does not prohibit the trial of offences under the ex-post-facto laws... prescribing a new procedure different from the ordinary procedure for prosecution or trial, is not hit by Article 20(1)"\footnote{48}(emphasis added).

Clause (3) of Article 20\footnote{49} protects a person accused of an offence against testimonial compulsions. This clause resembles fifth amendment of the American Constitution which reads "no person shall be compelled in any criminal case to be a witness against himself."\footnote{50} The terms like "accused of an offence", "compelled to be a witness against himself", "offence" etc., have been researched threadbare with case law. In \textit{MP Sharma v. Satish Chandra}, \footnote{51}the Supreme Court gave a wide connotation to the term "to be a witness" so as to include documentary and testimonial evidence.\footnote{52} The Constitutional bar is against compulsion and not against voluntary offer.\footnote{53} Giving "specimen of handwriting, signature, thumb impression, finger prints or foot prints to be used for comparison...... will not amount to compelling the accused to be witness against himself."\footnote{54} The protection against search and seizures is not available under clause (3) of Article 20.\footnote{55}

Clause (2) of Article 20 provides that "No person shall be prosecuted and punished for the same offence more than once". The clause enacts well known principle of criminal jurisprudence that "\textit{no one should be put in jeopardy twice for the same offence}".\footnote{56} If a person has been prosecuted and punished in a previous proceeding of an offence, he cannot be prosecuted and punished for the same offence again in

\begin{itemize}
\item \footnote{47} Chaturvedi, A.N., \textit{op. cit.} p.336.
\item \footnote{48} \\textit{Shiv Bahadur v. State of Vindhya Pradesh}, \textit{AIR} 1953 SC 394.
\item \footnote{49} Clause (3) reads "No person accused of an offence shall be compelled to be a witness against himself."
\item \footnote{50} See also \textit{P. Rajangam v. State of Madras}, \textit{AIR} 1959 Mad. 294.
\item \footnote{51} \textit{AIR} 1954 SC 300.
\item \footnote{52} \textit{Ibid.}
\item \footnote{53} \textit{R.S.Bhagat v. Union of India}, \textit{AIR} 1982 Del.191.
\item \footnote{54} \textit{State of Bombay v. Kathi Kalu Oghad}, \textit{AIR} 1961 SC 1808; see also Chaturvedi, A.N., \textit{op. cit.} pp.185-86.
\item \footnote{55} See \textit{Sharma v. Satish Chandra}, (1954) SCR 1077.
\item \footnote{56} See \textit{Maqbool Hussain v. State of Bombay}, \textit{AIR} 1953. SC 352; see also \textit{Sunil Batra v. Delhi Admrn}, \textit{AIR} 1978 SC 1675; \textit{Kumar, Narender.}, \textit{op.cit.pp186-187}; This principle is based on common law maxim \textit{nemo debet bis vexari}.
\end{itemize}
subsequent proceeding. The words, "prosecuted" and "punished" are not to be read disjunctively so as to mean "prosecuted" or "punished" but to be read conjunctively. Both factors must co-exist in order to attract invocation of Article 20 (2) of the Constitution. The spirit of the article has also been incorporated in Section 300 of the Cr.P.C., which provides that a person once convicted or acquitted is not to be tried for the same offence. A person acquitted or convicted of any offence may be afterwards tried, with the consent of the State Government, for any distinct offence for which a separate charge might have been made against him at the former trial under Sub-Section (1) of Section 220 of Cr.P.C.

Right to life and personal liberty is the most precious, sacrosanct, inalienable and fundamental of all fundamental rights of citizens. It is the most essential basic human rights in a democratic state. It is the back-bone of human right movements both at national and international levels. In ordinary language personal liberty means liberty relating to or concerning the person or body of the individual and personal liberty in this sense is anti-thesis of physical restraint or coercion. 'Life', does not mean the continuance of a person's animal existence but a right to the possession of each of his limbs and faculties by which life is enjoyed, right to livelihood, better standard of life, hygiene conditions in work place and leisure facilities. A prisoner remains a human being not-withstanding his imprisonment and would be entitled to those minimum human rights which are inalienable from a human being.

'Privacy' is another dimension of right to life and personal liberty. In Raj Gopal v. State of Tamil Nadu, the court held that "right to privacy" meant a "right to be let

59. See also heading of Section 300, Cr.P.C., 1973.
60. Sub Section (2) of Sec. 300.
alone*. Right to privacy had two rounds in court first before a bench of 8 then before a bench of 6. In both it had been worsted. It could not have survived a third bout. It was thought that privacy a fundamental right had been buried – a more appropriately, burnt to cinder. But ashes of lost freedoms are ever smouldering. In Govind the cherished right has arisen phoenix like from the ashes.... Neatly side stepping the ratio of longer benches the court has given the right a new base of life. In Kharak Singh v. State of UP, interference in personal liberty through surveillance by police was held ultra vires but in Govind v. State of MP, the police regulation of similar nature having force of law was held constitutional. The life or personal liberty can be taken away by a procedure established by law as provided under Article 21 of the Constitution, but such procedure contemplated by Article 21 should be fair and reasonable and not arbitrary, fancifull or oppressive otherwise it would be no procedure at all. In number of cases the court have prohibited use of fetters and handcuffs except “clear and present case of danger of escape.” In a recent case, the Supreme Court have observed that “to bind a man hand and foot, fetter in limbs with hoops of steel, shuffle him along in the street and stand him for hours in the courts is to torture him, defile his dignity, vulgarise society and foul the soul of our Constitutional culture, and the court have issued detailed instructions on the subject. Justice delayed is justice denied. The speedy trial of case also forms part of right to life and personal liberty and implicit in the broad sweep and content of Article 21.” A speedy trial in a criminal prosecution includes within it both the police investigation of the crime and later adjudication in court. Keeping in view the gravity of delay in trials Hon’ble Justice, R.P. Sethi of

68. AIR 1963 SC 1295.
69. AIR 1975 SC 1378.
70. See Article 21.
74. Ibid. p. 2196; Sec also supra note 70.
Supreme Court have given detailed directions to all High Courts. In consequence of directions of the Apex Court in *Hussainara’s Case*, large number of under trial were released who were languishing in jails for trivial offences for years. Right to go abroad is also another aspect of personal liberty and fundamental freedom. Though reasonable restrictions can be imposed but these restrictions have to be ‘just and fair’ not ‘arbitrary’ fanciful or oppressive.

Clause (4) to (7) of Article 22 of the Constitution provides for the procedure which is to be followed if a person is arrested under the law of preventive detention. The sole justification of such detention is suspicion or reasonable probability of detention committing some act likely to cause harm to the society or endanger the security of the Government. The Parliament is empowered to prescribe by law the circumstances where a person may be detained for a period longer than three months without obtaining opinion of Advisory Board, maximum period for preventive detention and procedure to be followed by Advisory Board. Dr. Bakshi Tek Chand had projected in the Constituent Assembly that “in no Constitution in the world such preventive detention is provided for....” The preventive detention is for preventive measures and no charge is framed against the person. Though disclosure of grounds of detention to the detainee is a mandatory requirement but there is no provision to file any appeal. The provisions relating to preventive detention will be traced since 1935 and enactment of the Preventive Detention Act, 1950, the Maintenance of Internal Security Act, 1971 and finally provisions of the National Security Act, 1980. In *Pushpa V. Union of India*, the court have laid down appropriate directions to be followed in case of detention of a person. As per NSA, 1980, Advisory Board is to be constituted by appropriate Govt. within three weeks from the date of detention of detainee and the

77. *Sec The Hindu, Delhi, August 7, 2001, p. 11, (Col. 5-7).*
78. *Supra note 75.*
82. *See clause (7) of Article 22.*
83. *C.A.D, vol 9 p.1545 ; Dr. Bakshi Tek Chand was the member of the Constituent Assembly.*
84. *AIR 1974 SC 613.*
grounds and representation of detenue, if any, is to be produced before the said Board. Article 22 (5) permits the detenue to make a representation. But the Constitution is silent as to the authority to which it has to be made or the procedure to be followed therefor. Section 8 of NSA, 1980 provides for affording an opportunity to the detenue to make representation to the appropriate Govt. However, the Act is silent about its form and manner in which it is to be dealt by the appropriate Govt. The National Security Act, 1980 does not entitle the detenue to appear by any legal practitioner but he can consult a lawyer for preparation of his representation. Maximum period of detention under the Act can be upto one year and two years in disturbed or terrorist infested areas.

Rights are meaningless in case these rights are not enforceable in court of law. The Fundamental Rights have been enshrined in Part-III of the Constitution. These rights are available to the accused person also (as he is a person or citizen) to move the Supreme Court for enforcement of fundamental rights by appropriate proceedings. The Supreme Court observed in Daryao Singh v. State of UP that "the appropriateness of the proceedings would depend upon the particular writ or order which he claims and it is not in that sense that the right has been conferred on the citizen to move this court by appropriate proceedings." The Constitution makers did not lay any particular form of proceedings because they knew that in country like India where there was so much of poverty, ignorance, illiteracy, deprivation and exploitation, any insistence on a rigid formula of proceedings for enforcement of a fundamental right would become self defeating. If a prisoner's fundamental right is flouted or legislative protection is ignored, the Supreme Court writ will run, breaking through stone walls and iron bars to right the wrong and restore the rule of law.

85. See Section 10 of the National Security Act, 1980.
87. Section 8 NSA, 1980.
88. AIR 1981 SC 746.
89. AIR 1982 SC 710 at p.748.
90. See 13; see also Sec. 14-A.
91. AIR 1961 SC 1457.
92. Ibid.
93. Supra note 35, p.287.
has the power to issue directions, orders or writs including the writs in the nature of *habeas corpus*, *mandamus*, *prohibition quo-warranto* and *certiorari* for enforcement of rights conferred by Part-III of the Constitution. Through its dynamic approach the courts have been entertaining public interest litigations by any public spirited person where person is unable to approach the court by reason of poverty, helplessness or disability or socially or economically disadvantaged position. The Supreme Court and High Court under Article 32 and 226 respectively of the Constitution have been issuing directions for enforcement of fundamental rights and they have also been awarded monetary compensation to the victims in appropriate cases shedding away the concept of "sovereign immunity" provided under Articles 300 of the Constitution. High Court has wide powers under Article 226 to issue order or writs for any other purposes also. The concept of *locus standi* has been redefined by courts in recent years in the interest of the society.

The right to equality enshrined in the Constitution would be meaningless if an accused person for want of legal aid is unable to defend himself and gets convicted due to his poverty. Such schemes are available in other countries also. An accused person has right to engage counsel of his choice to defend his case but this right will become infructuous if he has no means to afford to engage the legal practitioner. Article 39-A was inserted in the Constitution on recommendations of the Law Commission of India. The Article is one of the Directive Principles of State Policy. Article 39-A cast an obligation on the State to secure the operation of the legal opportunity and to provide free legal aid by suitable legislation or scheme, so that

95. Clause (2) of Article 32.
98. See also Kumar, Narender, *op. cit.* p. 440.
99. Article 14 to 16.
100. See The Legal Aid and Advice Act, 1949 of UK and The Legal Services Corporation Act, 1974 of USA.
101. See Article 22 (1).
opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities. Section 303 Cr.P.C also entitle accused person to engage the counsel.

Clause (1) Article 22 entitles the arrested person to consult and to be defended by a legal practitioner of his choice.103 The right to counsel begins from moment of arrest of the accused.104 The accused can secure services of a lawyer even at the time of police investigation.105 The Right to legal aid is one of the fundamental human right. The history of concerted endeavour on the part of the State to provide legal service to the indigent and needy.106 It is now established fact that the procedure which does not make legal services available to indigent accused and have to go through the trial without legal counseling cannot possibly be regarded as reasonable, fair and just.107 Section 304 Cr.P.C. also makes a provision for providing a counsel at State’s expense in case the accused is facing a trial in the Court of Sessions. Medgavkar J., of Bombay High Court has rightly observed that “if the ends of justice is justice and the spirit of justice is fairness, then each side should have equal opportunity to prepare its own case, and to lay its evidence fully, freely and fairly before the court. This necessarily involves preparation. Such preparation is far more effective from the point of view of justice, if it made with the aid of skilled legal advice-advice so valuable that in the gravest of criminal trials when life or death hangs in balance the very State which undertakes the prosecution of the prisoner also provides him, if poor, with such legal assistance.”108 The State can’t shirk its Constitutional responsibility of providing free legal aid to accused pleading financial or administrative constraints.109 Hence if an accused person is not provided legal aid it will not only be against Constitutional di-

103. Clause (1) of Article 22.
109. In re Llewelyn Evans, AIR1926 Bom. 556.
rective under Article 39-A but also violative of right to equality and right to life and personal liberty under Article 14 and 21 of the Constitution of India. \(^{110}\) Now Government have enacted the Legal Services Authorities Act, 1987 and legal aid and advice services are available at District, State and Centre level and schemes are also functional to create awareness among masses. The free legal aid is also available to the weaker sections of society i.e. scheduled castes, scheduled tribes, women, children, and other economically weaker sections of society. \(^{111}\)

A bail is a security given for due appearance of person in the Court to stand the trial. This is a temporary release pending trial of the case on assurance of presence in the court. \(^{112}\) But bail means release of a person from legal custody; it presupposes that he is in custody. \(^{113}\) The system of Muchalka and Zamant were prevalent in ancient time also. \(^{114}\) An accused is presumed to be innocent and release on bail is in consequence of concept of individual freedom implicit in Constitutional freedoms; and so is the interest of society. \(^{115}\) In bailable offences \(^{116}\) bail is a matter of right \(^{117}\) and in non-bailable it depends on discretion of the court. \(^{118}\) The basic rule may perhaps be tersely put as bail, not jail, except where there are circumstances suggestive of fleeing from justice for thwarting the course of justice or creating troubles in the shape of repeating offences as intimidating witnesses and like by the petitioner who seeks enlargement on bail from the court. \(^{119}\) In non-bailable offences court has to use discretion judiciously and not arbitrarily while granting or refusing bail to the accused person. \(^{120}\) The nature of accusation, extent of punishment, likelihood of the accused jumping


\(^{111}\) See Section 12 of Legal Services Authorities Act, 1987.


\(^{113}\) Varkay Davly Madhikhudiyal, AIR 1967 Kar 189; see also Narayan Prasad, AIR 1963 MP 276.

\(^{114}\) See Verma, S.K., op. cit. p.5.

\(^{115}\) Ibid. p.48.

\(^{116}\) See Schedule 1, Cr.P.C., 1973 for classification of offences into bailable and non-bailable categories.

\(^{117}\) See Section 436 (1) Cr.P.C.

\(^{118}\) See Section 437 Cr.P.C.; see Section 2 (a) Cr.P.C. for definition of “bailable” and “non-bailable offences.


the bail or tampering evidence are relevant factors which are to be kept in view for release of person on bail. 121 The court can impose conditions while granting bail so that freedom is not misused. 122

The court can refuse to grant bail and if bail is granted, it can be cancelled and person can be arrested and committed to custody. 123 The Supreme Court have issued number of guidelines in Hussainara Khatoon’s case 124 which are to be considered by Courts in the matter of bail. 125 Recently, the Apex Court have laid down yardsticks for release of undertrials where there is delay in investigation or trial of the cases. 126 This case has given a new definition to the law of bail. Section 167 Cr.P.C. have also provided for release of accused on bail if challan (police report under section 173, Cr.P.C.) is not submitted within 60 or 90 days as the case may be. The Code of Criminal Procedure have used various terms related with bail i.e. bond, surety and security without defining them. An effort has been made to research these terms to suggest streamlining the law of bail. The quantum of amount of bail bond is another important area where the right to bail can be affected if the amount is excessive. In Moti Ram v. State of MP, 127 the Court have laid down that bail amount ought not to be excessive. Anticipatory bail under Section 438 Cr.P.C. is a new concept introduced in the Code of 1973. Where person has reasonable apprehension of arrest he can apply to the High Court or Court of Sessions for anticipatory bail. 128 If the person misuses the bail it can be cancelled and restrictions in the interest of justice can be imposed. 129 Section 389 Cr.P.C. empowers the court to grant bail to the convicted person pending appeal and the order appealed against can be suspended. The condition is that the convicted person should have intention to file the appeal. "All that the Section lays down is that the Court is authorized to release a convicted person, if

123. See clause (5) of Section 437 Cr.P.C.; see also Nagendra Prasad v. State, 1987 Cr.LJ 215 (Patna High Court).
124. AIR 1979 SC 1360.
125. 'Common Cause' a Registered Society Through its Director v. UOI, AIR 1996 1619.
126. AIR 1978 SC 1595.
128. See AK Murmu v. Prasanjit Chowdhary, 1999 Cr.LJ, 3460.
in confinement, on bail during the pendency of the appeal. The order of releasing the accused on bail can be passed while the appeal is pending. But the Section does not restrict operation of bail only for the period the appeal is pending.\textsuperscript{130} The logic behind release on bail is that the accused unless finally sentenced is presumed to be innocent and keeping him in jail for five, six years for an offence which ultimately is found not to have been committed by him, is unreasonable. There can’t be any compensation for such incarceration.\textsuperscript{131} Hence now the bail is rule and jail is an exception.

There is no right without a remedy. The provisions relating to compensation available in Cr.P.C. and Constitution of India will be examined and their sufficiency will also be assessed. Section 250, provides for compensation for accusation without reasonable cause. The Magistrate can award compensation upto Rs. 100/- against the complainant or informant. In case of default of payment of compensation person can be awarded simple imprisonment upto thirty days.\textsuperscript{132} In defamation cases the court of Sessions can award compensation to the victim upto rupees one thousand under Section 237 Cr.P.C.\textsuperscript{133} and this compensation is in addition to civil or criminal liability of the offender.\textsuperscript{134} The court can also award compensation to the victim of crime out of the fine recovered from the accused person who has been sentenced by the court.\textsuperscript{135} This provision can be availed of by those accused persons who suffer torture or death while in police custody or jail. In such cases public servant becomes the accused and he is liable to pay the compensation to victim who is an accused in some other case. The objective of making this provision is that in case where death has resulted from homicide the court should award compensation to heirs of the deceased “in settling the claim once for all by doing away with the need for a further claim in civil court, needless worry and expense to both sides of the party.”\textsuperscript{136}

\textsuperscript{131} See Clause (3) of Section 250 Cr.P.C.
\textsuperscript{132} See Section 199 Cr.P.C. Pertaining to prosecution for defamation; see also clause (4) of Section 237 Cr.P.C.
\textsuperscript{133} See Clause (6) of Section 237 Cr.P.C.
\textsuperscript{134} See 357 and Chapter XXVII Cr.P.C.
\textsuperscript{136} Ibid. p.1327; see also Adamji Umar Dalal v. State of Bombay, AIR 1952 SC 14.
ing fine it is necessary to have as much regard to pecuniary circumstances of the accused persons as to the character and magnitude of the offence, and when a substantial term of imprisonment is inflicted, an excessive fine should not accompany it except in exceptional cases.” The Apex Court have also cautioned not to award unduly excessive compensation. The court should first calculate amount to be awarded and then impose fine higher than the compensation. Section 358 Cr.P.C. provides for compensation to the persons groundlessly arrested. The Magistrate may award compensation not exceeding rupees one hundred to be paid to the person arrested for loss of time and expenses in the matter. Section 358 of the Code obviously aims at protecting the Constitutionally guaranteed personal liberty of the persons and save them illegal and arbitrary arrest, even without reference to any accusation or charges levelled against such persons. This is definitely a progressive piece of legislation which upholds the rule of law and democratic values.

Indian Constitution does not specifically enshrine any Article authorizing right to claim compensation in the event of violation of fundamental rights. However Article 32 (which itself is a fundamental right) provides for a guaranteed right to move the Supreme Court for enforcement of fundamental rights conferred by Part-III of the Constitution. The Supreme Court have forged the tools and devised new remedies for awarding compensation to the persons whose fundamental rights have been violated. Secondly, the court have also been entertaining “public interest litigations” or “social action litigations” through public spirited persons when victims are poor, illiterate or unable to approach the court due to economically disadvantaged position. The Supreme Court have also discarded the feudalistic doctrine “sovereign immunity” in cases of violation of fundamental rights and State have been held liable to pay compensation in various cases for faults of its public servants. The High Court has also wide

138. Supra note 134; Ibid.
139. See Sec. 358 Cr.P.C.
141. Clause (1) of Article 32.
powers under Article 226 of the Constitution to issue various writs or directions or orders for implementation of fundamental rights and for other purposes. The Supreme Court as well as High Courts have powers to issue writs of habeas corpus, quo warranto, certiorari, mandamus, prohibition or any other order or direction as deemed proper. The Protection of Human Rights Act, 1993 has been enacted for better protection of human rights. The National Human Rights Commission (NHRC) has been constituted at national level and State Human Right Commission (SHRC) at State levels under the Act. The NHRC have been assigned multifarious functions. Section 18(3) of the Act authorise the Commission to make recommendations for immediate relief to the victims or members of his family. NHRC have been recommending award of compensation and it has been paid in number of cases from 1995 to 1999. The compensation have been recommended for custodial deaths, torture, sexual harassment and rape etc.

The feudalistic doctrine that 'King can do no wrong' enshrined in Article 300 of the Constitution and popularly known as doctrine of "sovereign immunity" has been held to be inapplicable in cases of violation of human rights or fundamental rights. The court while interpreting Article 21 relating to "Right to life and personal liberty", have been holding State liable for tortious acts of its servants. It was in the matter of Smt. Nilabati Behra v. State of Orissa, that Supreme Court had held in clear terms that, "the defence of sovereign immunity being inapplicable, and alien to the concept of guarantee of fundamental rights, there can be no question of such a defence being available in Constitutional remedy." The study comprises six Chapters. Chapter-1 deals with the rights of accused in historical perspective. The rights

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143. See Articles 32, 226 of the Constitution.
144. See Preamble of the Act. ; As per Section 2(1) (d) of the Protection of Human Rights Act, 1993 "Human Rights"means rights relating to life, liberty, equality and dignity of the individuals guaranteed by the Constitution or embodied in the International Covenants and enforceable by courts in India.
145. See Sec. 3 and 4 of the Protection of Human Rights Act, 1993 for appointment of Chairman and members of the NHRC; see also Secs. 21 & 22 of Act for Constitution of SHRC.
available in the ancient literature including vedas, Manusmriti of Manu, Arthasastra of Kautilya, Smritis, Dharamasastras and Mahabharata etc., have been traced. The rights available to the accused person during medieval, British period i.e., pre-independence and post-independence period find place in the Chapter. Though various rights were available to the accused person but the term “human rights" was not used. The concept of Human Rights is as old as ancient doctrine of ‘natural rights’ is of recent origin, emerging from (post second world war) International Charters and Conventions. The term “human rights" has been used in UN Charter, 1945 and thereafter in the Universal Declaration of Human Rights, 1948. Chapter-2 is an endeavour to trace out the rights of accused person in the Constitution of India which is the fundamental and the Supreme law of the land. The fundamental rights which are available to the accused like right to equality (with reference to the doctrine of Rule of Law), freedom of speech and expression including freedom of publication, protection against ex-post-facto criminal laws, protection against self-incrimination, protection against double jeopardy and right to personal liberty have been discussed threadbare. The provisions relating to preventive detention vis a vis rights of accused to know the grounds of detention, right to make representation find place in the Chapter. Article 32 and 226 of the Constitution pertaining to the Constitutional mechanism for enforcement of fundamental rights have also been examined.

Chapter-3 is an attempt to explain and elucidate the Constitutional provisions relating to legal aid, legal aid for social justice and various schemes for free legal aid under the provisions of the Legal Services Authorities Act, 1987. Chapter-4 is devoted to the study of right to beil available to the accused. The object of bail, bail as a matter of right and bail as a matter of judicial discretion have been analysed. The provisions relating to “anticipatory bail" are also covered in the Chapter.

In Chapter-5 provisions concerned with the compensatory justice under the Code of Criminal Procedure, 1973, the Constitution of India and the Protection of Human Rights Act, 1993 have been provided. The judicial approach derived from the

148. The term “human rights" does not find place in any document before 1945 though various rights were in existence. The term “human rights" was used for the first time in the UN Charter of 1945 in its Preamble.

judgments of the Supreme Court and High Courts have also been analysed in depth. Chapter-6 embodies the evaluation of the study in the form of appraisal. The study would be incomplete without offering suggestions. Therefore, after careful analysis of the rights of accused within the parameters of framework, suggestions for better enforcement and protection of fundamental rights (which are also human rights) pertaining to right of equality, right to silence during police interrogation, right to presence of counsel during interrogation, rights of detained person (under preventive detention laws), right to free legal aid, suggestions for reformation of bail law and compensatory justice under the Constitution, Cr. P. C. and PHR Act, 1993 etc., have been highlighted. The Chapter also comprises probable future trends which have been worked on the basis of the judgments and judicial trends and considering the present and future needs.