CHAPTER- III

STATUS OF RIGHTS OF ARRESTED PERSONS IN INDIA

3.1 Constitutional Rights of Arrested Persons

The Constitution of India is the law of all the laws in the land. It not only guides but also ensures strict compliance of all the directions it has provided in itself in the course of implementation of all civil, criminal and other laws of the country. The Constitution of India has prescribed certain constitutional standards by proclaiming these yard-sticks in the form of fundamental rights of the accused persons. The constitutional values are also reflected in the procedural and substantive penal laws in detail. They are to be understood not only in the form and manner in which they are chartered in the Constitution and the penal laws but they must also be seen and appreciated in the light of the interpretation of these rights as proclaimed from time to time by the Supreme Court of India.¹

There are certain fundamental and primary rights, which cannot be violated in the enforcement of any substantive as well as procedural penal laws. No doubt, all such substantive and procedural laws have, in themselves built-in systems of checks and balances to ensure that on the one hand, the enforcement of penal laws are in the best interest of the community at large and at the same time on the other, just, fair and reasonable procedures are followed in all such endeavours to safeguard the interest of the

accused persons.\textsuperscript{2} The Constitution of India has under Chapter III enumerated the Fundamental guarantees assured to a person in police custody under the law of the land. They may be listed as under:

\textbf{3.1.1 Right to Equality}

\textbf{Equality before law} – Article 14 of the Indian Constitution declares 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". The settled position of Article 14 is that it hit at arbitrariness and all the arbitrary acts of the state or its machinery are violative of Article 14. Therefore, if the treatment given to the arrestee is unreasonable and arbitrary it is violative of Art. 14. Protection against arbitrariness is the new concept of equality. .... In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic, while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14. Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness, pervades Article 14 like a brooding omnipresence.

Doctrine of equality is a deep rooted base of the principle of justice. It requires that all individuals should be treated alike even though they are unequal. In this regard the concept of equality visualises a sort of compensatory treatment to make all men equal before law

\textsuperscript{2} \textit{Ibid.}
without any consideration of caste and creed, big and small, privileged and unprivileged and rich and poor. However, the concept of equality does not necessarily mean that every one should be treated alike regardless of individual differences. Since absolute equality is impossibility, therefore, it means that among equals the law should be equal and equally administered. It further, means that everyone, classified as belonging to one category for a particular object shall be treated in the same way without any kind of discrimination.\(^3\)

Lest an accused, who has earned the wrath of the society for penal prosecution and sanctions for the alleged violation of the prescribed norms, or an individual is chosen for indictment for wrongs done in retrospect or for creating conditions prejudicial to his interests, does not suffer in a discriminatory way, it is incumbent upon the State that protection is afforded to him. A criminal trial is distinctive embodiment of social interest in the process of administrating law. The accusatorial system of trial which obtains in the legal system of the day has already recognised in favour of the accused as against the State, the right to remain silent by prescribing the presumption of innocence, by requiring the State to prove guilt beyond reasonable doubt, in the requirement of elaborate pretrial evidentiary screens, arrest, charge and trial. The recognition of these rules are well within the scope of the equality clause enabling the accused to get protective considerations against the powerful adversary which is the State. As the parties in the criminal trial \textit{viz.} the State and the individual are unmatching in their strength and resourcefulness, in which the later is placed in a disadvantageous position, the imbalances

are likely to be more to cause prejudice to the interest of the individual. Accordingly the role of doctrine of equality becomes more significant to understand the rights of the person who has been accused of having committed a crime.4

The guarantee of equality before the law is an aspect of what Dicey calls the rule of law in England. It means that no man is above law and that every person, whatever be his rank or conditions, is subject to the jurisdiction of ordinary courts. "With us", Dicey wrote "every official from the Prime Minister down to constable or a Collector of taxes is under the same responsibility for every act done without legal justification as any other citizen5." Rule of law requires that no person shall be subjected to harsh, uncivilized or discriminatory treatment even when the object is the securing of paramount exigencies of law and order.6

3.1.2 Right against Ex-Post Facto Laws

The Constitution of India ensures protection against conviction for offences enacted retrospectively or retroactively by its specific declaration of this right as fundamental rights under Chapter III of the Constitution. Article 20(1) of Indian Constitution states as under:

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 under the law in force at the time of the commission of the offence.

4 Id., at 60.
5 Dicey, Law of Constitution, 202-203
There is difference between an ex post facto law and a retrospective law. The maxim *Nulla Poena Sine Lege* expresses the idea that no man shall be made to suffer except for a distinct breach of the criminal law, which law shall be enacted beforehand in precise and definite terms. The rule prohibits (i) retrospective imposition of criminality; (ii) the extension by analogy of a criminal rule to cover a case not obviously falling within it and (iii) the formulation of criminal law in excessively vague and wide terms. The distinction between *ex post facto* law and retrospective law was for the first time drawn in the United States of America in [*Calder v. Bull*](https://example.com) and it was held that “Every *ex post facto* law must necessarily be retrospective but every retrospective law is not *ex post facto* law. The former only is prohibited. Every law that takes away or impairs, rights vested agreeably to existing laws is retrospective and generally unjust, and may be oppressive, it is a good general rule that a law should have no retrospect, but there are cases in which the law may justly, and for the benefit of community, and also of individuals, relate to a time antecedent to their commencement, as status of oblivion or of pardon...that create or aggravate the crime, or increase the punishment, or change the rules of evidence for the purpose of conviction...there is a great and apparent difference between making an unlawful act lawfully, and the making an innocent action criminal and punishing it as a crime.”

Indian Constitution confers power to the Parliament and the State Legislature to make laws under Articles 245, 246 and 248. In these Articles there is nothing to provide that the Indian legislatures do not possess the right to make retrospective legislation, which every

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sovereign legislature possesses. This issue was dealt in detail by the Supreme Court of India in *J.K. Jute Mills v. State of U.P*\(^8\) and held that:

The power of a legislature to enact a law with reference to a topic entrusted to it is, as already stated, unqualified subject only to any limitation imposed by the Constitution. In the exercise of such a power, it will be competent for the legislature to enact a law, which is either prospective or retrospective. In *Union of India v. Madan Gopal*,\(^9\) it was held by this court that the power to impose tax on income under entry 82 of List I in Schedule VII to the Constitution, comprehended the power to impose income-tax with retrospective operation even for a period prior to the Constitution. The position will be the same as regards laws imposing tax on sale of goods, In *M. P. V. Sundararamier & Co. v. State of Andhra Pradesh*,\(^10\) this court had occasion to consider the validity of a law enacted by Parliament giving retrospectively operation to laws passed by the State legislatures imposing a tax on certain sales in the course of inter-State trade. One of the contentions raised against the validity of this legislation was that, having regard to the terms of Art. 286 (2), the retrospective legislation was not within the competence of Parliament.

In rejecting this contention, the court observed:

> Article 286 (2) merely provides that no law of a State shall impose tax on inter-State sales 'except in so far as

\(^9\) AIR 1954 SC 158.
\(^10\) AIR 1958 SC 468.
Parliament may by law otherwise provide.' It places no restrictions on the nature of the law to be passed by Parliament. On the other hand, the words 'in so far as' clearly leave it to Parliament to decide on the form and nature of the law to be enacted by it. What is material to observe is that the power conferred on Parliament under Art.286(2) is a legislative power, and such a power conferred on a Sovereign Legislature carries with it authority to enact a law either prospectively or retrospectively, unless there can be found in the Constitution itself a limitation on that power." And it was held that the law was within the competence of the legislature. We must, therefore, hold that the Validation Act is not ultra vires the powers of the legislature under entry 54, for the reason that it operates retrospectively.

However, the only express limitation imposed upon the power of retrospective legislation is that it cannot make retrospective penal laws.\footnote{Article 20(1) of Indian Constitution states as under: "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 under the law in force at the time of the commission of the offence."} Any other law, may therefore, be made retrospective under the Constitution, including the tax laws, provided no fundamental right is infringed by reason of taking away a vested right by the retrospective legislation. It cannot be therefore predicated off-hand and as a matter of law that every restriction which operates with retrospective effect and affects rights obtained under the pre-
existing law, is unconstitutional as obnoxious to the freedom guaranteed by sub-cls. (f) or (g) of cl. (1) of Art. 19.12

3.1.3 Right against Double Jeopardy

The concept of double jeopardy is as old as the common law itself. The concept of double jeopardy is based on the celebrated maxim Nemo debet bis puneri uno delicto, which means that no one ought to be twice punished for one offence. The genesis of this maxim can be well found in the English Common Law principles where it was felt that “when a person has been convicted for an offence by a court of competent jurisdiction, the conviction is a bar to all further criminal proceedings for the same offence.” The principle of double jeopardy finds place in Indian Constitution under the provisions of Article 20(2), which states “No person shall be prosecuted and punished for the same offence more than once”. If one is prosecuted again for the same offence for which he has already been prosecuted he can take complete defence of his former acquittal or conviction. Not only the Constitution of India but also the General Clauses Act, 1897(vide section 26) 13 and the Code of Criminal Procedure, 1973(vide section 300) 14 have recognised the same right of the accused person.

13 Sec. 26. Provision as to offences punishable under two or more enactments.- Where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence.
14 Sec. 300. Person once convicted or acquitted not to be tried for same offence.

(1) A person who has once been tried by a court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made
The American Constitution incorporates the same rule in the Fifth Amendment that “no person shall be twice put in jeopardy of life or limb”. In England the double jeopardy rules reflect the changing criminal law and procedures as well as the political conditions of the time over the centuries. The controversy between Henry II and Archbishop Thomas a Becket—and Henry’s concession in 1776, following Becket’s murder—that clerks convicted in ecclesiastical courts were exempt from further punishment in the King’s Courts probably was primarily responsible for bringing about the adoption of the concept of double jeopardy in Common law. Becket’s main argument was that further punishment of clerks in the King’s courts would be violative of the maxim ‘Nemo bis in idipsum’ no

under sub-section (1) of section 221, or for which he might have been convicted under subsection (2) thereof.

(2) A person acquitted or convicted of any offence afterwards tried with the consent of ore State Government for any distinct offence for which a separate charges have been made against him at the former trial under sub-section (1) of section 220.

(3) A person convicted of any offence constituted by any act causing consequences which, together with such act, constituted a different offence from that of which he was convicted, may be afterwards tried for such last-mentioned offence, if the consequences had not happened or were not known to the court to have happened, at the time when he was convicted.

(4) A person acquitted or convicted of any offence constituted by any acts may, notwithstanding such acquittal or conviction be subsequently charged with, and tried for, any other offence constituted by the same acts which he may have committed if the Court by which he was first tried was not competent to try the offence with which he is subsequently charged.

(5) A person discharged under section 258 shall not be tried again for the same offence except with the consent of the court by which he was discharged or of any other court to which the first-mentioned court is subordinate.

(6) Nothing in this section shall affect the provisions of section 26 of the General Clauses Act, 1897 (10 of 1897) or of section 188 of this Code.

Explanation. The dismissal of a complaint, or the discharge of the accused, is not an acquittal for the purposes of this section.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for 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; nor shall private property be taken for public use, without just compensation.
men ought to be punished twice for the same offence. The maxim was very well known in ecclesiastical law, as it appears from St. Jerome's commentary in A.D. 391 on the prophet Nahum: 'For God Judges not twice for the same offence.'

The protection under clause (2) of Article 20 is narrower than that given in American and British laws. Under the British and American Constitution the protection against double jeopardy is given for the second prosecution for the same offence irrespective of whether an accused was acquitted or convicted in the first trial. But under Article 20(2) the protection against double punishment is given only when the accused has not only been prosecuted but also punished and is sought to be prosecuted second time for the same offence. The use of the word 'prosecution' thus limits the scope of the protection under clause (1) of Article 20. If there is no punishment for the offence as a result of the prosecution clause (2) of Article 20 has no application and an appeal against acquittal, if approved by the procedure is in substance a continuance of the prosecution. The word 'prosecution' as used with the word 'punishment' has been used not in a "disjunctive" but "conjunctive" sense and thereby giving effect to the meaning of 'and' not 'or' and it means both prosecuted and punished. So, when an accused was discharged for lack of compliance of procedure there is no punishment; and where a man is punished departmentally there is no prosecution.

16 Supra note 3, at p.124
3.1.4 Protection against Self-incrimination

Clause (3) of Article 20 of Indian Constitution provides that no person accused of any offence shall be compelled to be a witness against himself. Thus Article 20(3) embodies the general principle of English and American jurisprudence that no one shall be compelled to give testimony which may expose him to prosecution for crime. The cardinal principle of criminal law which is really the bedrock of English jurisprudence is that an accused must be presumed to be innocent till the contrary is proved. It is duty of the prosecution to prove the offence. The accused need not make any admission or statement against his free will. The Fifth Amendment of the American Constitution declares "no person shall be compelled in any criminal case to be a witness against himself."

A person who has been indicted of criminal proceedings has been conceded a privilege of keeping silent about the accusations. This is recognised as a cardinal principle in the administration of criminal justice and is designated as presumption of innocence. Sir Stephen explains the rationale of the rule by remarking that:

In the present day the rule that a man is presumed to be innocent till he is proved to be guilty is carried out in all its consequences. The plea of not guilty puts everything in issue, and the prosecutor has to prove everything that he alleges from the beginning. If it be asked why an accused is presumed innocent....the true answer is, not that the presumption is probably true, but that society in the present

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18 Id., at 220.
19 Supra note 13.
day is so much stronger than the individual and is capable of inflicting so very much more harm on the individual than the individual as a rule can inflict upon the society, that it can afford to be generous.²⁰

The fundamental rule of criminal jurisprudence against self incrimination has been raised to a rule of constitutional law in Article 20(3). This guarantee extends to any person accused of an offence and prohibits all kind of compulsions to make him a witness against himself. The Supreme Court of India in *M. P. Sharma v. Satish Chandra*²¹ examined the scope of this clause and held that:

> In view of the above back-ground, there is no inherent reason to construe the ambit of this fundamental right as comprising a very wide range. Nor would it be legitimate to confine it to the barely literal meaning of the words used, since it is a recognised doctrine that when appropriate a constitutional provision has to be liberally construed, so as to advance the intendment thereof and to prevent its circumvention.

Analysing the terms in which this right has been declared in our Constitution, it may be said to consist of the following components. (1) It is a right pertaining to a person "accused of an offence" (2) It is protection against "compulsion to be a witness", and (3) It is a protection against such compulsion resulting in his giving evidence "against himself". The cases with which we are

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²¹ AIR 1954 SC 300.
concerned have been presented to us on the footing that the persons against whom the search warrants were issued, were all of them persons against whom the First Information Report was lodged and who were included in the category of accused therein and that therefore they are persons "accused of an offence" within the meaning of Art. 20(3) and also that the documents for whose search the warrants were issued, being required for investigation into the alleged offences, such searches were for incriminating material.

Broadly stated the guarantee in Article 20(3) is against "testimonial compulsion". It is suggested that this is confined to the oral evidence of a person standing his trial for an offence when called to the witness stand. We can see no reason to confine the content of the constitutional guarantee to this barely literal import. So to limit it would be to rob the guarantee of its substantial purpose and to miss the substance for the sound as stated in certain American decisions. The phrase used in Art. 20(3) is "to be a witness". A person can "be a witness" not merely by giving oral evidence but also by producing documents or making intelligible gestures as in the case of a dumb witness22 or the like. "To be a witness" is nothing more than "to furnish evidence", and such evidence can be furnished through the lips or by production of a thing or of a document or in other modes.

The phrase used in Art. 20(3) is "to be a witness" and not to "appear as a witness". It follows that the protection afforded to an accused in so far as it is related to the phrase "to be a witness" is not merely in respect testimonial compulsion in the Court room.

22 See sec. 119, Evidence Act.
but may well extend to compelled testimony previously obtained from him. It is available therefore to 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 prosecution. The protection under Article 20(3) would be available in the present cases to these petitioners against whom a First Information Report has been recorded as accused therein."

In this case the Supreme Court interpreted the expression "to be a witness" very widely so as to include oral, documentary, and testimonial evidence. The prosecution under Article 20(3) covers not merely testimonial compulsion in a court room but also compelled testimony previously obtained — any compulsory process for production of evidentiary documents which are reasonably likely to support the prosecution against him. If this wide interpretation of the phrase "to be witness" adopted in this case was to be followed; the compulsory taking of finger impression or specimen handwriting of an accused would come within the mischief of Article 20(3). This broad interpretation, it was thought, would certainly hamper the effective administration of crime and efficient administration of criminal justice.23

In *State of Bombay v. Kathi Kalu,*24 the Supreme Court held that the interpretation of the phrase "to be witness" given in *M. P. Sharma's* case was too broad and required a qualification. The court held that:

"To be a witness" may be equivalent to "furnishing evidence" in the sense of making oral or written statements, but not in

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23 *Supra* note 15 at 221-222.
24 *AIR 1961 SC 1808.*
the larger sense of the expression so as to include giving of thumb impression or impression of palm or foot or fingers or specimen writing or exposing a part of the body by an accused person for purpose of identification. "Furnishing evidence" in the latter sense could not have been within the contemplation of the Constitution makers for the simple reason that though they may have intended to protect an accused person from the hazards of self-incrimination, in the light of the English Law on the subject— they could not have intended to put obstacles in the way of efficient and effective investigation into crime and of bringing criminals to justice. The taking of impressions of parts of the body of an accused person very often becomes necessary to help the investigation of a crime. It is as much necessary to protect an accused person against being compelled to incriminate himself, as to arm the agents of law and the law courts with legitimate powers to bring offenders to justice. Furthermore it must be assumed that the Constitution makers were aware of the existing law, for example, S. 73 of the Evidence Act or Ss. 5 and 6 of the Identification of Prisoners Act (XXXIII of 1920). Section 5 authorises a Magistrate to direct any person to allow his measurements or photographs to be taken, if he is satisfied that it is expedient for the purposes of any investigation or proceeding under the Code of Criminal Procedure to do so: 'Measurements' include finger impressions and foot-print impressions. If any such person who is directed by Magistrate, under S. 5 of the Act, to allow his measurements or photographs to be taken resists or refuses to allow the taking of the measurements or
photographs, it has been declared lawful by S. 6 to use all necessary means to secure the taking of the required measurements or photographs. Similarly S. 73 of the Evidence Act authorises the Court to permit the taking of finger impression or a specimen handwriting or signature of a person present in Court, if necessary for the purpose of comparison.

The matter may be looked at from another point of view. The giving of finger impression or of specimen signature or of handwriting, strictly speaking, is not "to be a witness." "To be a witness" means imparting knowledge in respect of relevant facts, by means of oral statements or statements in writing by a person who has personal knowledge of the facts to be communicated to a court or to a person holding an enquiry or investigation. A person is said 'to be a witness' to a certain state of facts which has to be determined by a court or authority authorised to come to a decision, by testifying to what he has seen, or something he has heard which is capable of being heard and is not hit by the rule excluding hearsay, or giving his opinion, as an expert, in respect of matters in controversy. Evidence has been classified by text writers into three categories, namely, (1) oral testimony; (2) evidence furnished by documents; and (3) material evidence. We have already indicated that we are in agreement with the Full Court decision in Sharma's case,25 that the prohibition in cl. (3) of Art. 20 cover not only oral testimony given by a person accused of an offence but also his written statements which may have a bearing on the controversy with reference to the charge against him. The accused may have documentary evidence in his possession which may throw light on

25 AIR 1954 SC 300.
the controversy. If it is a document which is not his statement conveying his personal knowledge relating to the charge against him, he may be called upon by the Court to produce that document in accordance with the provisions of Sect. 139 of the Evidence Act, which, in terms, provides that a person may be summoned to produce a document in his possession or power and that he does not become a witness by the mere fact that he has produced it; and therefore, he cannot be cross-examined. Of course, he can be cross-examined if he is called as a witness who has made statements conveying his personal knowledge by reference to the contents of the document or if he has given his statements in Court otherwise than by reference to the contents of the documents. In our opinion, therefore; the observation of this court in *Sharma's case* that S. 139 of the Evidence Act has no bearing on the connotation of the word 'witness' is not entirely well-founded in law. It is well established that clause (3) of Article 20 is directed against self-incrimination by an accused person. Self-incrimination must mean conveying information based upon the personal knowledge of the person giving the information and cannot include merely the mechanical process of producing documents in court which may throw a light on any of the points in controversy, but which do not contain any statement of the accused based on his personal knowledge. For example, the accused person may be in possession of a document which is in his writing or which contains his signature or his thumb impression. The production of such a document, with a view to comparison of the writing or the signature or the impression, is not the statement of an accused person, which can be said to be of the nature of a personal testimony. When an accused person is called
upon by the Court or any other authority holding an investigation to give his finger impression or signature or a specimen of his handwriting, he is not giving any testimony of the nature of a 'personal testimony.' The giving of a 'personal testimony' must depend upon his volition. He can make any kind of statement or deny refuse to make any statement. But his finger impressions or his handwriting, in spite of efforts at concealing the true nature of it by dissimulation cannot change their intrinsic character. Thus, the giving of finger impressions or of specimen writing or of signatures by an accused person, though it may amount to furnishing evidence in the larger sense, is not included within the expression 'to be a witness.'

In order that a testimony by an accused person may be said to have been self-incriminatory, the compulsion of which comes within the prohibition of the constitutional provision, it must be of such a character that by itself it should have the tendency of incriminating the accused, if not also of actually doing so. In other words, it should be a statement which makes the case against the accused person at least probable, considered by itself. A specimen handwriting or signature or finger impressions by themselves are no testimony at all, being wholly innocuous because they are unchangeable except in rare cases where the ridges of the fingers or the style of writing have been tampered with. They are only materials for comparison in order to lend assurance to the Court that its inference based on other pieces of evidence is reliable. They are neither oral nor documentary evidence but belong to the third category of material evidence which is outside the limit of 'testimony.'
The Supreme Court of India again came up with the issue of scope of Article 20(3) in *Nandini Satpathy v. P. L. Dani*\(^2^6\) and has considerably widened the scope of this provision.

"We hold that Section 161 enables the police to examine the accused during investigation. The prohibitive sweep of Article 20 (3) goes back to the stage of police interrogation - not, as contended, commencing in court only. In our judgment the provisions of Article 20 (3) and Section 161 (1) substantially cover the same area, so far as police investigations are concerned. The ban on self-accusation and the right to trial is under way, goes beyond that case and protects the accused in regard to other offences pending or imminent, which may deter him from voluntary disclosure of incriminatory matter. We are disposed to read 'compelled testimony' as evidence procured not merely by physical threats or violence but by psychic torture, atmospheric pressure, environmental coercion, tiring interrogative prolixity, overbearing and intimidatory methods and the like - not legal penalty for violation. So, the legal perils following upon refusal to answer, or answer truthfully cannot be regarded as compulsion within the meaning of Article 20 (3). The prospect of prosecution may lead to legal tension in the exercise of a constitutional right, but then, a stance of silence is running a calculated risk. On the other hand, if there is any mode of pressure, subtle or crude, mental or physical, direct or indirect, but sufficiently substantial, applied by the policeman for obtaining information from an

\(^{26}\) AIR 1978 SC 1025.
accused strongly suggestive of guilt, it becomes 'compelled testimony', violative of Article 20 (3).

A police officer is clearly a person in authority. Insistence on answering is a form of pressure especially in the atmosphere of the police station unless certain safeguards erasing duress are adhered to. Frequent threats of prosecution if there is failure to answer may take on the complexion of undue pressure violating Article 20 (3). Legal penalty may by itself not amount to duress but the manner of mentioning it to the victim of interrogation may introduce an element of tension and tone of command perilously hovering near compulsion.

We have explained elaborately and summed up, in substance, what is self-incrimination or tendency to expose oneself to a criminal charge. It is less than 'relevant' and more than 'confessional'. Irrelevance is impermissible but relevance is licit but when relevant questions are loaded with guilty inference in the event of an answer being supplied, the tendency to incriminate springs into existence. We hold further that the accused person cannot be forced to answer questions merely because the answers thereto are not implicative when viewed in isolation and confined to that particular 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. We have already explained that in determining the incriminatory character of an answer the accused is entitled to consider - and the Court while adjudging will take note of - the setting, the totality of circumstances, the equation, personal and social, which have a
bearing on making an answer substantially innocent but in effect guilty in import. However, fanciful claims, unreasonable apprehensions and vague possibilities cannot be the hiding ground for an accused person. He is bound to answer where there is no clear tendency to criminate."

3.1.5 Protection of Life and Personal Liberty

Article 21 of Indian Constitution says that:

"No person shall be deprived of his life and personal liberty except according to procedure established by law."

Though Article 21 is worded in negative terms, it is well-established now that it has both a negative and an affirmative dimension. A Constitution Bench of the Supreme Court examined the content of the expression ‘personal liberty’ in Article 21 in Kharak Singh v. State of U.P., Rajagopala Ayyangar J., speaking for the majority, said:

We shall now proceed with the examination of the width, scope and content of the expression ‘personal liberty’ in Article 21. We feel unable to hold that the term was intended to bear only this narrow interpretation but on the other hand consider that ‘personal liberty’ is used in the article as a compendious term to include within itself all the varieties of rights which go to make up the ‘personal liberties’ of man other than those dealt with in the several clauses of Article 19(1). In other words, while Article 19(1) deals with

27 AIR 1963 SC 1295.
particular species or attributes of that freedom, 'personal liberty' in Article 21 takes in and comprises the residue.

The learned Judge quoted the dissenting opinion of Field, J. (one of those dissenting opinions which have outlived the majority pronouncements) in Munn v. Illinois\textsuperscript{28} attributing a broader meaning to the word "life" in the fifth and fourteenth amendments to the US constitution, which correspond inter alia to Article 21 of our Constitution. The learned Judge held that the word 'personal liberty' would include the privacy and sanctity of a man's home as well as the dignity of the individual.

The minority opinion in the said decision, however, placed a more expansive interpretation on Article 21. They said:

No doubt the expression 'personal liberty' is a comprehensive one and the right to move freely is an attribute of personal liberty. It is said that the freedom to move freely is carved out of personal liberty and, therefore, the expression 'personal liberty' in Article 21 excludes that attribute. In our view, this is not a correct approach. Both are independent fundamental rights, though there is overlapping. There is no question of one being carved out of another. The fundamental right of life and personal liberty has many attributes and some of them are found in Article 19. If a person's fundamental right under Article 21 is infringed, the State can rely upon a law to sustain the action; but that cannot be a complete answer unless the said law satisfies the test laid down in Article 19(2) so far as the attributes covered by Article 19(1) are concerned.

\textsuperscript{28} Munn v. Illinois, (1877) 94 US 113, 142.
In *Maneka Gandhi v. Union of India*, Bhagwati J. held that the judgment in *R.C. Cooper v. Union of India* has the effect of overruling the majority opinion and approving the minority opinion in *Kharak Singh*.

In *Bolling v. Sharpe*, Warren, C.J. speaking for the U.S. Supreme Court observed:

> Although the court has not assumed to define 'liberty' with any great precision, that term is not confined to mere freedom from bodily restraint. Liberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective.

These words, though spoken in the context of the US Bill of Rights, have yet been relied upon in various decisions of the Supreme Court of India.

In *Maneka Gandhi v. Union of India*, a Constitution Bench of the Supreme Court went into the meaning of the expression "procedure established by law" in Article 21. The Court held that the procedure established by law does not mean any procedure but a procedure which is reasonable, just and fair. In fact Article 19 and Article 14 were both read into Article 21 for this purpose. The following dicta from the said decision bear reproduction:

> The law must therefore now be taken to be well-settled that Article 21 does not exclude Article 19 and that even if there

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29 AIR 1978 SC 597.
30 AIR 1970 SC 564.
31 AIR 1963 SC 1295.
is a law prescribing a procedure for depriving a person of 'personal liberty' and there is consequently no infringement of the fundamental right conferred by Article 21, such law, insofar as it abridges or takes away any fundamental right under Article 19 would have to meet the challenge of that Article.... Now, if a law depriving a person of 'personal liberty' and prescribing a procedure for that purpose within the meaning of Article 21 has to stand the test of one or more of the fundamental rights conferred under Article 19 which may be applicable in a given situation, ex-hypothesi it must also be liable to be tested with reference to Article 14.... There can be no doubt that it (Article 14) is a founding faith of the Constitution. It is indeed the pillar on which rests securely the foundation of our democratic republic.... In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic, while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14. Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness, pervades Article 14 like a brooding omnipresence and the procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Article 14. It must be "right and just and fair" and not arbitrary, fanciful or oppressive; otherwise, it
would be no procedure at all and the requirement of Article 21 would not be satisfied.

Several jurists have opined, not without justification that the effect of Maneka Gandhi is to practically import the concept of ‘due process of law’ from the American Constitution into our jurisprudence. Be that as it may, the fact remains that the procedure established by law which affects the liberty of a citizen must be right, just and fair and should not be arbitrary, fanciful or oppressive and that a procedure which does not satisfy the said test would be violative of Article 21.

3.1.6 Right to Know Grounds of Arrest

Article 22 (1) of Indian Constitution says 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.

This constitutional safeguard is necessary to enable the arrested person to know the grounds of his arrest and to prepare for his defence. An arrest or detention will be illegal if the arrested person is not told his grounds of arrest. The words used in Article 22(1) are ‘as soon as may be’ which means as nearly as is reasonable in the circumstances of a particular case. On this issue the Supreme Court of India held in the matter of re Madhu Limaye\(^{32}\) that:

The requirement that the person arrested should be informed of the reason why he is seized naturally does not

\(^{32}\) AIR 1969 SC 1014, para 11(3)
exist if the circumstances are such that he must know the general nature of the alleged offence for which he is detained." Lord Symonds gave an illustration of the circumstances where the accused must know why he is being arrested:

'There is no need to explain the reasons of arrest if the arrested man is caught red-handed and the crime is patent to high Heaven.'

The two requirements of clause (1) of Article 22 are meant 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 consulting a legal practitioner of his choice and to be defended by him. Clause (2) of Article 22 provides the next and most material safeguard that the arrested person must be produced before a Magistrate within 24 hours of such arrest so that an independent authority exercising judicial powers may without delay apply its mind to his case. The Criminal Procedure Code contains analogous provisions in Sections 60 and 340 but our Constitution makers were anxious to make these safeguards an integral part of fundamental rights.

Dr. B.R. Ambedkar while moving for insertion of Article 15A (as numbered in the draft Bill of the Constitution) which corresponded to present Article 22; thus observed as under:
Article 15A merely lifts from the provisions of the Criminal Procedure Code two of the most fundamental principles which every civilised country follows as principles of international justice. It is quite true that these two provisions contained in clause (1) and clause (2) are already to be found in the Criminal Procedure Code and thereby probably it might be said that we are really not making any very fundamental change. But we are, as I contend, making a fundamental change because what we are doing by the introduction of Article 15A is to put a limitation upon the authority both of Parliament as well as of the Provincial Legislature not to abrogate these two provisions, because they are now introduced in our Constitution itself. 33

Prior to the Constitution of India this right was not protected by the Code of Criminal Procedure, 1898 expecting that the accused could learn only after his production before a Magistrate or officer-in-charge of a police station34. Under Article 22(1) the right of the accused to be informed of the grounds of arrest in India is presently a Constitutional mandate. The right could not be claimed in the pre-constitution period immediately after his arrest. This right was protected by clause (4) of section 17335 of Cr.P.C. of 1898 and was claimable only when the Police report was filed after the completion of investigation into the commission of an offence. Of course, trial of an accused could not be held in the absence of the

34 Section 60 Cr.P.C. 1898.
35 Section 173(4) A copy of any report forwarded under this section shall, on application, be furnished to the accused before the commencement of the inquiry or trial; Provided that the same shall be paid for unless the Magistrate for some special reason thinks fit to furnish it free of cost.
copy of the charge sheet having been furnished to the accused. However, the absence of this right was felt by the founding fathers the Constitution and as such was recognised by clause (1) of Article 22.

Now the new Code of Criminal Procedure, 1973, has added a new vista in the promotion of human rights and personal liberty by incorporating into it a right of being forthwith, informed of the grounds of arrest to the accused. Every person being arrested without warrant other than under preventive detention measures has a right to be informed, forthwith, of particulars of the offence or grounds for his arrest. If the arrest is made without a warrant in a bailable case, the accused should be informed of his right to be released on bail after furnishing sureties. This is a new provision added to the new Code of Criminal Procedure; no such existed under the Code of Criminal Procedure, 1898. With the addition of this right to the Code, the expediency of the civil liberty of the Indian citizens has been well recognised. The grounds of arrest should be informed to the arrested persons in clear terms so as to enable him to avail privilege of the right to counsel enshrined in Article 22(1). The right of being informed of grounds of arrest is not dispensed with by offering bail to the arrested person. The Supreme Court of India has held in Shibben Lal Saxena v. State of U.P. that if one of the two grounds was irrelevant or was wholly illusory the detention order as a whole would be vitiated. Similarly if good ground is mixed up with vague, indefinite and bad grounds the arrest and the detention comes under clouds of doubt as such information of grounds of arrest does not give proper opportunity

36 Supra note 3 at 219.
37 AIR 1954 SC 179.
to the arrestee to defend himself and make proper representation. The grounds must particularise the offence so as to enable the arrested person to make adequate representation against his arrest and detention and in the absence of particularisation the grounds would be vague, indefinite and irrelevant.\textsuperscript{38} The phrase "to be informed of grounds of arrest and detention" does not mean the full disclosure of facts giving rise to a reason or cause of arrest and detention as required by Article 22(1). There should be full disclosure of grounds and not facts to enable the arrested person to make a full and effective representation against his arrest and detention. Non disclosure of full facts of the case is not in contravention of Article 22(1) because facts and grounds are separate and distinct from each other and the former gives rise to the later.\textsuperscript{39} In \textit{Vimal Kishore v. State of U.P.}\textsuperscript{40} the communication of merely of some provision of law under which the person was arrested, was held to be insufficient ground of arrest as it does not enable the arrested person to understand why he has been arrested. While delivering the judgement, Justice M. C. Desai held the grounds to be insufficient and explained the nature of grounds enshrined in Article 22(1) of Constitution of India:

\begin{quote}
If a person is arrested on a warrant the grounds or reasons for arrest are warrant; if the warrant is read over to him that is sufficient compliance with the requirement that he should be informed of the grounds of his arrest. If he is arrested without warrant, he must be told why he has been arrested. If he is arrested for committing an offence, he must be told that he has committed a certain offence, for which he would
\end{quote}

\textsuperscript{38} \textit{Sita Ram Kishore v. State}, AIR 1956 Patna, 1.  
\textsuperscript{39} \textit{Prem Nath v. Union of India}, AIR 1950 (Punj.) 235.  
\textsuperscript{40} AIR 1956 All. 56.
be placed on trial. In order to inform him that he has committed certain offence, he must be told of acts done by him for which he would be tried; informing him of the law applicable to that act would not be enough.

In *Joginder Kumar v. State of U.P.*, the power of arrest and its exercise has been dealt with at length. It would be appropriate to refer to certain perceptive observations in the judgment:

The horizon of human rights is expanding. At the same time, the crime rate is also increasing. Of late, this court has been receiving complaints about violation of human rights because of indiscriminate arrests. How are we to strike a balance between the two? A realistic approach should be made in this direction. The law of arrest is one of balancing individual rights, liberties and privileges, on the one hand, and individual duties, obligations and responsibilities on the other; of weighing and balancing the rights, liberties and privileges of the single individual and those of individuals collectively; of simply deciding what is wanted and where to put the weight and the emphasis; of deciding which comes first – the criminal or society, the law violator or the law abider; of meeting the challenge which Mr. Justice Cardozo so forthrightly met when he wrestled with a similar task of balancing individual rights against society's rights and wisely held that the exclusion rule was bad law, that society came first, and that the criminal should not go free because the constable blundered.

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41 AIR 1994 SC 1349.
The quality of a nation’s civilisation can be largely measured by the methods it uses in the enforcement of criminal law.”

This court in *Smt. Nandini Satpathy v. P.L. Dani*[^42] quoting Lewis Mayers, stated:

To strike the balance between the needs of law enforcement on the one hand and the protection of the citizen from oppression and injustice at the hands of the law-enforcement machinery on the other is a perennial problem of statecraft.” The pendulum over the years has swung to the right.

Again in para 21, at page 1033, it has been observed:

We have earlier spoken of the conflicting claims requiring reconciliation. Speaking pragmatically, there exists a rivalry between societal interest in effecting crime detection and constitutional rights which accused individuals possess. Emphasis may shift, depending on circumstances, in balancing these interests as has been happening in America. Since *Miranda*[^43] there has been retreat from stress on protection of the accused and gravitation towards society’s interest in convicting law-breakers. Currently, the trend in the American jurisdiction according to legal journals is that ‘respect for (constitutional) principles is eroded when they leap their proper bounds to interfere with the legitimate interests of society in enforcement of its

[^42]: AIR 1978 SC 1025 at 1032.
laws\textsuperscript{44}.... Our constitutional perspective has, therefore, to be relative and cannot afford to be absolutist, especially when torture technology, crime escalation and other social variables affect the application of principles in producing humane justice.

The National Police Commission in its Third Report referring to the quality of arrests by the Police in India mentioned power of arrest as one of the chief sources of corruption in the police. The report suggested that, by and large, nearly 60% of the arrests were either unnecessary or unjustified and that such unjustified police action accounted for 43.2% of the expenditure of the jails. The said Commission in its Third Report at page 31 observed thus:

It is obvious that a major portion of the arrests were connected with very minor prosecutions and cannot, therefore, be regarded as quite necessary from the point of view of crime prevention. Continued detention in jail of the persons so arrested has also meant avoidable expenditure on their maintenance. In the above period it was estimated that 43.2 per cent of the expenditure in the connected jails was over such prisoners only who in the ultimate analysis need not have been arrested at all....

(The figures given in the Report of the National Police Commission are more than two decades old. Today, if anything, the position is worse.)

\textsuperscript{44} Couch v. United States, (1972) 409 US 322 at 336.
The Royal Commission suggested restrictions on the power of arrest on the basis of the 'necessity of principle'. The two main objectives of this principle are that police can exercise powers only in those cases in which it was genuinely necessary to enable them to execute their duty to prevent the Commission of offences, to investigate crime. The Royal Commission was of the view that such restrictions would diminish the use of arrest and produce more uniform use of powers. The Royal Commission Report on Criminal Procedure – Sir Cyril Philips, at page 45 said:

.... We recommend that detention upon arrest for an offence should continue only on one or more of the following criteria;

a) the person’s unwillingness to identify himself so that a summons may be served upon him;

b) the need to prevent the continuation or repetition of that offence;

c) the need to protect the arrested person himself or other persons or property;

d) 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

e) the likelihood of the person failing to appear at court to answer any charge made against him.
The Royal Commission in the above-said Report at page 46 also suggested:

To help to reduce the use of arrest we would also propose the introduction here of a scheme that is used in Ontario enabling a police officer to issue what is called an ‘appearance notice’. That procedure can be used to obtain attendance at the police station without resorting to arrest provided a power to arrest exists, for example to be fingerprinted or to participate in an identification parade. It could also be extended to attendance for interview at a time convenient both to the suspect and to the police officer investigating the case....

In India, Third Report of the National Police Commission at page 32 also suggested:

...An arrest during the investigation of a cognizable case maybe considered justified in one or other of the following circumstances:

1) The case involves a grave offence 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.

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

3) The accused is given to violent behaviour and is likely to commit further offences unless his movements are brought under restraint.
4) The accused is a habitual offender and unless kept in custody he is likely to commit similar offences again.

It would be desirable to insist through departmental instructions that a police officer making an arrest should also record in the case diary the reasons for making the arrest, thereby clarifying his conformity to the specified guidelines....

It would equally be relevant to quote para 24, which reads as follows:

The above guidelines are merely the incidents of personal liberty guaranteed under the Constitution of India. No arrest can be made because it is lawful for the Police Officer to do so. The existence of the power to arrest is one thing. The justification for the exercise of it is quite another. The Police Officer must be able to justify the arrest apart from his power to do so. Arrest and detention in police lock-up of a person can cause incalculable harm to the reputation and self-esteem of a person. No arrest can be made in a routine manner on a mere allegation of commission of an offence made against a person. It would be prudent for a Police Officer in the interest of protection of the constitutional rights of a citizen and perhaps in his own interest that no arrest should be made without a reasonable satisfaction reached after some investigation as to the genuineness and bona fides of a complaint and a reasonable belief both as to the person's complicity and even so as to the need to effect arrest. Denying a person of his liberty is a serious matter. The recommendations of the
Police Commission merely reflect the constitutional concomitants of the fundamental right to personal liberty and freedom. A person is not liable to arrest merely on the suspicion of complicity in an offence. 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 offences, an arrest must be avoided if a police officer issues notice to person to attend the Station House and not to leave Station without permission would do.

The ultimate directions given, contained in paras 26 to 29, read as follows:

These rights are inherent in Articles 21 and 22(1) of the Constitution and require be recognizing and scrupulously protecting. For effective enforcement of these fundamental rights, we issue the following requirements:

1. An arrested person being held in custody is entitled, if he so requests 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 must be held to flow from Articles 21 and 22(1) and enforced strictly.
It shall be the duty of the Magistrate, before whom the arrested person is produced, to satisfy himself that these requirements have been complied with.

The above requirements shall be followed in all cases of arrest till legal provisions are made in this behalf. These requirements shall be in addition to the rights of the arrested persons found in the various Police Manuals.

These requirements are not exhaustive. The Directors General of Police of all the States in India shall issue necessary instructions requiring due observance of these requirements. In addition, departmental instruction shall also be issued that a police officer making an arrest should also record in the case diary, the reasons for making the arrest.

3.1.7 Right to have Counsel of Own Choice

An individual allegedly accused of crime is a morally and mentally distressed person; mostly he is unable to defend himself for want of legal knowledge and pecuniary resources. On the one hand the State with its resources tries to prove its action against the individual; on the other hand the other hand there is inability of the individual to meet with his defence. In order to mitigate this imbalance the institution of lawyer has been recognised by the State. Historically speaking this institution existed in India and other civilised countries of the world but not in the modern sense. Though the provision for legal assistance remained on the statute book of the Criminal Procedure Code, yet the Constitution makers thought this to be a basic need of the Indian society and so, the
long felt need to consult and to be defended by legal practitioner of choice was incorporated in the Constitution of India.45

Right to counsel in India has been recognised from ancient times. During Hindu and Muslim rules the cases of an accused having been defended by Pandits and Maulvis have been found. Prior to the constitutional guarantee under Article 22(1) relating to the accused's right to consult and engage lawyer for his defence was protected by section 340(1)46 of Code of Criminal Procedure, 1898. That section of the Code provided that any person accused of an offence before a criminal court or against whom criminal proceedings were instituted under that Code, could as of right be defended by a pleader. This right gave full opportunity to the accused to have a lawyer of his own choice.47 This statutory right has been made as a constitutional guarantee by Article 22(1).

Right to counsel guaranteed by Article 22(1) includes right of consultation with a lawyer of one's own choice and this right is extended to those persons as well as who have not been arrested but are under circumstances of near custodial interrogation. In Nandini Satpathy v. P.L Dani,48 delivering the judgement Justice V. R. Krishna Iyer held that:

The right to consult an advocate of his choice shall not be denied to any person who is arrested. This does not mean that persons who are not under arrest or custody can be

45 Supra note 3, at 230.
Any person accused of an offence before a Criminal Court, or against whom proceedings are instituted under this Code, may of right be defended by a pleader of his choice.
48 AIR 1978 SC 1025.
denied that right. The spirit and sense of Art. 22 (1) is that it is fundamental to the rule of law that the services of a lawyer shall be available for consultation to any accused person under circumstances of near-custodial interrogation. Moreover, the observance of the right against self-incrimination is best promoted by conceding to the accused the right to consult a legal practitioner of his choice.

The purpose of consulting lawyer of one's own choice will be defeated if the accused is not allowed to consult him when asked for. To be effective, the interview should take place out of the hearings of the police though it may be with in their presence. This right must not be abused and should be granted subject to reasonable restrictions as to time and convenience of the police authorities no less than that of the party seeking interview. In this connection Medgavkar, J., of the Bombay High Court observed that:

If the ends of justice are 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 is made with the aid of skilled legal advice—advice so valuable that in the gravest of criminal trials when life or death hangs in the balance, the very state which undertakes the prosecution of the prisoner also provides him, if poor, with such legal assistance.49

3.1.8 **Right to be produced before a magistrate within 24 hours of Arrest**

This is a fundamental right against illegal detention and without adhering to this “Right to life and personal liberty” under Article 21 of Indian Constitution can be realised at all. This provision of Constitution enables the Magistrate to look into the legality of arrest immediately and give relief to the arrestee if he has been arrested illegally or without following proper procedure. This provision enables to take necessary corrective measures if the life and liberty of a person is jeopardized by wrongful and illegal acts of police.

**Article 22(2) of the Indian Constitution, provides 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 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.”

Article 22(3) deals with the exceptions to the general rule and states as following:

“Nothing in clauses (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”.
Article 22(4) deals with the situations wherein the preventive detention has to be prolonged for more than three months and provides as following:

No law providing for preventive detention shall authorise the detention of a person for a longer period than three months unless-

(a) an Advisory Board consisting of persons who are, or have been, or are qualified to be appointed as, Judges of a High Court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention:

Provided that nothing in this sub-clause shall authorise the detention of any person beyond the maximum period prescribed by any law made by Parliament under sub-clause (b) of clause (7); or

(b) such person is detained in accordance with the provisions of any law made by Parliament under sub-clauses (a) and (b) of clause (7).

The procedure for detaining a person for more than three months is provide in clauses 5, 6 and 7 of Article 22, which are as following:

(5) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order.
(6) Nothing in clause (5) shall require the authority making any 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 may by law prescribe-

(a) the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an Advisory Board in accordance with the provisions of sub-clause (a) of cl (4);

(b) 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

(c) the procedure to be followed by an Advisory Board in an inquiry under sub-clause (a) of clause (4).

As per the provisions of Section 56\(^{50}\) and Section 76\(^{51}\) of Code of Criminal Procedure, 1973, the arrested person must be brought before the magistrate irrespective of the fact whether he

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50 **Section 56: Person arrested to be taken before Magistrate or officer in charge of police station.**

"A police officer making an arrest without warrant shall, without unnecessary delay and subject to the provisions herein contained as to bail, take or send the person arrested before a Magistrate having jurisdiction in the case, or before the officer in charge of a police station."

51 **Section 76: Person arrested to be brought before court without delay.**

"The police officer or other person executing a warrant of arrest shall (subject to the provisions of section 71 as to security) without unnecessary delay bring the person arrested before the court before which he is required by law to produce such person: Provided that such delay shall not, in any case, exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's court."
has been arrested with warrant or without warrant. In Khatri v. State of Bihar\textsuperscript{52} the Supreme Court took a strong view of not producing the arrestees within 24 hours before the magistrate and observed that "we would strongly urge upon the State and its police authorities to see that this constitutional and legal requirement to produce an arrested person before a Judicial Magistrate within 24 hours of the arrest must be scrupulously observed". The court further said that this healthy provision enables the magistrate to keep a check over the investigating agencies and the courts should come heavily down the police where this mandatory provision of law is found disobeyed. In Sharif Bhai v. Abdul Razak\textsuperscript{53} the court said that police officer shall be guilty of wrongful confinement and detention, if he fails to produce the arrestee before the magistrate within 24 hours. Before, taking to magistrate, the arrested person should not be confined anywhere except the police station where he was arrested or brought after arrest. The place of arrest must be notified and communicated to the relatives of the arrestee.

3.2 Legal Rights of Arrested Persons

3.2.1 Right to be informed of the grounds of Arrest

The constitutional guarantee of the right of the accused to be informed of the grounds of arrest under Article 22(1) finds procedural prescription for realising this mandate in Sections 50, 50-A, 55 and 75 of Criminal Procedure Code, 1973. The provisions of these sections are mandatory in nature and non-compliance of these provisions shall render the arrest illegal. Where a person is

\textsuperscript{52} Khatri v. State of Bihar, 1981(1) SCC 627.

\textsuperscript{53} AIR 1861, Bom.42.
arrested without any warrant, he should be informed of the particulars of the offence and grounds of his arrest and where the offence is bailable one, of his right to be released on bail. These sections confer a valuable right and non-compliance with it amounts to disregard to the procedure established by law. Making known to the accused grounds of his arrest is a constitutional requirement and failure to comply with this requirement renders the arrest illegal.

**Section 50: Person arrested to be informed of grounds of arrest and of right to bail**

(1) Every police officer or 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.

(2) Where a police officer arrests without warrant any person other than a person accused of a non-bailable offence, he shall inform the person arrested that he is entitled to be released on bail and that he may arrange for sureties on his behalf.

A joint reading of text of Article 22(1) of the Constitution of India and Section 50(1) of the Code of Criminal Procedure, 1973 mandates that every person arrested is to be informed the grounds of arrest and of his right to bail. Section 50, Code of Criminal Procedure brings the law in conformity with the provisions of Article 22(1) of the Constitution thereby enabling the person arrested to move for 'Habeas Corpus' to obtain his release. Itconfers a valuable right and non-conformation to its mandatory

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54 In *re Madhu Limaye*, AIR 1969 SC 1104.
provisions is a non-conformation to the procedure established by law.55 The provisions of Section 50(1), Code of Criminal Procedure, 1973 and Article 22(1) of the Constitution are mandatory, hence, if the accused has not been informed of the grounds of his arrest not the full particulars of the offence for which he was arrested, then his detention is illegal and void from the very inception and cannot be sustained despite the fact, the charge sheet has been submitted and he should be directed to be released immediately.56

[50-A. Obligation of person making arrest to inform about the arrest, etc., to a nominated person]57

(1) Every police officer or other person making any arrest under this Code shall forthwith give the information regarding such arrest and place where the arrested person is being held to any of his friends, relatives or such other persons as may be disclosed or nominated by the arrested person for the purpose of giving such information.

(2) The police officer shall inform the arrested person of his rights under sub-section (1) as soon as he is brought to the police station.

(3) An entry of the fact as to who has been informed of the arrest of such person shall be made in a book to be kept in the police station in such form as may be prescribed in this behalf by the State Government.

57 Inserted by the Cr. P.C. (Amendment Act) 2005, Section 7.
It shall be the duty of the Magistrate before whom such arrested person is produced, to satisfy himself that the requirements of sub-section (2) and sub-section (3) have been complied with in respect of such arrested person.

Section 55: Procedure when police officer deputes subordinate to arrest without warrant

(1) When any officer in charge of a police station or any police officer making an investigation under Chapter XII requires any officer subordinate to him to arrest without a warrant (otherwise than in his presence) any person who may lawfully be arrested without a warrant, he shall deliver to the officer required to make the arrest an order in writing, specifying the person to be arrested and the offence or other cause for which the arrest is to be made and the officer so required shall, before making the arrest, notify to the person to be arrested the substance of the order and, if so required by such person, shall show him the order.

(2) Nothing in sub-section (1) shall affect the power of a police officer to arrest a person under section 41.

The power to arrest under Section 55, Criminal Procedure Code, has to be exercised where the obtaining of warrant from the Magistrate would involve unnecessary delay in effecting the arrest. The object of this section is to avoid unnecessary delay.\textsuperscript{58} Order deputing his subordinate Police Officer should be in writing and not by mere endorsement\textsuperscript{59} any arrest without the order in writing will be unlawful and the person would be within his right to use criminal force to prevent his illegal arrest, however such use of

\begin{footnotesize}
\begin{enumerate}
\item Bir Bhadra Pratap Singh v. D. M. Azamgarh, AIR 1959 All.384.
\item AIR 1968 All. 132.
\end{enumerate}
\end{footnotesize}
force shall be within the provisions of Section 99 Indian Penal Code.\textsuperscript{60}

**Section 75: Notification of substance of warrant**

The police officer or other person executing a warrant of arrest shall notify the substance thereof to the person to be arrested, and, if so required, shall show him the warrant.

Section 75, Cr.P.C. refers the "Police Officer or other person executing the warrant of arrest" has only to notify the substance of the warrant to the person to be arrested and if required to show him the warrant. Such execution of warrant need not be only by the Police Officer but by "other person" as referred in this section.\textsuperscript{61} In order that the person arrested may satisfy himself regarding the authenticity of a warrant issued under Section 75, Cr.P.C. it is necessary that a seal of Court should appear on it. Absence of seal on a warrant of arrest renders it void and invalid and obstruction to the execution of such a warrant of arrest is not punishable by sections 225 and 353 of Indian Penal Code.\textsuperscript{62}

**3.2.2 Right of the arrested person not to be subjected to unnecessary restraint**

**Section 49:** The person arrested shall not be subjected to more restraint than is necessary to prevent his escape.

\textsuperscript{60} Bhootati Konda Murugadu v. State of Andhra Pradesh, 1996 Cr.L.J. 3310.
\textsuperscript{61} Birendra Kumar Rai v. Union of India, 1992, Cr.L.J.3866.
\textsuperscript{62} Pangir Bajgir Gosain v. State, 1962(1) Cri.L.J 91(Raj)
The provisions of section 49, Cr.P.C. reflects the ideas of humane treatment of person in custody. Krishna Iyer, J. in Prem Shankar Shukla v. Delhi Administration observed that:

The core principle found in Article 5 of the Universal Declaration of Human Rights, 1948 is that:

"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

And Article 10 of the International Covenant on Civil and Political Rights reads: "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."

Of course, while these larger considerations may colour our mental process, our task cannot overflow the actual facts of the case or the norms in part III and the provisions in the Prisoners (Attendance in Courts) Act, 1955 (for short, the Act). All that we mean is that where personal freedom is at stake or torture is in store, to read down the law is to write off the law and to rise to the remedial demand of the manacled man is to break human bondage, if within the reach of the judicial process. In this jurisdiction, the words of Justice Felix Frankfurter are a mariner's compass:

"The history of liberty has largely been the history of observance of procedural safeguards."

63 AIR 1980 SC 1535.
In this case it was held that handcuffing is more than to mortify the accused person as it dehumanizes him and therefore, violates his very personhood.

3.2.3 Protection against arbitrary or illegal detention

Prompt production before a magistrate is essential to the protection of the rights of the accused. He is presumed to be innocent until proven guilty. But the police often assume the opposite and subvert a lawful arrest to oppressive ends. Actions resulting in the curtailment of liberty of an individual are to be judicially verified as to its reasonableness and justification. The law has provided that person arrested without warrant shall be produced before a magistrate having the jurisdiction in the case. The person arrested can not be detained by the police for more than twenty four hours of such arrest. Section 56 of the Code of Criminal Procedure, 1973 deals with the provision of taking the arrested person without unnecessary delay before a magistrate having jurisdiction and reads as following:

Section 56: Person arrested to be taken before Magistrate or officer in charge of police station

A police officer making an arrest without warrant shall, without unnecessary delay and subject to the provisions herein contained as to bail, take or send the person arrested before a Magistrate having jurisdiction in the case, or before the officer in charge of a police station.

Where arrest is made without warrant and where the office is bailable the police officer may offer bail as per the Code. Where in the opinion of the police it is not fit to give bail, then the arrested
person has to be taken to the Magistrate having jurisdiction. These provisions of Sections 56 and 57 Cr.P.C. are analogues to Article 22(2) of the Indian Constitution. In *State of U.P. v. Abdul Samad*, the Supreme Court of India took a serious view of detaining petitioners beyond 24 hours without the orders of the Magistrate and held that "such detention beyond 24 hours is illegal and if the arrested person is not produced within 24 hours before the Magistrate then he will be entitled to release immediately." Even the oral application for bail can not be refused to be heard by the Magistrate on the production of an arrestee. But issuing an order of remand without production of arrestee, when he is in police custody is deprecated. When an accused present himself before the Magistrate and make a prayer to surrender, it should be accepted by the Magistrate. The practice of postponing surrender application is not fair. If the application however, does not mention that person surrendering is wanted in a case, Police report may be called.

**Section 57: Person arrested not to be detained more than twenty-four hours**

No police officer shall detain in custody a person arrested without warrant for a longer period than under all the circumstances of the case is reasonable, and such period shall not, in the absence of a special order of a Magistrate under section 167, exceed twenty four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's court.

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64 AIR 1962 SC 1506.
65 AIR 1959 M.P. 147.
Section 57, of the Code of Criminal Procedure, 1973, deals essentially with the question of production of a person after arrest by the police without warrant. But at the same time, it does not deal with the question of bail. As a matter of fact arrests without warrant call for greater protection than do arrests under a warrant issued by a court. The compulsion to produce the arrested person before a magistrate within twenty four hours time limit ensures the immediate application of judicial mind to the legality of the arrest and regularity of the procedure. Therefore, a police officer who fails to produce the arrested accused within the prescribed limit exposes himself to the charge of wrongful confinement, even if the arrest were to be legal. Even in cases where police may not actually arrest a person without warrant but put him under restraint affecting his mobility and movement, the case will be covered under Section 57 of Cr.P.C. If the plea of no actual arrest is accepted, that would be an illegal abuse of police power and such an act would be held as tantamount to arrest and then naturally the provisions of this section would apply to the case. The court would see the reality of the absence of freedom of movement in such cases to treat it as a case of arrest. The purpose Section 57 is twin fold, firstly the law is not in favour of detention and secondly to enable the person to make representation before the Magistrate.

There lies on more procedural safeguard against arbitrary or illegal detention in the shape of Section 58 of the Code of Criminal Procedure to prevent the abuse and misuse of the power of arrest by the police without warrant, so that there is a close scrutiny of

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68 Sharif Bhai v. Abdul Razak, AIR, 1861 Bom.42.
the exercise of the power and timely corrections are available to insure strict compliance of the law by the police. The provisions of Section 58 reads as following:

**Section 58: Police to report apprehensions**

Officers in charge of police stations shall report to the District Magistrate, or, if he so directs, to the Sub-divisional Magistrate, the cases of all persons arrested without warrant, within the limits of their respective stations, whether such persons have been admitted to bail or otherwise.

This section creates a legal obligation upon the officer-in-charge of the police station, to report apprehensions. The object of Sections 58 and 59 of the Code of Criminal Procedure, 1973 is that the Magistrate should promptly exercise authority, if necessary, with regard to all arrests by police. As no person can be released without the order of Magistrate except on bail or recognizance, it shall be the Magistrates responsibility as well as that of police if a person illegally arrested remains unnecessary in custody.

Section 76 of Code of Criminal Procedure is a procedural safeguard for the cases where the arrest has been made by execution of a warrant. The warrant is deemed to be exhausted and therefore, in order to continue detention, if necessary, the accused person will have to be produced before the magistrate or orders under section 167 of the Cr.P.C. The provisions of Section 76 of Cr.P.C reads as following:
Section 76: Person arrested to be brought before court without delay

The police officer or other person executing a warrant of arrest shall (subject to the provisions of section 71 as to security) without unnecessary delay bring the person arrested before the court before which he is required by law to produce such person: Provided that such delay shall not, in any case, exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's court.

3.2.4 Right to be defended by counsel of his choice

Section 303 of Code of Criminal Procedure, 1973 provide-

Any person accused of an offence before a Criminal Court, or against whom proceedings are instituted under this Code, may of right be defended by a pleader of his choice.

Section 303 of Code of Criminal Procedure, 1973 makes it clear that every person accused of an offence before the Criminal Court has got a right to be defended by pleader of his choice. This section certainly contemplates that the accused should not only be at liberty to be defended by a pleader at the time when proceeding are actually going on, but also implies that he should have a reasonable opportunity if in custody, of getting into communication with his legal adviser for the purpose of preparing his defence. The same policy finds place in Section 40 of the Prisoners Act (9 of 1894), which lays down that, subject to proper restrictions, an unconvicted prisoner should be allowed to see his
Unlike in civil cases, it is not necessary in criminal cases that a vakalatnama has to be filed. In criminal cases it is sufficient if a memo of appearance is filed by an advocate with a declaration that he has instructions from his client to represent him in the case. Such memo of appearance enables sufficient authority and power to represent the accused. The contents of memo of appearance can not be challenged by the prosecution. It is only the accused for whose benefit the memo is filed can challenge.

If one is denied of his right to be defended by a pleader of his choice, the conviction is unsustainable. In the present case no opportunity was given to the respondent to defend his case by engaging a lawyer of his choice. Hence, the court found that the conviction of the respondent by the Assistant Commandant/Judicial Magistrate 1st Class is in contravention of the provision of Section 303 of Code of Criminal Procedure and the same is also hit by principles of natural justice as the respondent was deprived of adequate opportunity to defend his case. Rule of natural justice requires that one should not be deprived of his vested right or be punished without having been given an opportunity to offer an explanation on his behalf. This principle stems from the maxim audi alteram partem, which means no one should be condemned unheard. Such a fact situation, not only entails serious charge, but would also culminate into unfairness and serious prejudice to him holding the trial against him in a Session case. The fairness of the trial is sine quo non in any criminal trial. Law without justice is blind, whereas, justice

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70 In re. Lelwyn Evans, ILR 50 Bom. 741.
without law is lame. It is, therefore, the duty of the Presiding Officer to be alive to the provisions of law. It is elementary principle of law that no order should be made to a man's prejudice, especially in a criminal case, without hearing him and the very objective of the Legislature in allowing parties to be represented at trial by counsel is that counsel must be heard before a final opinion is formed by the Court. It is not a question of indulgence but of right. The right conferred by this section does not extend to a right in an accused person to be provided with a lawyer by the State or by the police or by the Magistrate. That is a privilege given to him and it is his duty to ask for a lawyer if he wants to engage one and to engage one himself or get his relations to engage one for him. The only duty cast on the Magistrate is to afford him the necessary opportunity.73

3.2.5 Right to be released on bail

Section 436, Cr.P.C : In what cases bail to be taken?

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

73 Tara Singh v. State, AIR 1951 SC 441.
Provided further that nothing in this section shall be deemed to affect the provisions of sub-section (3) of section 116 [or section 446A].

(2) 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 cases of Bailable Offences, to which Section 436 applies, a Police Officer has no discretion at all to refuse to release the accused on bail, so long as the accused is prepared to furnish surety.\(^74\) In case of bailable offence, a Police Officer, at the time of arrest or while in custody, shall release such person accused of bailable offence on bail, if such person is prepared to give bail or when such person appears or is brought before the Court and he is prepared to give bail, the Court shall release him on bail. In bailable offences, bail can be claimed as a matter of right.\(^75\) The basic rule is to put accused on bail and not in jail except where there are suggestive circumstances.\(^76\) The orders granting bail are not required to be speaking orders.\(^77\) The likelihood of the applicant interfering with the witnesses of the prosecution may be the criteria for refusal of

\(75\) Ratilal Bhanji Mithani v. Assistant Collector of Custom, AIR 1967 SC 1639.
The Court granting bail or Court of Session has not power to cancel bail in respect of bailable offences though such powers are vested on such Courts in respect of non-bailable offences under sub-section (5) of Section 437. Cr.P.C. makes no express provision of cancellation of bail granted under Section 436. Nevertheless, if at any subsequent stage of the proceedings, it is found that any person accused of a bailable offence is intimidating, bribing, or tampering with the prosecution witnesses or attempting to abscond, the High Court has the power to cause him arrested and to commit him to custody for such period as it thinks fit. This jurisdiction springs from the overriding inherent powers of the High Court and can be invoked in exceptional cases only. This inherent power of the High Court exists and is preserved by Section 482 of the Cr.P.C. There is no inherent power available to be exercised by any subordinate criminal court for cancellation of bail granted under Section 436, Cr.P.C.

Section 437, Cr.P.C : 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 for life;

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79 Sudhir Kumar Singh v. State of Orissa, 1994 Cr. L.J 368, (Orissa)
(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, imprisonment for life or imprisonment for seven years or more, or he had been previously convicted on two or more occasions of a non-bailable and cognizable offence:

Provided that the court may direct that a person referred to in clause (i) or clause (ii) 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 clause (ii) be released on bail if it is satisfied that it is just and proper so to do 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 he 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 inquiry into his guilt, [the accused shall, subject to the provisions of section 446A and pending such inquiry, be released on bail], or, at the discretion 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, Chatter 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, 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 the trial of a person accused of a non bailable offence and before Judgment 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 judgment delivered.

Section 437 gives discretion to the Court to grant bail to the accused in non-bailable offences subject to the restrictions under sub-sections (1), (2) and (6). The grant of bail is exclusive jurisdictional discretion of the Court to be exercised judicially. The general rule is to allow bail rather than to refuse bail since the law presumes an accused to be innocent till proven guilty. When investigation is likely to take long time because of serious allegations and the grant of bail may frustrate the efforts of the investigating agencies in collection of evidence, the bail can not be allowed. In cases where the person is accused of offences punishable with death or imprisonment for life, the accused cannot be released if there appear grounds believing that he has been guilty. When unnatural circumstances surrounding the death, are such that prima facie commission of serious offence are

80 AIR 1955 Raj. 141.
82 Talab Hazi Hussain v. Madhukar Purshottam Mondkar, AIR 1958 SC 376
made out, the bail should not be granted.\textsuperscript{83} However, interim bail can be granted under sub-section(2) of Sec.437 if the Court finds pending further inquiry that there are no reasonable grounds for believing that accused had committed non-bailable offence.\textsuperscript{84} The Magistrate, while granting bail, can require execution of bond with or without sureties to avoid hardship to an accused but the conditions should not frustrate the very object of granting bail.\textsuperscript{85}

\textbf{Section 438, Cr.P.C : Direction for grant of bail to person apprehending arrest}

(1) When any person has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for direction under this section; and that court may, if it thinks fit, direct that in the even of such arrest, he shall be released on bail.

(2) When the High Court or the Court of Session makes a direction under sub- section (1), it may include such conditions in such directions in the light of the facts of the particular case, as it may thinks fit, including -

(i) A condition that the person shall make himself available for interrogation by a police officer and when required;

(ii) A condition that the person shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to

\textsuperscript{83} Supra note 74
\textsuperscript{84} Supra note 75.
\textsuperscript{85} 1992 Cri.L.J. 521.
dissuade him from disclosing such facts to the court or to any police officer,

(iii) A condition that the person shall not leave India without the previous permission of the court;

(iv) Such other condition as may be imposed under sub-section (3) of section 437, as if the bail were granted under that section.

(3) If such person is thereafter arrested without warrant by an officer in charge of a police station on such accusation, and is prepared either at the time of arrest or at any time while in the custody of such officer to give bail, he shall be released on bail, and if a Magistrate taking cognizance of such offence decides that a warrant should issue in the first instance against that person, he shall issue a bailable warrant in conformity with the direction of the court under sub-section (1).

The distinction between an ordinary bail and anticipatory bail is that where the former is granted after arrest and therefore, mean release from custody the later is granted in anticipation arrest. The term 'Anticipatory Bail' is misnomer because Section 438 contemplates an releasing the accused on bail in the event of his arrest and not in anticipation of arrest. However, no blanket anticipatory bail can be granted. There must be some compelling circumstances made out for granting of anticipatory bail and these should be viewed impartially. The material considerations for

88 Supra note 86.
granting anticipatory bail are different from those for granting post arrest bail. Some circumstances may be, nature and gravity of offence, status of accused, likelihood of fleeing from justice, repeating offences, tempering with witnesses, history of case etc. However, the powers under Section 438 can be exercised even in the case of offence under Section 302. Paramount considerations are likelihood of the accused fleeing from the justice and tempering with the prosecution evidence. When either the conditions of the bail are violated or investigations were not properly done and in granting the bail important events and allegations were ignored, the anticipatory bail can be cancelled.

Section 439, Cr.P.C : 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 section 437, may impose any condition, which it considers necessary for the purposes mentioned in that sub-section;

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

Provided that the High Court or the Court of Session shall, before granting bail to a person who is accused of an offence which is triable exclusively by the Court of Session or which, though not so triable is punishable with imprisonment for life, give notice of the

90 Supra note 79.
application for bail to the Public Prosecutor unless it is, for reasons to he recorded in writing, of opinion that it is not practicable to give such 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.

Section 439 gives wide powers to the High Court as well as Court of Session to grant and such jurisdiction is not revisional but concurrent with that of subordinate Court trying the case. Bail may be granted on grounds of parity\textsuperscript{92} of course the grant of bail is discretion, but it is a judicial discretion.\textsuperscript{93}While granting bail the cardinal principle to be kept in mind is that personal liberty must necessarily be preserved but certainly not in such a manner as to facilitate antisocial elements to destroy the very fabric of the democratic set-up under the Constitution.\textsuperscript{94}

\textbf{3.2.6 Right to be examined by Medical Practitioner}

Section 54 of Code of Criminal Procedure, 1973 deals with the right of the arrestee to be examined by Medical Practitioner and provides-

"When a person who is arrested, whether on a charge or otherwise, alleges, at the time when he is produced before a Magistrate or at any time during, the period of his detention in custody that the examination of his body will afford evidence which will disprove the commission by him of any

\textsuperscript{93} Manniswami v. State of Karnataka,(1983) 2 Crimes, 143 (Knt).
\textsuperscript{94} Mushtaque Ahmed v. State of U.P.,( 1984) 1 Crimes 70 (All).
offence or which Magistrate shall, if requested by the arrested person so to do direct the examination of the body of such person by a registered medical practitioner unless the Magistrate considers that the request is made for the purpose of vexation or delay or for defeating the ends of Justice."

An amendment has been carried out in Section 54 of Criminal Procedure Code, 1973, by way of Amendment Act 2005, which says that:-Section 54 of the principal Act shall be renumbered as sub-section (1) thereof, and after sub-section (1) as so renumbered, the following sub-section shall be inserted, namely:-

"(2) Where an examination is made under sub-section (1), a copy of the report of such examination shall be furnished by the registered medical practitioner to the arrested person or the person nominated by such arrested person."

After the amendment of 2005, the new Section 54 of Criminal Procedure Code, reads as following:

**Section 54, Cr.P.C : Examination of arrested person by medical practitioner at the request of the arrested person:**- (1) When a person who is arrested, whether on a charge or otherwise, alleges, at the time when he is produced before a Magistrate or at any time during the period of his detention in custody that the examination of his body will afford evidence which will disprove the commission by him of any offence or which will establish the commission by any other person of any offence against his body, the Magistrate shall, if requested by the arrested person so to do direct the examination of the body of such person by a registered medical
practitioner unless the Magistrate considers that the request is made for the purpose of vexation or delay or for defeating the ends of justice.

(2) Where an examination is made under sub-section (1), a copy of the report of such examination shall be furnished by the registered medical practitioner to the arrested person or the person nominated by such arrested person.

Now the Code of Criminal Procedure (Amendment) Act, 2008\(^{95}\) substitutes Section 54 of the principal Act, by a new section providing for medical examination soon after arrest. This gives statutory position to the requirement of D.K.Basu case and makes examination of arrested person mandatory soon after arrest and to prepare the record of such examination, mentioning therein any injuries or marks of violence upon the person arrested, and the approximate time when such injuries or marks may have been inflicted. The new section reads as following:

54. (1) when any person is arrested, he shall be examined by a medical officer in the service of Central or State Governments and in case the medical officer is not available by a registered medical practitioner soon after the arrest is made:

Provided that where the arrested person is a female, the examination of the body shall be made only by or under the supervision of a female medical officer, and in case the female medical officer is not available, by a female registered medical practitioner.

\(^{95}\) Which has come into force with effect from 31st December, 2009, except for Sections 5, 6 and 21(b)
(2) The medical officer or a registered medical practitioner so examining the arrested person shall prepare the record of such examination, mentioning therein any injuries or marks of violence upon the person arrested, and the approximate time when such injuries or marks may have been inflicted.

(3) Where an examination is made under sub-section (1), a copy of the report of such examination shall be furnished by the medical officer or registered medical practitioner, as the case may be, to the arrested person or the person nominated by such arrested person."

3.2.7 Right to Legal Aid at the expense of the Government in certain cases

Section 304 of Code of Criminal Procedure, 1973 deals with the provisions of Legal Aid and provides as under:-

(1) Where, in a trial before the Court of Session, the accused is not represented by a pleader, and where it appears to the court that the accused has not sufficient means to engage a pleader, the court shall assign a pleader for his defence at the expense of the State.

(2) The High Court may, with the previous approval of the State Government make rule providing for-

(a) The mode of selecting pleaders for defence under sub-section (2);

(b) The facilities to be allowed to such pleaders by the courts;

(c) The fee payable to such pleaders by the Government, and generally, for carrying out the purposes of sub-section (1).
The State Government may, by notification, direct that, as from such date as may be specified in the notification, the provisions of sub-sections (1) and (2) shall apply in relation to any class of trials before other courts in the State as they apply in relation to trials before the Courts of Session.

3.3 Provisions in conflict with new jurisprudence of arrest

The position of law of arrest in India has changed over the period of time and now the settled position of law is that arrest should be affected only where there is justification for arrest and in those cases where the investigation can be completed without making arrest, unnecessary arrest should not be made. But there are few provisions of law which deserves mention as existence of these provisions is against the latest position of opting arrest as last option only in those cases where it is necessary to do so but these provisions envisages arrest for small purposes. These provisions can be discussed as following:

3.3.1 Section 311-A Criminal Procedure Code

"Power of Magistrate to order person to give specimen signatures or handwriting.- If a Magistrate of the first class is satisfied that, for the purposes of any investigation or proceeding under this Code, it is expedient to direct any person, including an accused person, to give specimen signatures or handwriting, he may make an order to that effect and in that case the person to whom the order relates shall be produced or shall attend at the time and place specified in such order and shall give his specimen signatures or handwriting:
Provided that no order shall be made under this section unless the person has at some time been arrested in connection with such investigation or proceeding."

Though the contents of the main section allows the Magistrate to order any person to give specimen signatures or handwriting if he is satisfied that, for the purposes of any investigation or proceeding under this Code, it is expedient to direct any person, including an accused person, to give specimen signatures or handwriting but the proviso to this section puts a rider that the Magistrate can not make a order under this section unless the person has at some time been arrested in connection with such investigation or proceeding. As a matter of fact the proviso is supplanting the provisions of main section instead of supplementing it. Because the main section empowers to order specimen of any person including an accused therefore, arresting those persons who are not accused in the case but whose specimen signatures may determine the culpability or ex-culpability of any persons can't be expected to be arrested. Moreover, even in the case of an accused person the culpability may be determined only after the comparison of writing/signatures so he can't be arrested before determining that, as there will neither be grounds of arrest nor justification for arrest. Furthermore, as per the settled law in many cases there may be no justification for arrest as the case can be completed even without arrest but the investigating officer may need to take specimen handwriting to determine the culpability.

Therefore, the proviso of Section 311(A) Cr.P.C is undermining the law of arrest and is not supporting the purpose of main section. This proviso deserves correction to make it compatible with the
main provisions of the section and to put the whole section in
league with the law of arrest.

3.3.2 Section 41(2) read with Section 109 of Criminal
Procedure Code, 1973

It has been observed during the period of research that police in
the State of Himachal Pradesh is continuing to make arrests u/s
41(2)/109 of Cr.P.C whereas this section enabling arrests have
been substituted by a new one. Now the latest position under this
 provision is different and the continuation of old practice may put
us in trouble if contested in any court of law. Moreover, the new
provisions of Cr.P.C after coming in operation of amendment Act
41 of 2010 has as such changed the position of law with respect to
the concept of arrest considerably and deserves more sensitization
and new orientation of police officers. The change of position of old
Section 41(2) Cr.P.C vis-à-vis the new substitution after
amendment elaborated as following:

The old Section 41(2) of Criminal Procedure Code, 1973 reads as
following:

(2) Any officer in charge of a police station may, in like manner,
arrest or cause to be arrested any, person, belonging to one or
more of the categories of person specified in section 10996 or
section 110.

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When an Executive Magistrate receive information that there is within
his local jurisdiction a person taking precautions to conceal his presence
and that there is reason to believe that he is doing so with a view to
committing a cognizable offence, the Magistrate may, in the manner
hereinafter provided, require such person to show cause why he should
not be ordered to execute a bond, with or without sureties, for his good
The language of the new Section of 41(2) of Criminal Procedure Code is changed now to:

(2) Subject to the provisions of section 42, no person concerned in a non-cognizable offence or against whom a complaint has been made or credible information has been received or reasonable suspicion exists of his having so concerned, shall be arrested except under a warrant or order of a Magistrate.

The language of new section 41(2) of Cr.P.C makes it clear that under this provision only those persons will be arrested “who in the presence of a police officer, has committed or has been accused of committing a non-cognizable offence refuses, on demand of such officer, to give his name and residence or gives a name or residence which such officer has reason to believe to be false, so that his name or residence may be ascertained.” Whereas as per the old Section 41(2) the any officer in charge of a police station has the power to arrest or cause to be arrested any person, belonging to one or more of the categories of person specified in section 109 or

97 42. Arrest on refusal to give name and residence.
(1) When any person who, in the presence of a police officer, has committed or has been accused of committing a non-cognizable offence refuses, on demand of such officer, to give his name and residence or gives a name or residence which such officer has reason to believe to be false, he may be arrested by such officer in order that his name or residence may be ascertained.
(2) When the true name and residence of such person have been ascertained, he shall be released on his executing a bond, with or without sureties, to appear before a Magistrate if so required:
Provided that, if such person is not resident in India, the bond shall be secured by a surety or sureties resident in India
(3) Should the true name and residence of such person not be ascertained within twenty-four hours from the time of arrest or should he fail to execute the bond, or, if so required, to furnish sufficient sureties, he shall forthwith be forwarded to the nearest Magistrate having jurisdiction
section 110. Therefore, the arrests which used to be made by application of 41(2) read with Section 109 of Cr.P.C were of those persons who were taking precautions to conceal presence and that there was reason to believe that it is being done so with a view to committing a cognizable offence. As a matter of fact under the provisions of Section 41(2) of Cr.P.C the police had power to arrest on the basis of apprehension, the apprehension arising out of the fact that the person or persons are taking precautions to conceal presence with a view to commit some cognizable offence. In actual practice this provision was used in most arbitrary manner and was abused in massive way by police. It is for this reason that the law commission in its 173rd report observed and suggested its repeal. The law commission in its report on page 89 stated that “In our considered opinion, sub-section (2) of section 41 is unnecessary and superfluous in view of section 151 of the Code.” The commission further added at page 91 of the report that “We are of the opinion for the above reasons that sub-section (2) of section 41 is superfluous and unnecessary – apart from the inherent discriminatory character of the provision.

Now after the amendments of 2009 and 2010 the new section has become operational w.e.f. 2-11-2010 vide Notification No SO 2689(E) dated: 1.11.2010. As per this new section 41(2) the arrest is envisaged only of persons who have committed non-cognizable offence in the presence of a police officer, or has been accused of committing a non-cognizable offence refuses, on demand of such officer, to give his name and residence or gives a name or residence which such officer has reason to believe to be false, he may be arrested by such officer in order that his name or residence may be ascertained.
All the arrests made under Section 41(2)/109 Cr. P.C are illegal after 2-11-2010 and officer making the arrests have exposed themselves to the danger of compensation for wrongful confinements and arrests as per the latest law settled by Hon'ble Supreme Court in Nilabati Behara’s case.

Therefore, there is urgent need to sensitize all the District Superintendents of Police to stop making arrests u/s 41(2)/109 Cr. P.C as it is no more a legal provision and ignorance of law cannot be pleaded as an excuse.

3.4 Sum-Up

"Not Power to Arrest rather Justification for Arrest" is the evolution of new jurisprudence of arrest and settled position of law

A police officer can arrest a person without warrant under the circumstances mentioned in the Sections 41, 42 and 151 of Cr.P.C. 1973. While doing so the police officers has to exercise these powers very cautiously for on mere suspicion a police officer cannot arrest a person without warrant. No arrest can be made just because it is lawful for the police officer to do so. The police officer must be able to justify the arrest apart from his power to do so. Arrest and detention, in the police lock-up, of a person can cause incalculable harm to the reputation and self esteem of a person and thus no arrest can be made in a routine manner on a mere allegation of an offence made against a person. A person is not liable to be arrested merely on the suspicion of complicity in the offence. There must be some reasonable justification in the opinion of the officer affecting the

arrest, such arrest being necessary and justified. Except in heinous offences, and arrest must be avoided. If a police officer issues notices to the person to attend the station house and not to leave the station without permission, it is sufficient.\textsuperscript{100} Despite this settled position of law on arrest the indiscriminate rate of arrest without justification does not see any halt and in the case of \textit{Som Mittal v. Government of India},\textsuperscript{101} the Hon’ble Supreme Court had to make a mention of the fact that the law laid down in \textit{Joginder Kumar’s} case is not being followed by law enforcing agencies. The court observed that:

“Despite the categorical judgement of the Supreme Court it appears that the police is not at all implementing it. What invariably happens is that whenever an FIR of a cognizable offence is lodged the police immediately goes to arrest the accused person. This is clear violation of the aforesaid judgement of the Supreme Court.

It may be noted that Section 2(c) Cr.P.C defines a cognizable offence as an offence in which a police officer may arrest without warrant. Similarly Section 41 Cr.P.C states that a police officer may arrest a person involved in a cognizable offence. The use of word “may” shows that a police officer is not bound to arrest even in a case of cognizable offence. When he should arrest and when not is clarified in Joginder Kumar Case.

Again in Section 157(1) Cr.P.C it is mentioned that a police officer shall investigate a case relating to a cognizable

\textsuperscript{100} \textit{Joginder Kumar v State of Uttar Pradesh}, 1994 SCC 1172(Cr).

\textsuperscript{101} 2008(3)SCC at 766
offence, and if necessary take measures for the arrest of the offender. This again makes it clear that arrest is not a must in every case of a cognizable offence.”

To give effect to the law settled down by the Supreme Court of India in Joginder Kumar’s case as stated above, an amendment has been made in Section 41 of Cr.P.C aimed at making the process of arrest more rational based on justification. The amended provision of section 41 Cr.P.C distinguishes between the offences having punishment up to seven years and above seven years. This amendment has also introduced section 41(A) enabling police officer to give notice of appearance in cases where the arrest is not required under the provisions of sub-section (1) of section 41, directing the person 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, to appear before him or at such a place as he may be specified in the notice. The persons to whom such notice is issued is duty bound to comply with the terms of the notice and where such person complies and continues to comply with the terms of notice, he shall not be arrested in respect of the offence referred to in the notice unless, for reasons to be recorded, the police officer is of the opinion that he ought to be arrested. The amended provisions of Section 41 of Criminal Procedure Code reads as following:

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

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.
Provided that a police officer shall, in all cases where arrest of a person is not required under the provisions of this sub-section, record the reasons in writing for not making the arrest.

3) against whom a credible information has been received that he has committed cognizable offence punishable with imprisonment for a term which may extend to more than seven years whether with or without fine or with death sentence and the police officer has reason to believe on the basis of that information that such person has committed the said offence.

4) who has been proclaimed as an offender either under this Code or by order of the State Government; or

5) in whose possession anything is found which may reasonably be suspected to be stolen property and who may reasonably be suspected of having committed an offence with reference to such thing; or

6) who obstructs a police officer while in the execution of his duty, or who has escaped, or attempts to escape, from lawful custody; or

7) who is reasonable suspected of being a deserter from any of the Armed Forces of the Union; or

8) who has been concerned in, or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists, of his having been concerned in, any act committed at any place
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; or

8) who, being a released convict, commits a breach of any rule made under sub-section (5) of section 365; or

9) for whose arrest any requisition, whether written or oral, has been received from another police officer, provided that the requisition specifies the person to be arrested and the offence or other cause for which the arrest is to be made and it appears there from that the person might lawfully be arrested without a warrant by the officer who issued the requisition.