CHAPTER III

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The makers of our Constitution wanted to give freedoms to the citizens of India. They, after studying the different Constitutions of the world, wanted to draw a different picture regarding freedoms. Article 19 of the Constitution is the proof of the fact. But at the same time it was realised that absolute power corrupts everybody so certain restrictions were imposed by the makers. No doubt restriction on our freedoms are impediments in our progress but it is equally true that no progress is possible without discipline. The Constitution of India under its Chapter III has provided us a number of freedoms in the name of fundamental right. But these freedoms are not absolute only for the reasons that their misuse or over-use may create a problem or offences against public peace and tranquility in India. The most relevant article for this study in article 19 of the Constitution. Certain freedoms have been given under clause (1) of the Constitution but clause (2) has imposed certain restrictions upon this article which is very necessary.

 Freedoms enumerated in Article 19(1) of the Constitution of India are those great and basic rights which are
recognised as the natural rights inherent in the status of a citizen. But none of these freedoms is absolute or uncontrolled for, each in liable to be curtailed by laws made or to be made by the state to the extent mentioned in clause (2) to (6) of Article 19.\textsuperscript{2a} Clauses (2) to (6) of Article 19 recognise the right of the state to make laws putting reasonable restrictions in the interest of the general public, security of the state, public order, decency or morality and for other reasons set out in those sub-clauses. The principle on which the power of the state to impose restriction is based is that all individual rights of a person are held subject to such limitations and regulations as may be necessary or expedient for the protection of general welfare. In the words of Das J:

"Social interest in individual liberty may well have to be subordinated to other greater social interests. Indeed, there has to be a balance between individual rights guaranteed under Article 19 (1) and the exigencies of the state which is the custodian of the interest of general public, public order, decency or morality and of other public interest which may be described as social welfare".

In the original Constitution distinction have been drawn between clauses (3) to (6) on the one hand other and clause (2) on the
other, in as much as the word "restrictions" used in clause (3) to (6) was qualified by the word "reasonable", while the word "reasonable" was absent from clause (2). The Constitution (First Amendment) Act, 1951, has inserted the word "reasonable" before the word "restriction" in clause (2) also. Hence, a law restricting the exercise of any of the seven freedoms guaranteed by clause (1) of Article 19 to be constitutionally valid, must satisfy two conditions namely:

(i) the restriction must be for the particular purpose mentioned in the clause permitting the imposition if the restriction on that particular right.

(ii) the restriction must be a reasonable restriction.

It may be emphasised that the requirement that a restriction should be reasonable is of great constitutional significance, for it acts as a limitation on the power of legislation and consequently widens the scope of judicial review of laws restraining the exercise of freedoms guaranteed by Article 19. The determination by the legislature of what constitute a reasonable restriction is not final or conclusive; it is subject to supervision of constitution. However, a judicial verdict announced by a court in or in relation to a matter brought before it for its decision cannot be said to affect the Fundamental Right of citizens
under Article 19 (1) of the constitution.

The principles to be born in mind in applying the test of reasonableness under Article 19 and the test of arbitrariness under Article 14 of the constitution are now well settled. For example a Fundamental Right to acquire, hold and dispose of property can be controlled by the state only by making a law imposing in the interest of general public reasonable restrictions on the exercise of the said right. Such restrictions on the exercise of a Fundamental Right shall not be arbitrary, or excessive or beyond what is required in the interest of general public. The reasonableness of a restriction shall be tested both from the substantive and procedural aspect.

**Article 19 (2) Before And After Amendment:**

**Article 19 (1) -**

Prior to 1st Amendment to the Constitution there was no restrictions on these freedom for public order peace and tranquility.

3. Article 19 (1) provides that all the citizens shall have the right to freedom of speech and expression.
This sub-clause was retrospectively amended by Constitution First Amendment Act, 1951, which provides that-

"nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes a reasonable restriction on the exercise of the right conferred by said sub-clause in the interest of security of the State, friendly relation with foreign State, public order, decency or morality, or any relation to contempt of court defamation or incitement of an offence."

The First Amendment the U.S. Constitution has been referred to by our Supreme Court in considering the Article 19(1)(a) relevant part of that amendment is that... Congress shall make no law abridging the freedom of speech or of the press.

4. See Article 19(2) before 1st Amendment (1951) : provided that- "Nothing in sub-clause (1) of clause-1 shall affect the operation of any existing law in so far as it relates to, or prevents the State from making any law relating to libel, slander, defamation, contempt of court or any matter which offends against decency or morality, which undermines security of our trends to overthrow the State".

5. Article 19(2)
incite breach of the peace or riot; use of threatening, abusive or insulting words or behaviour in any public place or at any public meeting with intent to cause a breach of the peace or whereby breach of the peace is likely to be caused, and all such acts as would endanger public safety.

It will be noticed that clause (2) has used the words "in the interests of public order" and not "for the maintenance of public order". A law may not have been designed to directly maintain the public order and yet it may have been enacted in "the interests of public order" if it assist or is conducive to the maintenance of public order. In other words, this would bring within the protection of clause (2) not only such utterances as are directly intended to incite disorder, but also those that have the tendency to lead to disorder. Thus a law punishing utterances made with deliberate intention to hurt the religious feelings of any class of persons is valid, because it imposes a restriction on the right to free speech in the interest of public order, since such speech or writing has the tendency to create public disorder even if in some cases those activities may not actually

lead to a breach of the peace. But it is necessary that there must be reasonable and proper nexus or relationship between the restriction and the achievement of public order. If the restriction has no proximate relationship to the achievement of public order, it cannot be said that the restriction is a reasonable restriction within the meaning of clause (2). The restriction must not be far-fetched, hypothetical or problemsatical or too remote in the chain of its relation with the public order. In Superintendent, Central Prison Vs. Ram Manohar Lohia, the Supreme Court invalidated Section 3 of the U.P. Special Powers Act, which punished a person, even if he incited a single person not to pay or defer the payment of Government dues because there was no proximate nexus between the speech and public order. The Supreme Court said:

"We cannot accept the argument of the learned Advocate General that instigation of a single individual not to pay tax or dues is a spark which may in the long run

9. Ramji Lal Modi Vs. State of Utter Pradesh, AIR 1957 SC 620; 1957 SCR 820. The test of clear and present danger laid by Supreme Court as the sole consideration for restricting free speech has been rejected in this case, because the framework of the Constitution of India was different from the framework in the United States.


11. Ibid.
ignite revolutionary movement, destroying public order. We can only say that Fundamental Right cannot be controlled on such hypothetical and imaginary consideration.\textsuperscript{12}

In another case,\textsuperscript{13} a vitriolic attack upon the character and integrity of the Chief Justice of a High Court was held to have no rational connection with the maintenance of law and order. Subject to the condition of proximate relationship, the Legislature is competent to pass a law permitting an appropriate authority to place anticipatory restrictions upon particular kinds of acts in an emergency for the purpose of maintaining public order. "Public order has to be maintained in advance in order to ensure it" and, therefore, action in advance of the kind permissible under Section 144, Criminal Procedure Code, is not impermissible.\textsuperscript{14} The American doctrine\textsuperscript{15} that previous restraint on the exercise of Fundamental Rights is only permissible if there be a "clear and present danger" that the words or acts will bring about the substantive evils that the Legislature has a right to prevent is not applicable in interpreting Article 19.\textsuperscript{16}

\textsuperscript{12} AIR 1960 SC 633; (1960) 2 SCR 821.
\textsuperscript{15} Schenck Vs. United States, (1910) 249 US 47.
The restriction, apart from having a rational nexus with public order, must also be reasonable. It is for the courts to decide if a restriction is reasonable both substantively and procedurally. *Virendra Vs. State of Punjab*,\(^{17}\) is an important decision of the Supreme Court illustrating the scope of permissible restriction under this clause on the right to freedom of speech and expression. The law impugned in that case was the *Punjab Special Powers (Press) Act*. It provided for (i) the prohibition of printing or publication of any article report, news item, letter or any other material relating to or connected with "Save Hindi Agitation"; (ii) the imposition of ban against the entry and the circulation of the said papers published from New Delhi in the State of Punjab and (iii) authorising the State Government or its delegate to impose pre-censorship.

The first provision relating to ban on publication of news, etc. was upheld in the time of tension brought about or aided by the "Save Hindi Agitation", taking into consideration the safeguards provided therein, as being a reasonable restriction on the liberty of the press.

The safeguards which impelled the court to hold the restrictions as substantively and procedurally reasonable were:

17. AIR 1957 SC 896; 1958 SCR 308.
(a) The positive requirement of the existence of the satisfaction of the authority as to be necessary for the making of order for the specific purposes mentioned in the Act.

(b) The discretion was given in the first instance to the State Government and not to every subordinate officer to determine the necessity of passing the order.

(c) The order could remain to force only for two months from the making thereof.

(d) The aggrieved party was given the right to make representation to the State Government which could, on consideration thereof, modify, confirm or rescind the order.

To the objection that the conferment of such wide powers exercisable on the subjective satisfaction of the Government with no provision for judicial review made the restriction unreasonable the court replied:

Quick decision and swift and effective action must be of the essence of these powers and the exercise of it must, therefore be left to the subjective satisfaction of the Government charged with the duty of maintaining law and order; to make the exercise of these powers justiciable and subject to judicial scrutiny will defeat the very purposes of the enactment.

The second provision of the Act mentioned above, namely, the power to impose a ban against the entry and the circulation of the paper was not sustained as a reasonable restriction on the freedom of speech because there was no time limit for the operation of an order made against a paper and also because there was no provision made for any representation being made to the State Government.
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In Babulal Parate Vs. State of Maharashtra, the well-known Section 144 of the Criminal Procedure Code was impugned on the ground of its placing unreasonable restrictions on the right of freedom of speech and expression. Under this section, a Magistrate, if he is of the opinion that there is sufficient ground for immediate prevention, can by a written order direct a person or persons to abstain from certain acts if he considers that such direction is likely to prevent or tends to prevent a disturbance of public tranquility, or a riot or an affray. The court sustained the section, holding that anticipatory action to prevent disorders is within the ambit of the protection. The section did not confer an arbitrary power on the Magistrate in the matter of making the order, because the Magistrate at the time of passing the order had to state the material facts and also because the order could be challenged before the Magistrate who had passed it. Section 124-A and 505, Indian Penal Code have likewise been held constitutionally valid being reasonable restrictions in the interest of public order. A rule prohibiting strikes would not be violative of freedom of speech.

However, in State of Bihar Vs. K.K. Misra, the Supreme Court held that an unreasonable restriction was imposed upon

the freedom of speech, assembly and movement by Section 144(b) of the Criminal Procedure Code which authorises the State Government to extend the life of an order issued by a Magistrate under clause (1) of that section beyond two months if it was necessary, for preventing danger to human life, health, safety or a likelihood of a riot or an affray. This power was not to be exercised judicially and therefore was open to be exercised arbitrarily. There was no provision for the party to make a representation nor was the order of a temporary nature.

Before completing the discussion upon the public law and order, it is also very necessary to discuss the integrity and sovereignty of India as a ground of maintenance of Law and order. This ground has been added by Constitution 16th Amendment Act, 1963. This present amendment is made to guard from the freedom of speech and expression being used to assail the territorial integrity and sovereignty of the Union. Thus, it will be legitimate for parliament under this clause to restrict the right of free speech if it preaches secession of any part of India from the Union. It will be noted here that the restrictions is with respect of the territorial integrity of India and not on the preservation of the territorial integrity of the constituent states. The Constitution itself contemplates changes of the territorial limits of the constituent States.
Sedition and Public Peace and Tranquillity -

It will be noticed that sedition is not mentioned as one of the grounds on which restrictions on the freedom of speech and expression may be imposed. The word "sedition" has been a word of varying import in the English Law. On hundred and fifty years ago, holding a meeting or taking out a procession was considered sedition. Even holding an opinion which will bring ill will towards the Government was treated as sedition. The interpretation, however, is now changed. Sedition now embraces those practices, whether by word, deed or writing which are calculated to disturb the tranquility of the State and lead ignorant persons to subvert the Government. Incitement to violence or public disorder is the gist of the offence. The time is long passed when mere criticism of Government was sufficient to constitute sedition, for it is recognized that the right to utter honest and reasonable criticism is a source of strength to the community rather than a weakness. Criticism of an existing system or the expression of a desire for a different system altogether is not prohibited. In India, Section 124-A of the Indian Penal Code defines the offence of sedition. The language of the section has been adopted from the English Law. The section, however, has been interpreted very widely by the Courts in India. Under these
decisions, criticism of the Government could amount to seditious if the words excited or attempted to excite hatred, enmity, dislike, contempt or ill-will towards the Government, though there was no incitement to violence or disorder. The Federal Court in Nihrendu Vs. Emperor,22 construed the section liberally in accordance with the general principles of the English Law. The Chief Justice in that case said:

"Public disorder or the reasonable anticipation or likelihood of public disorder is thus the gist of the offence. The Acts or words complained of must either incite to disorder or must be such as to satisfy reasonable men that is their intention or tendency".

The Privy Council did not accept the interpretation of the Federal Court in Nihrendu Vs. Emperor and preferred to interpret the section in accordance with the previous line of decisions which had not confined the offence of sedition to incitement to violence or disorder. The constitutional validity of Section 124-A, Indian Penal Code, in relation to the freedom of speech was questioned in Kedar Nath Singh Vs. State of Bihar. The Court, after an exhaustive review of the case law, confirmed the interpretation of Section 124-A of the Federal Court in Nihrendu case, and held it not ultra vires the Constitution. The gist of cri-

22. AIR 1942 FC 22.
minality, in an offence of sedition, as defined in Section 124-A Penal Code, is that the words written or spoken should have a tendency or intention of creating public disorder or disturbance of law and order.

The Constitution (Fortieth Amendment) Act, 1976, incorporated the prevention of Publication of Objectionable Matter Act, 1976, in the Ninth Schedule, objectionable matter has been defined as that which incites disaffection towards the Government or to commit any offence or to interfere with the production and distribution of essential commodities or seduction of any member of Armed Forces, defamation of the President, Vice-President, Prime Minister, Speaker, or Governor or a State. Restrictions imposed on any of these grounds could not be challenged on the ground of unreasonableness. Also with the inclusion of Fundamental Duties by the 42nd Amendment the implication is that nobody should exercise his freedom of speech and expression so as to violate the fundamental duties, and it is likely that the courts may be included to give a harmonious interpretation of the restrictions imposed on the exercise of the right and the fundamental duties, as has been the case with the Directive Principles of State Policy.

It is also necessary that article 19(2) should be referred fully for completing the work. Reasonable restric-
tion under following heads can also be imposed in the maintenance of law and order:—

**Security of the States:**

Under clause (2) of article 19 reasonable restrictions on the freedom of speech and expressions can be imposed in the interest of security of the State. Security of the State may will be endangered by crimes of violence intended to overthrow the government, waging of war and rebellion against the government external aggression or war. All utterances intended or calculated to have above effects may properly be restrained in the interest of security of the State. Serious and aggravated form of public disorder are within the expression of the security of the State. In Romesh Thopper's case, the Supreme Court definitely pointed out that the expression does not refer to ordinary breaches of public order which do not involve any danger to the State itself.

Incitement to commit violent, crimes like murder would endanger the security of the State. Thus in State of Bihar vs. Shellbala Devi, the law which made penal words or signs or visible representation, which incited or to encourage or tended to incite to encourage any offence of

23. AIR 1950, SC 124.
murder or any cognizable offence involving violence was held by the Supreme Court to fall within Article 19(2). After amendment of constitution in 1951 public order has been added as a ground for restrictive laws, and there would hardly be any occasion or draw fine distinction between two expressions.

Friendly Relations with Foreign States:

Ground was added by the Constitution after (First Amendment Act, 1951) State can impose reasonable restrictions on the freedom of speech, in the interest of friendly relations with foreign State. Justification is obvious, unstrained malicious propaganda against foreign friendly State may jeopardise the maintenance of good relation between India and that State.

It may be pointed out that it is recognised principle of international law that State in their relations with other State are responsible for acts committed by the persons within their jurisdiction. In accordance with this principle, most modern system of law have made provisions for punishment of libels on the ground that they imperil peaceful relation of her majesty with foreign State. Accordingly a law which makes it an offence to publish any libel tending to degrade or revile or expose the hatred or contempt any foreign prince,
Ambassador or other foreign dignitaries will fall within this expression and will be valid provided that the restrictions are not unreasonable.

Decency or Morality:

Decency or morality is another ground on which freedom of speech and expressions may be reasonably restricted. Decency connotes the same as lack of obscenity. Obscenity becomes a subject of constitutional interest since it illustrates well the clash between the right of the individual to freely express his opinions and the duty of the State to safeguard the morals. It is obvious that the right to freedom of speech cannot be permitted to deprave and corrupt the community, and therefore, writings or other objects, if obscene, may be suppressed and punished because such action would be to promote public decency or morality. In English law, it is a misdemeanour to write and publish obscene criminal books, pictures etc., which have a tendency to deprave and corrupt those minds are open to immoral influences. In India, the scope of indecency or obscenity under the existing law is illustrated in Sections 292 to 296 of the Indian Penal Code. These sections prohibit the sale or distribution or exhibition of obscene matter or doing of obscene acts or singing of obscene songs or uttering obscene words, in public places. Books pamphlets, writings or paintings used for
bonafide religious purposes or painting in any temple are exceptions to Section 292. Although the Indian Penal Code prohibits and punishes the sale of obscene books and articles. It does not lay down the test to determine obscenity. In Ranjit D.Udeshi Vs. State of Maharashtra, the Supreme Court for the first time was called upon to lay down the test of determine obscenity. The facts were that appellant, a Bombay Bookseller, was prosecuted under Section 292 of Indian Penal Code for selling and for keeping for sale the well known book, Lady Chatterley's Lover (unexpurgated edition) written by D.H.Lawrence. The Magistrate held that the book was obscene and sentenced the appellant. The appellant took many defences before the Supreme Court, which were rejected by the Supreme Court. The Supreme Court has held that restrictions can be imposed in the interest of decency and morality.

The Supreme Court has also negatived the requirement of scienter as a necessary ingredient of the offence under Section 292 and if the word obscenity is given as wide a meaning as was given in the Hicklin case, there is a danger that many a literary work will not be available to the reading public. Clause (2) has used the expression "decency

or morality". The scope of the word "morality" is not very clear. The conception of morality differs from place to place and from time to time. Thus, birth control and contraceptives were considered immoral at one time and there have been convictions for publishing literature dealing with contraception.

**Contempt of Courts**

The constitutional right to freedom of speech would not prevent the courts to publish, as contempt of themselves, spoken or printed words calculated to have that effect. The expression "contempt of court" is now defined by Section 2 of the Contempt of Courts Act, 1971 as under:

(a) "Contempt of Court" means civil contempt or criminal contempt;

(b) "Civil contempt" means willful disobedience to any judgment, decree, direction order, writ or other process of a Court or willful breach of an undertaking given to a court;

(c) "Criminal contempt" means that publication of any matter or the doing of any other act what-so-ever which (i) scandalises or tends to scandalises, or lowers or tends to lower the authority of any court; (ii) prejudices, or interferes or tends to interfere with, the due course of any judicial proceedings (iii) interferes or tends to interfere with, or obstructs or tends to obstruct, the administration of justice in any other manner.

Article 129 and 215 of the Constitution empower the Supreme Court and High Courts respectively to punish people for their respective contempt. The contempt of courts Act,
1971, defines the power of the High Court to punish contempts of its subordinate courts. In E.M.S. Namboodripad Vs. T.N. Nambiar, the Supreme Court observed that freedom of speech shall always prevail except where contempt of court is manifested, mischievous or substantial. Again in M.R.Parashar Vs. Farooq Abdullah contempt proceedings were initiated against Chief Minister of Jammu and Kashmir for alleged speeches that justice in the Courts can be brought, Courts give unfounded stay orders which need not be obeyed. In view of clear denial by the Chief Minister that he made such a speech the Court dismissed the petition for want of proof. Moreover, it involves the fundamental right of freedom of speech and expression which allows the people to express themselves about any institution including judiciary.

**Defamation**

Defamatory matter is matter which exposes a person about whom it is published to hatred, ridicule or contempt. The law of defamation is divided into libel and slander. Defamatory matter, if in writing, printing or some other permanent medium is a libel; if in spoken words or gestures, a slander. It is not possible to deal here with the contents of the lawful defamation.
Incitement To an Offence:

This is also a new ground added in 1951. Obviously, the freedom of speech cannot confer a licence to incite people to commit offence. During the debate on this clause in Parliament, it is suggested that the phrase should be "incitement to violence" as the word "offence" is a very wide expression and could include any act which is punishable under the Indian Penal Code or any other law. The suggestion was rejected. In State of Bihar Vs. Shailbala Devi, the Supreme Court held that incitement to murder or other violent crimes would generally endanger the security of the State; hence a restriction against such incitement would be a valid law under clause (2) of the Article 19.

Reasonable Restriction In The Interest of the General Public:

Under this heading firstly, the restriction imposed must be required in "the interest of the general public" and secondly, it must be a "reasonable restriction".

The expression "in the interest of general public", the Court has held, "is of wide imports comprehending public order, public health, public security, morals, economic welfare of the community and the objects mentioned in Part IV of the Constitution. A law providing for basic amenities;

24b. AIR 1952 SC 329.
for the dignity of human labour is a social welfare measure in the interest of general public. 25

In order to determine the reasonableness of their restriction, regard must be had to the nature of the business and conditions prevailing in that trade. It is obvious that these factors must differ from trade to trade and no hard and fast rules concerning all traders can be laid down. Thus, traders in noxious or dangerous goods or trafficking in women may be prohibited altogether and there is nothing unconstitutional in the law doing so. But trades which are not illegal or immoral or injurious to the health and welfare of the public, though may not be altogether suppressed, can be regulated or their evils mitigated in the interests of the general public. In other words, the pursuit of any lawful trade or business may be made subject to such conditions as may be deemed essential by the Legislature to the safety, health, peace, order and morals, of the community.

Some occupations by the noise made in pursuit, some by the odours they engender, and some by the dangers accompanying them, require regulations as to the locality in which they may be conducted. Some, by the dangerous charac-

ter of the articles used, manufacture or sell them. 26

In some cases it was contended that a particular activity or business did not come within the scope of a Fundamental Right under Article 19 (1) since it was immoral or dangerous. The Supreme Court, however, has taken the view that whether an activity or business comes within the purview of Article 19 (1)(g) should not be determined by applying the standards of morality obtaining at a particular time in our country. Standards of morality can afford a guidance to impose restrictions, but cannot limit the scope of the right. While the scope of the right is not to be determined by the morality of the trade or business, there are activities which, it would be reasonable to suppose, do not come within the ambit of this freedom such as trading in adulterated food. 27

Protection in Respect of Conviction For Offences:

Our Constitution in Articles 20, 28 and 22 provides certain safeguards to the persons accused of crimes. The

28. (1) No person shall be convicted of any offence except for violation of 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.

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protection secured by this article may conveniently be considered under the headings of—(1) Ex Post Facto laws, (ii) Double jeopardy, and (iii) Prohibition against self-incrimination.

Ex-Post Facto Laws:

The right secured by clause (1) corresponds to the provisions against ex post facto laws of the American Constitution which declares that no ex post facto laws shall be passed. Broadly, speaking ex post facto laws are laws which nullified and punished what had been lawful when done. "There can be no doubt", said Jagannathadas, J., "as to the paramount importance of the principle that such expost facto laws which retrospectively create offences and punish them are bad as being highly inequitable and unjust".

The first part of clause (1) lays down that 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. This means that a person can only be

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(2) No person shall be prosecuted and punished for the same offence more than once.

(3) No person accused of any offence shall be compelled to be a witness against himself.
convicted of an offence if the act charged against him was an offence under the law in force at the date of the commission of the Act. If at the date of the commission of an Act, such commission was not prohibited by a law then in force, no future legislation prohibiting that act with retrospective effect will justify a conviction for such commission. In other words, if an act is not an offence at the date of commission, no future law can make it an offence. Thus, where the rule made applicable from 1.7.1961 was published in the Gazette of 7.7.1961, it was held that the rule could not be applicable in respect of acts committed before 7.7.1961. If non-payment of the Panchayat dues was not an offence on the day it fell due, the defaulter can not be convicted for his omission to pay under a law enacted subsequently, even if it covered older dues.

It is only retrospective criminal legislation that is prohibited and not the imposition of civil liability retrospectively, i.e. if the statute fixes criminal liability for contravention of the prohibition or command which is made applicable to transactions which have taken place before the date of its enactment, the provisions of Article 20(1) will be attracted. In Hathi Singh's case an Act

passed in June, 1957, imposed on the employers closing their undertaking the liability to pay compensation to their employees since November 28, 1956. For failure to discharge the liability to pay compensation, a person could be imprisoned under the statute. The question was if the Act violated Article 20(1). The Court held that the liability was a civil liability and since the failure to discharge a civil liability is not an offence. Article 20(1) would not apply. Likewise, a tax can be imposed retrospectively.\footnote{M.P. V. Sundaramier and Company Vs. State of Andhra-Pradesh, AIR 1958 SC 468.}

Not only that, a penalty under a tax law imposed retrospectively does not violate Article 20(1) because the penalty is simply a civil liability to be enforced by the tax authorities.

**Double Jeopardy**

The right secured under clause (2) is grounded on the common law maxim “nemo debet bis vexari”— a man shall not be brought into danger for one and the same offence more than once. If a person is charged again for the same offence in an English Court, he can plead, as a complete defence his former acquittal or conviction, or as it is technically expressed, take the plea of "autrefois acquit" or "autrefois convict".

\footnote{M.P. V. Sundaramier and Company Vs. State of Andhra-Pradesh, AIR 1958 SC 468.}
The corresponding provision in the American Constitution is embodied in that part of the Fifth Amendment which declares that no person shall be subject for the same offence to be put twice in jeopardy of life or limb. The principle has been recognised in the existing law in India and is enacted in Section 26 of the General Clause Act, 1857 and Section 300 of the Criminal Procedure Code, 1973.

Although these were the materials which formed the background of the Fundamental Right given in Article 20(2) of the Constitution, the ambit and content of guarantee are much narrower than those of the common law in England or doctrine of "double jeopardy" in the American Constitution of Section 300 (Old Section 403) of the Criminal Procedure Code.

In the American system the constitutional bar applies to the second prosecution irrespective of the result of the first prosecution. The constitutional safeguard can be pleaded to the second prosecution whether the accused was acquitted or convicted in the first prosecution. The common law principle, is also the same. The rule in the Indian Constitution is different. In order to bring the case of a person within the prohibition of Article 20(2) it must be shown that he had been "prosecuted" before a court and
"punished" by it for the "same offence" for which he is prosecuted again. Accordingly, there can be no constitutional bar to a second prosecution and punishment for the same offence unless the accused had already been punished in the first instance. The Supreme Court has said "If there is no punishment for the offence as a result of the prosecution, sub-clause (2) of Article 20 has no application", subject to the qualification there must be a prosecution in both the instances. What does the word "prosecution" mean? Prosecution has no fixed meaning and is susceptible both of a wide and a narrow meaning. But as used in Article 20(2), it embodies the following three essentials:

(a) There must be a person accused of an offence. The word "offence" has to be taken in the sense in which it is used in the general clauses Act, 1897 as meaning an act or omission made punishable by any law for the time being in force.

(b) The proceeding or the prosecution should have taken place before a "court" or "judicial tribunal". Thus the revenue authorities, like the sea customs authorities, are not judicial tribunals and the adjudging of confiscation, increased rate of duty or penalty under the provisions of the Sea Customs Act, 1878 will not constitute a judgment or order of a court or judicial tribunal necessary for the purpose of supporting a plea of double jeopardy." Likewise proceedings before a tribunal which entertains departmental or administrative enquiries can not be considered as proceedings in connection with prosecution and punishment.

34. Maqbool Hussain Vs. State of Bombay, AIR 1953 SC 325.
(c) The proceedings should have been taken before the judicial tribunal or court in reference to the law which creates offences. Thus, where an enquiry is held before a statutory authority against a Government servant, not for the purposes of punishing for the offence of cheating and corruption but to advise the Government as to the disciplinary action to be taken against him, it can not be said that the person has been prosecuted. It would make no difference even if the authority making the enquiry is required to act judicially.

Gajendragadkar, J. has stated the protection under Article 20(2) as follows:

The constitutional right guaranteed by Article 20(2) against double jeopardy can be successfully invoked only where the prior proceedings on which reliance is placed are of a criminal nature instituted or continued before a court of law or a tribunal in accordance with the procedure prescribed in the statute which creates the offence and regulates the procedure.36

There is no punishment within the meaning of Article 20(2) unless it is preceded by a prosecution in the sense explained above is well illustrated in Maqbool Hussain Vs. State of Bombay. In that case, the appellant, a citizen of India, on arrival at the airport, did not declare that he had brought in gold with him. But on search it was found that he was carrying 107 tolas of gold in contravention of the Government notification. The customs authorities thereupon took action against him under Section 167(8) of the Sea Customs

Act, 1878 and confiscated the gold. Some time afterwards a complaint was filed in the Court of the Chief Presidency Magistrate against the appellant charging him with the offence under Section 8 of the Foreign Exchange Regulation Act, 1947. The appellant pleaded that his prosecution before the Magistrate was in violation of the Fundamental Right guaranteed under Article 20(2) because he had already been prosecuted and punished in as much as his gold had been confiscated by the customs authorities. The Court held that the sea customs authorities is not a court or judicial tribunal and the adjudging of confiscation or the increased rate of duty or penalty under the provisions of the Sea Customs Act did not constitute a judgment or order of a court of judicial tribunal necessary for the purpose of supporting a plea of double jeopardy. The proceedings taken before the sea customs authorities were, therefore, not "prosecution" of the appellant not did the order of confiscation constitute a punishment inflicted by a court or judicial tribunal on the appellant. The appellant could not, therefore, be said to have been prosecuted and punished for the same offence with which he was charged before the Chief Presidency Magistrate.

Prohibition Against Self Incrimination:

Clause (3) of Article 20 declares that no person accused of an offence shall be compelled to be a witness
against himself. This provision embodies the principle of protection against compulsion of self incrimination which is one of the fundamental canons of the British System of criminal jurisprudence and which has been adopted by the American system and incorporated in the Federal Constitution. The Fifth Amendment of the American Constitution provides that no person shall be compelled in any case to be a witness against himself. It has also, to a substantial extent, been recognised in the criminal administration of justice in this country by incorporation into various statutory provisions. The constitution of India raises the rule against self-incrimination to the status of a Constitutional prohibition.

Analysing the terms in which the guarantee is contained in our constitution, it may be stated to consist of the following three components:

(1) it is a right pertaining to a person accused of an offence.

(2) it is a protection against compulsion to be a witness; and

(3) it is a protection against such compulsion resulting in his giving evidence against himself.

**Persons Accused of An Offence**

The privilege under clause (3) is confined only to an accused i.e. a person against whom a formal accusation relating to the commission of an offence has been levelled
which in the normal course may result in the prosecution. It is, however, not necessary to avail the privilege, that actual trial or enquiry should have commenced before the Court or tribunal. Thus a person against whom the first information report has been recorded by the Police and investigation ordered by the Magistrate can claim the benefit of the protection. Even if his name was not mentioned as an accused in the first information report, it will not take him out of that category if evidence, whether oral or circumstantial, points to the guilt of a person and he is taken in custody and interrogated on that basis. He becomes a person accused of an offence. In America the privilege against self-incrimination is not confined to the accused only. It is also available to witnesses. Under the English law, too, a witness is protected from answering questions which may lead to criminal prosecution or any other penalty or forfeiture. The protection under clause (3) of Article 20 is confined to the accused only and is in accord with the existing rule of the Indian Evidence Act, 1872. A person served with summons under the Foreign Exchange (Regulations) Act, 1947, is an accused within the meaning of Article 20 (3).

37a


37. Amin Vs. State, AIR 1958 All. 293.
37a AIR 1964 SC 1552.
Under this section, where an order has been made for the winding up of a company, the High Court may on a report of the official liquidator, direct the holding of a public sitting of the court for the public examination of promoters, directors, auditors etc. of the company, regarding their conduct and dealings in relation to the affairs of the Bank. The appellant, who was ordered under Section 45-G, to appear for the examination, challenged the validity of the order on the ground that this section was unconstitutional in as much as it contravened the Fundamental Right guaranteed to the citizen under Article 20 (3). Gajendragadkar Chief Justice, observed that Article 20 (3) was in applicable to the instant case because the persons called for public examination under Section 45-G were not accused of any offence. The fact that an accusation might follow the enquiry would not attract Article 20 (3).

In Nandini Sathpathy Vs. P.L. Dani, the Supreme Court had to consider the legal basis of the police practice of interrogating suspects in view of the constitutional and legal safeguards available to a person against oppressive and unjust police interrogations. In this case, Mrs. Sathpathy, the accused, who was a suspect and yet not an accused, was examined at the Police Station in connection with inves-

38. 2 SCC 424 AIR 1978 SC 1025.
tigation into the charges of corruption against her. On her refusal to answer the questions put to her, she was charged with an offence under Section 179 of Indian Penal Code. It was argued that the refusal to answer police interrogations was justified on the grounds of Article 20 (3) of the Constitution and Section 161 (2) of the Criminal Procedure Code, 1973. The Supreme Court, speaking through Krishna Iyer, J. took the view that the area covered by Article 20 (3) and Section 161 (2) is substantially the same, and the expression "any person supposed to be acquainted with the facts and circumstances of the case" included an accused person who fills that role because the police suppose him to have committed the crime and must, therefore, be familiar with the facts. The court then proceeded to say that the expression 'accused of an offence' no doubt includes a person formally brought into police diary as an accused person but it also includes a suspect. Adverting to several of its earlier decisions, the court did not agree with the 'restrictive view' of the expression 'accused of an offence' taken therein and extended the application of Article 20 (3) to police interrogations. However, in cases involving grave offences, Krishna Iyer, J. was not prepared to go against the settled view of the Supreme Court.
Protection Against Compulsion To Be A Witness:

The guarantee in Article 20 (3) is against the compulsion 'to be a witness'. To be a witness means making of oral or written statements in or out of court by a person accused of an offence. In other words, it means imparting knowledge in respect of relevant facts by an oral statement or a statement in writing made or given in a court or otherwise. Such statements are not confined to confessions but also cover incriminatory statements i.e., to the statements which have a reasonable tendency strongly to point out to the guilt of the accused. In Nandini Satpathy the court held that "relevant replies which furnish a real and clear link in the chain of evidence indeed to bind down the accused with the crime become incriminatory and offend Article 20 (3) if elicited by pressure from the mouth of the accused".

To be a witness is not equivalent to 'furnishing evidence' in its widest significance that is to say, as including not merely making of oral or written statement but also production of documents or giving materials which may be relevant at trial to determine the guilt or innocence of the accused. In the leading case of State of Bombay Vs. Kathi Kalu Oghad', a Bench of the Supreme Court consisting of eleven Judges, disagreeing with the interpretation in its earlier case, defined the scope of the protection thus:

It is well established that clause (3) of Article 20 is directed against self-incrimination by the accused person. Self-incrimination must mean conveying information based upon the personal knowledge of the person giving the information and can not include merely the mechanical process of producing documents in court which may throw a light on any of the points in the 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 of the impression, is not the statement of an accused person which can be said to be of the nature of a personal testimony.

Hence giving thumb-impression or impressions of foot or palm or fingers or specimen writings or showing parts of the body by way of identification are not included in the expression 'to be a witness'.

Section 94 of the Code of Criminal Procedure, 1898 Section 91 of Criminal Procedure Code, 1973, empowered a Criminal Court as also police officer to order any person to produce a document or thing in his possession for the purpose of any inquiry or trial. In Shyam Lal Mohal Lal Vs. State

39a. AIR 1965 SC 1251.
of Gujrat the respondent a moneylender was prosecuted under the Money Lenders' Act for not keeping proper accounts. The prosecutor applied to the Magistrate to compel the accused to produce the accounts but the court refused to produce the accounts but the court refused to accede to the request in view of Article 20 (3). The High Court having upheld the Magistrate the State went in appeal to the Supreme Court.

The two questions before the Supreme Court were: (1) whether section 94 Criminal Procedure Code, 1898 applied to an accused person, (2) if so, whether the section was hit by Article 20 (3). The second question was not pleaded and considered. As to the first question the court was divided. Sikri J. on behalf of the majority, held that having regard to the general scheme of the Criminal Procedure Code and the basic concept of criminal law, Section 94 could not be applied to an accused. Moreover, if the court construed Section 94 to include an accused, the protection of Article 20 (3) would be of no value in a case where the accused was directed by the Police to attend the produce a document. Shah, J. in a dissenting judgment, relied on the ground that the rule of protection against self-incrimination as understood in the United Kingdom having not been extended to India, an accused could well be called upon under Section 94 to produce documents or things in his person. But, since the respondents, did not plead the unconstitutionality of the section, the question was left open
by the entire court with the result that the majority judgment dismissed the appeal, and the opinion of the minority was in favour of allowing the appeal.

The protection under Article 20 (3) does not extend to searches made in pursuance of a warrant issued under Section 96 of the Criminal Procedure. Also taking of signature of accused during investigation does not amount to giving a statement under Section 162 of the Criminal Procedure Code nor Article 20 (3).

Compulsion Must Be Giving Evidence Against Himself:

The prohibition is only against the compulsion of the accused to give evidence against himself. In Kalawati Vs. H.P. State, the Supreme Court has held that Article 20 (3) does not apply at all to a case where the confession is made by an accused without any inducement, threat or promise. Similarly, retracted confessions although they have very little probative value, are not repugnant to this clause.

To bring the evidence without the inhibition of Article 20 (3) it must be shown that the accused was compelled to make the statement having a material bearing on the criminality of the maker. Compulsion here means what in law is

called 'duress', which is explained as follows:

Duress is where a man is compelled to do an act by injury, beating or unlawful imprisonment (sometimes called 'duress' in strict sense) or by the threat of being killed suffering some grievous bodily harm or being unlawful imprisoned (some times called menace or 'duress per mines'), 'duress' also includes threatening, beating or imprisoning of the wife, parent or child of a person.

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

Life And Personal Liberty:

Article 21, though couched in negative language, confers on every person the fundamental right to life and personal liberty.\(^{41}\) The right to life which is the most fundamental of all is also the most difficult to define. Certainly it can not be confined to guarantee against the taking away of life; it must have a wider application. With reference to corresponding provision in the 5th and 14th amendment of the U.S. Constitution which says that no person shall be deprived of his "life, liberty or property without due process of law", in Munn Vs. Illinois,\(^ {42}\) Field, J. spoke

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42. 94 U.S. 113.
of right to life in the following words:

"By the term 'life as here used something more is meant that were animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed. The provision equally prohibits the mutilation of the body by the amputation of an arm or leg, or the putting out of an eye, or the destruction of any other organ of the body through which the soul communicates with the outer world."

This statement, which has been repeatedly quoted with approval by our Supreme Court,\textsuperscript{43} has been further expanded in Francis Coralie Vs. Union Territory of Delhi,\textsuperscript{44} by the statement, "that any act which damages or injures or interferes with the use of any limb or faculty of Article 21". In the same case Bhagwati, J. held:

"We think that the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessaries of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing, and expressing oneself in diverse forms, freely moving about the mixing and comingling with fellow human beings."

The judge conceded that "the magnitude and content of the components of this right would depend upon the extent of the economic development of the country", but emphasised that "it must, in any view of the matter, include the right to the basic necessities of the life and also the right to carry on

\textsuperscript{43} Kharak Singh Vs. State of Uttar Pradesh, AI R 1963 SC 1295.
\textsuperscript{44} 1981 1 SCC 608 SC 180, 194.
such functions and activities as constitute the bare minimum expression of the human self". The court upheld the right of the detenu in this case to have interviews with members of her family, friends and her lawyer.

Again, relying on Francis Coralie, in Bandhua Mukti Morcha Vs. Union of India, where the question of bondage and rehabilitation of some labourers was involved, Bhagwati J. held:

"It is the fundamental right of everyone in this country... to live with human dignity, free from exploitation. This right to live with human dignity enshrined in Article 21 derives its life breath from the Directive Principles of State Policy and particularly clause (a) and (f) of Article 39 and Articles 41 and 42 and at least, the refore, it must include protection of the health and strength of the workers men and women, and of the tender age of children against abuse, opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity educational facilities, just and humane conditions of work and maternity relief. These are the minimum requirements which must exist in order to enable a person to live with human dignity, and to State... has the right to take any action which will deprive a person of the enjoyment of these basic essentials."

This statement has been fully endorsed by the Court in a petition seeking ban on injurious drugs. Similarly the Court has favourably entertained a petition under Article 21

for appropriate relief against the leakage of oleum gas from a chemical plant resulting in loss of lives and injuries to the health. The right of appropriate relief against the ill-effects of X-ray radiation on the employees of a State Corporation Bharat Electronics Ltd. has also been recognised under Article 21.

For some time the Court held the view that right to life in Article 21 does not include right to livelihood. After some controversy on that issue, the Court has clearly held that right to livelihood in the right of life "because no person can live without the means of living, that is, the means of livelihood". Further, upholding the right of the people in hill areas for a suitable approach road the Court in State of H.P. Vs. Umed Ram held that the right to life in Article 21 "embraces not only physical existence of life but also the quality of life and for residents of hill areas, access to road is access to life itself". Right to unpolluted environment and preservation and protection of nature's gifts has also been conceded under Article 21.

The question whether deprivation of property leading to "deprivation of life or liberty or livelihood", falls

within the reach of Article 21 has been left open though where it does not result in such deprivation. Article 21 has not application. 51

In view of the global development in the sphere of human rights these judicial decisions are a strong pointer towards the recognition of an right to basic necessities of life under Article 21.

The expression "liberty" in the 5th and 14th amendment to the U.S. Constitution has been given a very wide meaning. It takes in all the freedoms. The expression is not confined to mere freedom from bodily restraint, and "liberty" under law, but extends to the full range of conduct which the individual is free to pursue. In Article 21, in contrast to the American Constitution, the word 'liberty' is qualified by the word personal leading to an inference that the scope of liberty under our Constitution is narrower than in the U.S. Constitution. Seemingly that was the impression drawn by some of the judges in A.K. Gopalan Vs. State of Madras. 52 Though that case was concerned about the constitutionality of preventive detention of the petitioner which in any case was an infringement of the "personal liberty" even in the narrowest sense.

52. AIR 1951 SC 27.
of that term and therefore it may be said that the scope of "personal liberty" was not an issue in that case, yet some of the learned judges looking at the difference in the expression in the U.S. and Indian Constitutions and relying upon the meaning given to "personal liberty" by some English jurists concluded that personal liberty was confined to freedom from detention or physical restraint. "But there was no definite pronouncement made on this point since the question before the Court was not so much the interpretation of the words "personal liberty" as the interrelation between Article 19 and 21.

For the first time the meaning and scope of "personal liberty" came up pointedly for consideration in Kharak Singh Vs. State of Uttar Pradesh. In that case validity of certain police regulations which without any statutory basis, authorised the police to keep under surveillance persons whose names were recorded in the "history-sheet" maintained by the police in respect of persons who are or are likely to become habitual criminals. Surveillance as defined in the impugned regulation included secret picketing of the house, domiciliary visits at night, periodical inquiries about the person, an eye on his movements, etc. The petitioner alleged that this regulation violated his fundamental right to movement in Article 19 (1) (a) and "personal liberty" in Article 21. For
determining the claim of the petitioner the Court, apart from defining the scope of Article 19 (1)(a), had to define the scope of "personal liberty" in Article 21.

Speaking for the majority Ayyangar, J. rejected that "personal liberty" was confined to "freedom from physical restraint or freedom from confinement within the bounds of a prison", and held that "personal liberty" is used in the Article as 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 particular species or attributes of that freedom, "personal liberty" in Article 21 takes in and comprises the residue". He concluded that "an unauthorised intrusion into a person's home and the disturbance caused to him thereby" violated "personal liberty" enshrined in Article 21 and therefore, the regulation was invalid in so far as it authorised domiciliary visits but the rest of it did not violate either Article 19 (1)(a) or Article 21. He also held that "the right to privacy is not a guaranteed right under our constitution and therefore, the attempt to as certain the movement of an individual which is merely a manner in which privacy is invaded is not an infringement of a fundamental right guaranted by part III".
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 have 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.

He held that right to privacy "is an essential ingredient of personal liberty" and that the right to personal liberty is "a right of an individual to be free from restrictions or encroachments on his person. Whether those restrictions or encroachments are directly imposed or indirectly brought about by calculated measures". Applying that test he found the entire regulation violative of Article 21, and also of Article 19 (1)(a) and (d).
In Govind Vs. State of Madhya Pradesh, the Court contemplated a right of privacy included, among others, in the right to personal liberty but upheld regulations similar to the one invalidated in Kharak Singh because the regulations had statutory basis.

In Satwant Singh Sawhney Vs. A.P.O. New Delhi, it was held that right to travel abroad is included within the expression "personal liberty" and, therefore, no person can be deprived of his right to travel except according to the procedure established by law. Since a passport is essential for the enjoyment of that right, denial of a passport amounts to deprivation of personal liberty. In the absence of any procedure prescribed by the law of land sustaining the refusal of a passport to a person, its refusal of a passport to a person, its refusal amounts to an unauthorised deprivation of personal liberty guaranteed by Article 21. This decision was accepted by Parliament and the infirmity was set right by the enactment of the passports Act, 1967. In State of Maharashtra Vs. Prabhakar Pandurang, the Court held that the right to personal liberty included the right to write a book and get it published and when this right was exercised by a detainee its denial without the authority of law violated Article 21.

54. AIR 1966 SC 424.
This case also established that a prisoner does not cease to be a human being incapable of having fundamental rights. More decisions on that issue are discussed below.

Reviewing the foregoing and some other decisions and agreeing with the approach of the minority in Kharak Singh, Bhagwati, J. in Maneka Gandhi Vs. Union of India concluded.

The expression "personal liberty" in Article 21 is of the widest amplitude and it covers a variety of rights which go to constitute the personal liberty of man and some of them have been raised to the status of distinct fundamental rights and given additional protection under Article 19.

Upholding the right of the petitioner to have interviews with her family members, friends and lawyer during the preventive detention, in Francis Coralie Vs. Union Territory of Delhi, Bhagwati, J. quoting his above mentioned statement in Maneka Gandhi held that personal liberty includes right to socialise with family members and friends as well as to have interview with the lawyer.

**Procedure Established By Law**

The expression procedure established by law means procedure laid down by statute or procedure prescribed by the law of the State. Accordingly, first, there must be a
law should be a valid law, and thirdly, the procedure laid down by the law should have been strictly followed. The Executive in the absence of any procedure prescribed by the law sustaining the deprivation of personal liberty shall act in violation of Article 21 if it interferes with the life or personal liberty of the individual.

The ambit of protection given by the American Constitution in relation to personal liberty is wiser than under the Indian Law. The American constitution provides that a person cannot be deprived of his liberty "without the process of law". The American Supreme Court has interpreted the guarantee to mean that the court would examine a law to ascertain if it is a just law, both as to the procedure and to the substantive provisions contained therein.

In A.K. Gopalan Vs. State of Madras, it was held that the expression procedure established by law means procedure enacted by a law made by the State. The Supreme Court, by a majority, rejected the argument that the law in Article 21 is used in the sense of jus and lex, and that it means the principles of natural justice on the analogy of "due process of law" as interpreted by the American Supreme Court. That in effect amounted to holding that Article 21 was a protec-

55. AIR 1950 SC 27.
tion only against the conclusion of A.D.M. Jabalpur Vs. Shivakant Shukla, where the Supreme Court held that Article 21 was the sole repository of the right to life and personal liberty against its illegal deprivation by the Executive and in case enforcement of Article 21 was suspended by a presidential order under Article 359, the Court could not enquire whether the executive action depriving a person of his life or personal liberty was authorised by law. Soon after the emergency and all that was done in its name were rejected by the electorates in early 1977, the Supreme Court in Maneka Gandhi Vs. Union of India, changed this unfortunate position and gave a fundamental character to the right in Article 21. This the court did by establishing a relationship between Articles 14, 19 and 21 which had apparently been denied in Gopalan, particularly in respect of Articles 19 and 21.

The relationship between Article 19 and 21, as has been noted above, was first emphasised by the minority in Kharak Singh, though expressing doubts on the majority view in Gopalan the Court had already established such relationship between the repealed Article 19 (1)(a) and 31 (1) of which the latter was expressed in similar language as Article 21. The argument of exclusiveness of fundamental rights

as expounded in Gopalan was finally rejected in R.C. Cooper vs. Union of India,\(^{58}\) though again in that case also the relationship between repealed Articles 19 (1)(f) and 31 (2) and not between Articles 19 and 21 was in issue. However, this decision was the main basis for establishing the relationship between Articles 14, 19 and 21 in Maneka Gandhi, Bhagwati, J., who delivered the leading opinion in Maneka Gandhi, held that the law must now be taken to be well settled that Article 21 does not exclude Article 19, and a law prescribing a procedure for depriving a person of "personal liberty" will have to meet the requirement of Article 21 and also of Article 19 as well as of Article 14. In this exposition of the concept of 'procedure' in Article 21, which we have already discussed under Article 14, and extended its application to the nature and requirement of the procedure under Article 21. It was explained that the principle of reasonableness, which is an essential element of equality or non-arbitrariness prevailing Article 14, must also apply with equal force to the procedure contemplated by Article 21, that is the procedure must be 'right, just and fair' and not 'arbitrary, fanciful or oppressive'. In order that the 'procedure' is right, just and fair, it should conform to the principles of 'natural justice' that is, 'fair play in action'. Hence it was held that any procedure which permits impairment

of the constitutional right to go abroad without giving a reasonable opportunity to show cause cannot but be condemned as unfair and unjust. In the present case, it was held, however, that Section 10 (3)(e) of the Passport Act, 1967, is not violative of Article 21 as it is implied in the provisions that the rules of natural justice would be applicable in the exercise of the power of impounding a passport.

From Procedure Established by Law To Due Process of Law:

While Bhagwati, J., in Maneka Gandhi case, established the requirement of reasonableness of procedure in Article 21 through Article 14, some of the judges in that case and in some other subsequent cases have read it in Article 21 itself and particularly in the word "law" leading to the conversion of "procedure established by law" into "due process of law" in the American sense which the Constitution-makers had intended to avoid by replacing the latter expression by the former. Thus in Maneka Gandhi, Chandrachud, J. said that the procedure in Article 21 "has to be fair, just and reasonable, not fanciful, oppressive or arbitrary" and Krishna Iyer, J. said that "law in Article 21" is reasonable law, not any enacted piece". Again in Sunil Batra vs. Delhi Administration, Krishna Iyer, J. said "True our Constitution has no 'due process' clause... but... after Cooper... and Maneka Gandhi... the consequence is the same" and added that Article 21 is the counterpart of the procedural due process in the United States
In the same case speaking for the rest of the Court Desai, J. said:

The word 'law' in the expression 'procedure established by law' in Article 21 has been interpreted to mean in Maneka Gandhi case... that the law must be right, just and fair and not arbitrary, fanciful or oppressive.

In Jolly George Varhese Vs. Bank of Cochin, the Court, through Krishna Iyer, J. surmised that some day the question of the validity of Section 51 and Order 21 and Rule 37 of the Civil Procedure Code, which authorise arrest and detention of judgment-debtor on the application of the decreeholder, could be questioned under Article 21 although in the instant case the Court referred back the matter to the lower Court with the clarification that arrest and detention would violate Article 21 if the judgment debtor had no means to pay the decreetal amount and did not evade its payment by any malafide or dishonest means or intentions, he said:

The high value of human dignity and the worth of the human person enshrined in Article 21, read with Article 14 and 19, obligates the State not to incarcerate except under law which is fair, just and reasonable in its procedural essence.

In Bachan Singh Vs. State of Punjab, the Court by 4 to 1, upheld the validity of death penalty under Section 302.

of the Indian Penal Code read with Section 354 of the Criminal Procedure Code against the challenge based on Articles 14, 19 and 21. For the majority in the light of Maneka Gandhi case, Sarkaria, J. rephrased Article 21 in the following words:

No person shall be deprived of his life or personal liberty except according to fair, just and reasonable procedure established by valid law.

In this dissent, expressed after more than two years, Bhagwati, J. turned to the trinity of Article 14, 19 and 21 each of which, according to him, contained the requirement of reasonableness and concluded.

It is plain and indisputable that under our Constitution law can not be arbitrary or irrational and if it is, it would be clearly invalid, whether under Article 14 or Article 19 or Article 21 whichever, be applicable.

It is here that for the first time Bhagwati, J. clearly went beyond Article 14 to establish the requirement of reasonableness and it is also here that he applied this requirement for the first time to a law, not just procedural but substantive, and in fact reached the conclusion that Section 302 of the Indian Penal Code read with Section 354(3) of the Criminal Procedure Code, was "unconstitutional and void being violative of Articles 14 and 21".
In Mithu Vs. State of Punjab, a Constitutional Bench, for the first time and unanimously invalidated a substantive law Section 303 of the Indian Penal Code— which provided for the mandatory death sentence for murder committed by a life convict. Quoting from Maneka, Sunil Batra and Bachan Singh, the Court observed:

These decisions have expanded the scope of Article 21 in a significant way and it is now too late in the day to contend that it is for the legislature to prescribe the procedure and for the Courts to follow it; that it is for the legislature to provide the punishment and for the Courts to follow it, that it is for the legislature to provide the punishment and for the Courts to impose it... the last word on the question of justice and fairness does not rest with the legislature.

After posing the question of reasonableness of Section 303 under Article 21 the Court concluded that "it is difficult to hold that the prescription of the mandatory sentence of death answers the test of reasonableness and added that "a provision of law which deprives the court of the use of its wise and beneficent discretion in a matter of life and death, without regard to the circumstances in which the offence was committed and, therefore, without regard to the gravity of the offence, can not but be regarded as harsh, unjust and unfair. "Relying exclusively on Article 21 Reddy, J. concurred, "So final, so irrevocable and so irresuscitable is the sentence of death, that no law which provides for it without involvement of the judicial mind can be said
to be fair, just and reasonable". Thus not merely procedure but a substantive law was invalidated under Article 21.

This development was picked up, though without any reference to Mithu, by Pendse, J. of the Bombay High Court in Basantibai Vs. State of Maharashtra and applied to a property legislation— the Maharashtra Housing Area Act, 1976. The Court invalidated as unjust, unreasonable and unfair those provisions of the Act under which for acquisition of land the owner got less compensation than provided under the Land Acquisition Act, 1894. Pendse, J. held:

The legislation must be just, fair and reasonable whether protection of Articles 14 and 19 is available or otherwise, and... the legislation providing for deprivation of property must satisfy the requirements of being fair, just and reasonable.

The decision in Basantibai has been reserved by the Supreme Court but without disturbing the conclusions of the High Court on the question of reasonableness. This indicates that the Supreme Court does not have any obvious disagreement with the opinion of Pendse, J. on the scope and application of the principle of reasonableness.

Pursuing a similar line of approach in T. Sareetha Vs. T. Venkata Subbalah, 61 Choudhary, J. for the High Court

61. AIR 1983 A.P. 356.
of Andhra Pradesh extended the application of the principle of reasonableness to matrimonial matters and invalidated Section 9—provision for restriction of conjugal rights of the Hindu Marriage Act, 1955. He found "the remedy of restitution of conjugal rights provided for by that section... savage and barbarous remedy, violating the right to privacy and human dignity guaranteed by Article 21 of our Constitution". "After Mithu case", he clarified, "It is not easy to assert that Article 21 is confined any longer to procedural protection only".

Although subsequently in two different cases first the Delhi High Court and then the Supreme Court, disagreeing with Sareetha, have upheld the validity of Section 9 of the Hindu Marriage Act, no doubt was expressed, at least by the Supreme Court, on the application of the requirement of reasonableness or of Articles 14 and 21 to matrimonial laws or non-penal laws. The Delhi High Court "applying the standard that the law has to be just, fair and reasonable as enunciated in Manska Gandhi found Section 9 constitutionally valid, so also the Supreme Court found that Section 9 "serves a social purpose as an aid to the prevention of break-up of marriage" and therefore, satisfied Articles 14 and 21.

The Courts have extended and applied the requirement of reasonableness to a Government order issued under a University Act, prohibiting election contest to any body including the State Legislature and Parliament, to delay in execution of death sentence to selection of students by the State Government for admission to medical colleges to promote national integration. Suman Gupta Vs. State of Jammu and Kashmir,\(^63\) to a law assigning powers and functions to the municipal authorities,\(^64\) to civil service rules made under Article 309 of the Constitution,\(^65\) to service regulations,\(^66\) to bank regulations,\(^67\) to job regulations of the public corporations,\(^68\) and to invalidate the offence of attempt to commit suicide.\(^69\)

From these decisions it is clear that the requirement of reasonableness which originally emerged from the interrelation of Article 14 and 21 and initially carried the impression of controlling only procedural laws relating to deprivation of life and personal liberty, has developed into a general principle of reasonableness similar to due process of law in the U.S. Constitution capable of application to any branch of law.

Relationship Among Articles 14, 19 and 21

It has been noted above that the impression of exclusiveness among different fundamental rights, particularly between Articles 19 and 21, which Gopalan has left has been removed by Maneka Gandhi through R.C. Cooper. It has also been noted that by establishing a relationship among Articles 14, 19 and 21, particularly between Articles 14, 19 and 21, a requirement of reasonableness of law providing for deprivation of life or liberty has been created. The creation of requirement of reasonableness is a different thing, but otherwise no controversy apparently ever existed about the relationship between Articles 14 and 21. Starting with State of West Bengal Vs. Anwar Ali. Sarkar, we have a whole chain of cases where validity of laws providing for deprivation of personal liberty has been tested under Article 14.

It is only in respect of relationship between Articles 19 and 21 that the controversy has existed and in the light of Bachan Singh Vs. State of Punjab, discussed below under the sub-head (v) right against cruel and unusual punishment, the controversy is not yet dead. In Bachan Singh the Court seems to have held that the validity of criminalising

or penalising certain activities has not to be tested under Article 19 because that Article does not give any right to commit crimes. But that is simply not true. We have seen, for example, in the discussion on Article 19(1)(a) that the validity of provisions of Indian Penal Code, 1860 like section 124-A penalising seditious speeches and Section 292 penalising sale, etc. of obscene materials has been tested under Article 19. Therefore, the test for the application of Article 19 is not whether a protected by Article 19. If it does, its validity shall have to be tested under Article 19 though it may also be tested under Article 21 if the reasonableness of procedure for penal sanctions is also questioned. For example, if theft or murder are penalised the penal law does not require to be tested under Article 19 because stealing and committing murders are not the activities protected by that Article. But if anti-government speeches or entry into certain territory of India are penalised the law has to satisfy the requirements of Article 19 because speech and movement are the activities protected by that article.

Although most of the cases concerning the expansion of Article 21 in different directions have been mentioned above, yet there are many more which either do not exactly

fit into the foregoing heads or have not received adequate attention under them. For the sake of convenience they may be mentioned under the following different subheads:

Right of Prisoners:

The case of Prabhakar Pandurang,\textsuperscript{72} has clearly been mentioned in which the right of a detenu to send his book, written during detention, for publication was recognised. A prisoner is entitled to all his fundamental rights unless his liberty has been constitutionally curtailed. Therefore, any imposition of a major punishment within the prison system is conditional upon the observance of the procedural safeguards enshrined in Article 21, even though he is not in a position to enjoy the full panoply of Fundamental Rights due to the very nature of the regime to which he is lawfully committed. In Sunil Batra Vs. Delhi Administration,\textsuperscript{73} the solitary confinement of a prisoner, who was awarded the capital sentence for having committed the offence of murder under Section 30 (2) of the Prison Act, 1894, was held bad as it was imposed not as a consequence of the violation of the prison discipline but on the ground that the prisoner was one under sentence of death. Desai, J. pointed out that the conviction of a person for a crime did not reduce him to a non-person vulnerable to major punishment imposed by the

\textsuperscript{72} AIR 1966 SC 424.

\textsuperscript{73} (1978) 4 SCC 494 AIR SC 1675.
Jail authorities without observance of procedural safeguards. It was also held that bar-fetters, to a very considerable extent, imposed under Section 56 of the Prisons Act, 1894, curtail, if not wholly deprive, locomotion which is one of the facts of personal liberty and such action can only be justified in the circumstances relatable to the character of the prisoner and his safe custody. However, prisoners have no fundamental right to escape from lawful custody, and hence, the presence of armed police guards caused no interference with the right to personal liberty. So also prisoners cannot complain of the installation of the live wire mechanism with which they are likely to come in contact only if they attempt to escape from prison. Also, the denial of amenities or their poor maintenance do not necessarily constitute an encroachment on the right to personal liberty. If a prisoner demands that he should have better companions in jail or should be removed to a ward with more relaxation and resents keeping convict cooks or having wardens as jailmates in his cell, the Superintendent of Jail may justifiably turn down such requests in view of the prisoner's record and potential.

Moreover, in several cases courts have issued appropriate directions to prison and police authorities for safe-

guarding the rights of the prisoners and persons in police lockup, particularly of women and children against sexual abuse and for their early trials. 76

Rights of Inmates of Protective Homes:

Appropriate directions have been given by the courts to the inmates of protective and remand homes for women and children for providing suitable human conditions in the homes and for providing appropriate machinery for effective safeguard of their interests.

Right to Legal Aid:

Right to free legal aid at the cost of the State to an accused who cannot afford legal services for reasons of poverty, indigence or incommunicado situation is part of fair, just and reasonable procedure under Article 21. 77 Not only that, the trial court is under an obligation to tell an accused who fails to afford legal represented by a lawyer, at the cost of the State. 78 In case an accused is not told of this right and therefore, he remains unrepresented by a lawyer, his trial is vitiated by constitutional infirmity and any conviction as a result of such trial is liable to be set aside. 79

Right to Speedy Trial:

This right came up in a series of cases involving undertrials, who were in jail for a period longer than the maximum sentence that could be imposed on conviction. In Hussainara Khatoon (I) vs. Home Secretary Bihar, it was held that a procedure which keeps such large number of people behind bars without trial so long can not possibly be regarded reasonable, just or fair so as to be in conformity with the requirement of Article 21. Bhagwati, J. observed that although the right to speedy trial is not specifically mentioner as a fundamental right, it is implicit in the broad sweep and content of Article 21. In Hussainara (II) vs. Home Secretary Bihar, the court re-emphasised the expenditious review for withdraw of cases against under trials for more than two years. In Hussainara (III) vs. Home Secretary, Bihar, the Court reiterated that the investigation must be completed within a time bound programme in respect of under trials and gave specific orders to be followed for quick disposal of cases of under trials. In Hussainara (IV) vs. Home Secretary, Bihar, in continuation of Hussainara (I) and Hussainara (III), the Court

considered the affidavits filed in response to its
Dissatisfied with the compliance of its earlier direction, the Court ordered release of under trials held for periods more than the maximum term imposed on them on conviction. It was held that continuance of such detention is clearly illegal and in violation of that fundamental right under Article 21. The Court went one step further and after making a reference to the Hoskot case recognised the right to free legal services to the poor and the needy as an essential ingredient of reasonable, fair and just procedure implicit in the guarantee of Article 21, and directed the State to provide a lawyer at its own cost for making a bail application to an under trial: (i) charged with bailable offence on the next remand date, or (ii) held for non-bailable offence after having spent half the term of maximum sentence impossible on him were he convicted. In Hussainara, the Court considered the extent to which direction in Hussainara (IV) had been complied with, passed further directions and gave more time where necessary. In Hussainara (VI), in the pending cases to ensure speedy trial, the Court requested further details from the High Court and directed the State Government to file affidavit in reply. The sum and substance of the decisions in the Hussainara cases is the recognition of the right to speedy trial, and the right

to legal aid services under Article 21. It was pointed out that the present legal and judicial system denied justice to the poor and the needy because the system of bail with its misdirected emphasis in furnishing financial security operated adversely against the accused.

Since Hussainara in a large number of cases involving accused charged with serious and non serious offences, mentally retarded persons and others have come up before the Court and it has held that all persons awaiting trial for long can approach the Supreme Court which will give necessary direction in the matter. But whether a case deserves such directions will depend on a number of factors relevant for the determination of the fact that if there has been any unfairness in the administration of criminal justice i.e. where in spite of most effective steps on the part of the State because of the complex nature of a case trial could not be held expeditiously the Court may not give any relief beyond asking the State that the trial should be started soon and proceed from day to day. Raghbir Singh Vs. State of Bihar.

**Right Against Cruel And Unusual Punishment**

In Jagmohan Singh Vs. State of Uttar Pradesh,

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AIR 1982 SC 1167.
86. (1986) 4 SCC 481.
the constitutionality of imposing death sentence was challenged. The Supreme Court held that if the entire procedure for criminal trial under the Criminal Procedure Code for arriving at a sentence of death is valid then the imposition of death sentence in accordance with the procedure established by law cannot be said to be unconstitutional. In Bachan Singh Vs. State of Punjab, it was argued that the Supreme Court in the Maneka Gandhi case has given a new interpretative dimension to the provision of Article 21, 19 and 14, and their inter-relationship in every law of punitive detention both in its procedural and substantive aspects must pass the test of all the three articles. This argument was not accepted by the Court (four to one). It was held that Article 19, unlike Article 21, does not deal with the right to life and personal liberty and is not applicable for judging the constitutionality of the provisions of Section 302, Indian Penal Code. The condition precedent for the applicability of Article 19 is that the activity which the impugned law prohibits and penalises must be within the purview and protection of Article 19 (1). To commit crime is not an activity guaranteed by Article 19 (1). As regards Article 21 the founding fathers recognised right of the State to deprive a person of his life or personal liberty in accordance with fair, just and reasonable procedure established by valid law, and there are several other indications in the Constitution which show that the Constitution makers
were fully cognizant of the existence of death penalty, such as, entries 1 and 2 in list II, Article 72 (1) (c), Article 161 and Article 34. Thus, it was observed that death penalty either perse or because of its execution by hanging by rope does not constitute an unreasonable, cruel or unusual punishment.\textsuperscript{88} In T.V. Vatheeswaran Vs. State of Tamilnadu,\textsuperscript{89} it was held that delay exceeding two years in the execution of death sentence entitles a convict to get it commuted to life imprisonment. But it was overruled in Sher Singh Vs. State of Punjab,\textsuperscript{90} that no such limit could be fixed for the execution of death sentence without regard to the facts of every case.

Finally, a constitutional bench of the Supreme Court in Triveniben Vs. State of Gujrat, has expressly overruled Vatheeswaran and held that "it may\textsuperscript{consider} the question of in ordinate delay in light of all circumstances of the case to decide whether execution of sentence should be carried out or should be altered into imprisonment, for life.

Article 21 read with the Directive Principles of State Policy enshrined in Articles 39, 41 and 42 as well as the bonded Labour System (Abolition) Act, 1976 obliges

\textsuperscript{88}Deena Vs. Union of India (1983) 4 SCC 645.
\textsuperscript{89}(1983) 2 SCC 68 AIR SC 361.
\textsuperscript{90}(1988) 4 SCC 574, 576.
the State to identify, release and suitable rehabilitate the bonded labourers. The bonded labourers also have the right to live with human dignity enshrined in Article 21.

Right to claim monetary compensation for the violation of the rights in Article 21 has also been recognised in several cases.

Violation of the right of personal liberty by a private individual is not within the purview of Article 21. Therefore, a person whose right to personal liberty is infringed by a private individual must seek his remedy under the ordinary law and not under Article 21.91

Protection Against Arrest And Detention:

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 be denied the right to consult, and to be defended by a legal practitioner of his choice.

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

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time necessary for the journey from the place of arrest to the court of Magistrate and no such person shall be detained in custody beyond the said period without the authority of a Magistrate.

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.

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).

No law providing for preventive detention shall authorise the detention of a person for a longer period than two months unless an Advisory Board constituted in accordance with the recommendations of the Chief Justice
of the appropriate High Court has reported before the expiration of the said period of two months that there is in its opinion sufficient cause for such detention.

Provided that an Advisory Board shall consist of a Chairman and not less than two other members, and the Chairman shall be a serving Judge of the appropriate High Court and the other members shall be serving or retired Judges of High Court.

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

In this clause, "appropriate High Court" means—

(i) in the case of the detention of a person in pursuance of an order of detention made by the Government of India or an officer or authority subordinate to that Government, the High Court for the Union territory of Delhi;

(ii) in the case of the detention of a person in pursuance of an order of detention made by the Government of any State (other than a Union Territory), the High Court for that State; and

(iii) in the case of the detention of a person in pursuance of an order of detention made by the administrator of a Union Territory or an officer or authority subordinate to such administrator, such High Court as may be specified by or under any law made by Parliament in this behalf.
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.

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.

Parliament may be law prescribed—

(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 clause (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 any Advisory Board in an inquiry under sub-clause (a) of clause (4).

Parliament may by law prescribe—

(a) the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention; and

(b) the procedure to be followed by an Advisory Board in any inquiry under clause (4).
Article 22 was initially taken to be the only safeguard against the legislature in respect of laws relating to deprivation of life and liberty protected by Article 21. In the constituent assembly Dr. Ambedkar also claimed Article 22 as compensation for loss of "due process" from Article 21 CAO 35. Consequently, the relationship between Articles 21 and 22 has drastically changed, rather reversed. Earlier "the procedure established by law" for depriving a person of his life or liberty under Article 21 drew its minimum contents from Article 22. But Article 21 had nothing to offer to Article 22. Now Article 21 also contributes to Article 22. The matters on which Article 22 is silent now draw their contents from Article 21. This is particularly true in respect of laws relating to preventive detention which in addition to Article 22 have also to conform to the requirement of Article 21 at least to the extent to which such requirements are not inconsistent with the express provisions of Article 22.

Rights of Arrested Persons:

Clause (1) and (2) of Article 22 confer four rights upon a person who has been arrested. Firstly, he shall not be detained in custody without being informed, as soon as

may be of the grounds of his arrest. If information is delayed, there must be some reasonable ground justified by the circumstances.  

Secondly, he shall have the right to consult and to be represented by a lawyer of his own choice. This right too is not lost if he is released on bail. Thirdly, every person who has been arrested has the right to be produced before the nearest Magistrate within 24 hours of his arrest. In computing this period of 24 hours, the time spent on the journey from the place of arrest to the Court of Magistrate is to be excluded. This requirement is dispensed with if the person arrested is admitted to bail. Fourthly, he is not to be detained in custody beyond the said period of 24 hours without the authority of the Court. Even if an accused was initially illegally detained, the detention became lawful when subsequently he was arrested and produced before a Magistrate within 24 hours. But where remand orders are obtained by the Police from the Magistrate or a Judge without producing the arrested person before such Magistrate of Judge within 24 hours, Article 22 (2) is violated. An under trial prisoner need not be arrested separately for every criminal

case pending against him. A subsequent lawful detention is not vitiated by the earlier illegal detention. 98

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 of misunderstanding in the mind 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 it mind to his case. The Criminal Procedure Code contains analogous provisions in Sections 56 and 303, but Constitution makers were anxious to make these safeguards an integral part of the Fundamental Rights. Thus, once it is shown that the arrest made by the police officers were illegal, it is necessary for the State to establish that at the stage of remand the Magistrate directed detention in Jail custody after applying his mind to all relevant matters. 99

It has been held,\textsuperscript{100} that there are two conditions for the application of clause (1). Firstly, the Fundamental Rights secured to arrested persons by Article 22 (1) give protection against such arrests as are effected otherwise than under a warrant issued by a Court on the allegation or accusation that the arrested person has or is suspected to have committed or is about or likely to commit an act of criminal or quasi-criminal nature or some activity prejudicial to the public or the State interest.\textsuperscript{101} In other words, clause (1) of Article 22 is designed to give protection against the act of the executive or other non-judicial authorities, including an arrest made under a warrant issued by the Speaker of a State Legislature. The reason is that a person who is arrested under a warrant of a court is made acquainted with the grounds of his arrest before the arrest is actually, effected. Secondly, the person must have been taken into custody on the allegation or accusation of an actual or suspected or apprehended commission by that person of any offence of a criminal or quasi-criminal nature or some act prejudicial to the State or public interest. Thus in State of Punjab Vs. Ajaib Singh, the taking into custody of an abducted person by a police officer and the delivery of such person by him into the custody of the

\textsuperscript{100} State of Punjab Vs. Ajaib Singh AIR 1953 SC 10. 
\textsuperscript{101} State of Madhya Pradesh Vs. Shobharam AIR 1966 SC 1910.
officer in charge of the nearest camp under Section 4 of the aducted person (Recovery and Restoration) Act, 1949 and (2) of the Constitution because there was no allegation or accusation of any actual or apprehended commission by that person of any offence of a criminal or quasi-criminal nature.

Following the decision of the Supreme Court in Ajaib Singh case, it has been held in Raj Bahadur Singh vs. Legal Ramembrancer,\(^{102}\) that the removal of a minor girl from a brothel or from premises which are used as a brothel under Section 13 of the Bengal Suppression of Immoral Traffic Act, 1923, is not an arrest within the meaning of clauses (1) and (2) of Article 22. Likewise, an arrest and detention of a defaulter who fails to pay income tax does not come within the purview of clauses (1) and (2) because the purpose of arrest is not to punish him for an offence but to make him pay the arrears.\(^{103}\)

Clause (3) enacts two exceptions. The Fundamental Rights guaranteed to arrested persons by clauses (1) and (2) do not apply: (a) to enemy aliens, and (b) to persons arrested or detained under any law providing for preventive detention.

102. AIR 1953 Cal. 522.
Preventive Detention:

Clauses (4) to (7) relate to preventive detention. If we look to the lists distributing legislative powers between the States and the Union, we find that the subject of preventive detention is mentioned in the Union List (Schedule VII List I Entry 9) as well as in the concurrent list (Schedule VII list III Entry 3). Both the Centre and the States are free to have their own laws except that in the case of a conflict, it is the Central Law that will prevail. However, the Centre's ambit is larger than of the States as the Centre can have a preventive detention law for reasons connected with defence, foreign affairs and security of India by virtue of Entry 9 of List I, in addition to security of a State, the maintenance of public order or of supplies and services essential to the community by virtue of Entry 3 of List III.

There is no authoritative definition of the term "preventive detention" in Indian Law. The expression had its origin in the language used by the law Lords in England while explaining the nature of detention under Regulation 14-B. Defence of Realm Act, 1914, passed on the outbreak of the First World War, and the same language was repeated in connection with emergency regulations made during the last World War. The word "preventive" is used in contrast to the word "punitive". To quote the words of Lord Finley in Rex Vs. Halliday, 104 it is not punitive

104. 1917 AC 260, 269.
but precautionary measure". Preventive detention differs from the ordinary or punitive detention both in respect of its purpose and its justification. The object of preventive detention is not to punish a man for having done something but to intercept him before he does it and to prevent him from doing it. No offence is proved nor any charge formulated. The justification of such detention is suspicion or reasonable probability of the impending commission of the prejudicial act and not criminal conviction which can only be warranted by legal evidence. In A.K. Gopalan vs. State of Madras, 105 Patanjali Shastri, J. in explaining the necessity of such a provision, said:

"This sinister-looking feature, so strangely out of place in a democratic Constitution, which invests personal liberty with the sacrosanctity of a fundamental right, and so incompatible with the promises of its preamble, is doubtless designed to prevent the abuse of freedom by anti-social and subversive elements which might imperil the national welfare of the infant republic".

During the first and Second World War the British Parliament empowered the Government to pass orders of preventive detention and the Courts upheld the power on the ground of necessity. 106 However, precious the personal liberty of the subject may be, 'there is something for which it may well be, to some extent, sacrificed by legal

105. AIR 1950 SC 27.
enactment, namely national success in war or escape from national plunder or enslavement. But no power of preventive detention has been exercised by the British Parliament during peace time. The Indian Constitution, however, recognises "preventive detention" in normal times also. The law of preventive detention is authorised by our Constitution presumably because it was for seen by the Constitution makers that there may arise occasions in the life of the nation when the need to prevent citizens from acting in ways which unlawfully subvert or disrupt the basis of an established order may outweigh the claims of personal liberty.

Though the constitution makers had recognised the necessity of laws as to preventive detention, it has also provided in Clause (4) to (7) certain safeguards to mitigate their harshness by placing fetters on legislative power conferred on the Legislature and to prevent misuse of the power by the Executive.

Although the history of preventive detention predates the Constitution and can be traced back to the Bengal State Prisoners Regulation, 1918, ever since 1950,

the Centre has been having preventive detention laws except for two brief gaps, between January, 1970 and May, 1971 and then from March, 1977 till September, 1980. In September, 1980 the President promulgated the National Security Ordinance, 1980 which automatically became the National Security Act, 1980. In addition to that there are other Central and State Laws which provide for preventive detention.

In view of the new directions given to the right to life and personal liberty since Maneka Gandhi Vs. Union of India as well as the concern shown to that right in the 44th Amendment by making enforcement of Articles 20 and 21 non-suspendable Article 22, a major attack was launched against the National Security Act, 1980 and the practice of preventive detention in A.K. Roy Vs. Union of India. Among the various grounds of attack some were of preliminary nature. For example the nature of ordinance making power and the power to bring an amendment of the Constitution into effect. The Court decided that an ordinance is as much a law as an Act and that the power expressly vested in the executive to bring an amendment of the Constitution into effect at its discretion, does not violate any constitutional provision or principle and the courts can not com-

pel the executive to bring an amendment of the Constitution into force. Thus the amended clauses (4) and (7), which could take effect only on a notification from the Central Government, which notification the Central Government has not issued remain in operative. One of the major substantive arguments that the Act of 1980 and the preventive detention in general was violative of the just and fair procedure as has emerged through the relationship of Articles 14, 19 and 21 was negatived by the Court on the ground that though the preventive detention laws have to satisfy the requirements of Articles 14, 19 and 21 they can not be unconstitutionnalised per se so long as Article 22 and the legislative entries expressly sanction them. Several other grounds of attack related to the specific provisions of the Act on the ground of their inconsistency with either Article 21 or Article 22. But all these provisions were upheld subject to some clarifications in respect of some of them. Those grounds and clarifications are covered within the following discussion.

Various safeguards provided to the detenus under clauses (4) to (7) of Article 22 may be discussed under the following heads. In considering these safeguards we have to bear in mind what has been said in the beginning of our discussion on this Article as well as what has been said just above with reference to A.K. Roy case that the
safeguards provided in clauses (4) to (7) do not exclude safeguards provided under other fundamental rights and are specifically influenced by Articles 14, 19 and 21.

Review By Advisory Boards:

A detenu under preventive detention is not detained after trial and conviction of an offence by a competent court. To provide safeguards against arbitrary detention, clause (4) states that no law providing for preventive detention shall authorise the detention of a person for a longer period than three months unless an Advisory Board constituted of persons who are, or have been, or are qualified to be High Court Judges has reported before the expiration of the said period of three months that there is in its opinion, sufficient cause for such detention. If the Advisory Board reports that the detention is not justified, the Government is duty bound to revoke the detention order Shibban Lal Saxena Vs. State of Uttar Pradesh. If the Advisory Board reports that the detention is justified, then only the detaining authorities determine the period of detention. It is no business of the Advisory Board to express any opinion as to how much longer than three months the detenu should be kept in detention. The matter before the Advisory Board is the subject of detention of the person

110. AIR 1954 SC 179.
concerned and not for how long he should be detained.
The expression "such detention" in Article 22 (4) (a) refers to preventive detention and not to how long the person is to be detained.\textsuperscript{111} It is clear from the clauses (4) and (7) of Article 22 that the policy of Article 22 is except where there is a Central Act to the contrary passed under clause (7) (a), to permit detention for a period of three months only, and detention in excess of that period is permissible only in those cases where an Advisory Board, set up under the relevant statute, has reported to the sufficiency of the cause for such detention.\textsuperscript{112} The confirmation of the opinion of the Advisory Board to continue the detention beyond three months must be within three months from the date of detention in conformity with the mandate of clause (4) of Article 22.\textsuperscript{113} But even where the Advisory Board report that the detention is justified, there is a protection against indefinite continuation of the detention. Clause (4)(b) lays down that the detention cannot exceed in any case beyond the maximum period prescribed by a law of parliament for that class of detenu.

In case the opinion of the Board is not obtained within three months of detention, the detention becomes

\textsuperscript{111} Puran Lal Lakhanpal Vs. Union of India AIR 1958 SC 163.
\textsuperscript{112} S.Mukherji Vs. State of West Bengal (1974) 3 SCC 50.
\textsuperscript{113} D.S.Roy Vs. State of West Bengal (1972) 1 SCC 308.
illegal and the detenu is entitled to be released even though the opinion of the Board has been obtained within three months of a second order or detention revoking the first and authorising the continuation of detention on the same ground on which the original detention was made.\textsuperscript{114}

In A.K. Gopalan case,\textsuperscript{115} the majority had held that the word 'and' in Article 2 (7)(a) meant in the context 'or' which meant that it was enough if Parliament, under Article 22 (7)(a), prescribed either the circumstances or the classes of cases in which a person might be detained for a period longer than three months without reference to an Advisory Board.

In State of West Bengal Vs. Ashok Dey,\textsuperscript{116} it was argued that since clause (7) authorises only Parliament to make a law for preventive detention for a period longer than three months a State Legislature is not authorised to make a law in this regard. The Supreme Court held that since preventive detention is a subject in the Concurrent List, a State Legislature is competent to make a law subject to such limitations as have been specified in Article 22.

\textsuperscript{114} Abdul Latif Vs. B.K. Jha (1987) 2 SCC 22.
\textsuperscript{115} AIR 1950 SC 27.
\textsuperscript{116} (1972) 1 SCC 199, 204, 205 AIR 1972 SC 1660.
In Fagu Shaw Vs. State of West Bengal, the question arose whether Parliament is bound to prescribe the maximum period of detention under Article 22 (7)(b) in order that proviso to Article 22 (4)(a) might operate. The Supreme Court held that as Parliament and State Legislatures have power under Entry 3 of List III in Schedule VII of the Constitution to pass a law enabling the detention of a person for a period longer than three months of the Advisory Board, there could be no limit to that period, reasonableness apart.

**Grounds of Detention And Representations**

Clause (5) of Article 22 gives two rights to the detainee. First, he has the right to be communicated the grounds on which the order of detention has been made against him and that is to be done, "as soon as may be." Communication here means imparting to the detainee sufficient knowledge of all the grounds of detention which are in the nature of charges against him. Thus, where the detainee did not know sufficient English to understand the grounds communicated to him, it was held that there was not sufficient compliance with the requirements laid down in the Constitution. The grounds for making the order are the reasons on which the


detaining authority was satisfied that it was necessary to make the order. These grounds, therefore, must be in existence when the order is made. The grounds for conclusions of facts and not a complete detailed recital of all facts. No part of such grounds can be held back nor can new grounds be added there to.\textsuperscript{119} The Constitutional right of the detenu will equally be infringed where any of the grounds supplied earlier is revoked by the detaining authority subsequently. In Shibban Lal Saksena Vs. State of Uttar Pradesh,\textsuperscript{120} the petitioner had been supplied with to grounds of his detention. Subsequently, the detaining authority revoked one of the grounds. It was contended that in these circumstances the detention is illegal and the petitioner is entitled to be released. In reply the State contended that the remaining ground was sufficient to sustain the detention order. The Supreme Court held the detention invalid.

\textbf{Procedure of Advisory Boards}:

Power is given under clause (7)(c) to Parliament to prescribed the procedure to be followed by an Advisory Board in an enquiry under sub-clause (a) of clause (4).


\textsuperscript{120} \textit{AIR} 1954 SC 179.
The procedure laid down in Parliamentary legislation will override the procedure established by a State Law. The idea is to prevent, as far as possible, hazardous and unjust procedure being laid down under State G enactments.

In addition to the procedure which Parliament may lay down, the courts have evolved certain norms to be followed in respect of the proceedings before the Advisory Boards. It has been held that an Advisory Board is not a judicial or quasi-judicial body and therefore, it is not bound to follow the procedure required for such bodies. The Board is in fact in the nature of a body charged with the responsibility of advising the executive in regard to cases of preventive detention where it is intended that such detention will last for more than three months. Therefore, a detenu can not claim the right of cross-examination in the proceedings before the Advisory Board. But right to a real and effective personal hearing by the Board to the detenu has been recognised in case the detention law says that such hearing has to be given if the detenu so desires. Moreover, in the absence of any provision to the contrary, the detenu has the right to offer oral and documentary evidence before the Advisory Board in order to rebut the

allegations made against him. 123

The detene has no fundamental right to be represented by a lawyer before the Advisory Board, though he may make a request to the Board for such representation which the Board may or may not accept. 124

Post Detention Conditions:

Primarily it is for the legislature and the executive to lay down a detailed code in respect of the treatment of persons under preventive detention. But, conceding this fact, in A.K. Roy Vs. Union of India, the Court has held that it can always examine individual complaints of ill treatment and observed:

We must impress upon the Government that the detenus must be afforded all reasonable facilities for an existence consistent with human dignity. We see no reason why they should not be permitted to wear their own clothes, eat their own food, have interviews with the members of their families at least once a week and, last but not the least, have reading and writing material according to their reasonable requirements.

The Court specifically directed that "persons who are detained under the National Security Act must be aggregated under the II"

from the convicts and kept in a separate part of the place of detention. Further it said: "It is hardly fair that those who are suspected of being engaged in prejudicial conduct should be lodged in the same ward or cell where the convicts whose crimes are established are lodged.

Prohibition of Traffic In Human Beings And Forced Labour:

Traffic in human beings and begar and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law.

Nothing in this article shall prevent the State from imposing compulsory service for public purposes, and in imposing such service the State shall not make any discrimination on grounds only of religion, race, caste or class or any of them.

This made embodies two declarations. First, that traffic in human beings, begar and other similar forms of forced labour are prohibited. The prohibition applies not only to State but also to private persons, bodies and organisations. Second, any contravention of the prohibition shall be in offence punishable in accordance with law.

Under Article 35 of the Constitution Laws punishing acts
prohibited by this article shall only be made by Parliament, though existing laws on the subject, until altered or repealed by Parliament, are saved.

Traffic in human beings means to deal in men and women like goods, such as to sell or let or otherwise dispose them of. It would include traffic in women and children for immoral or other purposes. The Suppression of Immoral Traffic (Prevention) Act, 1956 is a law made by Parliament. Under Article 35 of the Constitution for the purpose of punishing acts which result in traffic in human beings. Slavery is not expressly mentioned but there is no doubt that the expression traffic in human beings would cover it. Under the existing law, whoever imports exports, removes, buys, sells or disposes of any person as a slave or accepts, receives or detains against his will any person as a slave shall be punished with imprisonment.

In pursuance of Article 23 the bonded labour system has also been abolished and declared illegal by the bonded labour system (Abolition) Act, 1976.

Begar means involuntary work without payment. It is fundamental right of a person, citizen or non-citizen,

125. Dubar Vs. Union of India, AIR 1952 Cal. 496.
126. Section 370 Indian Penal Code.
not to be compelled to work without wages, the only exception being commonly imposed public services. The guarantee is not restricted to begar alone but includes "other similar forms of forced labour". Begar commonly connotes forced labour for which no wages are paid or, if some payment is made, it is grossly inadequate. It means making a person work against his will and without payment any remuneration.\(^{127}\) To ask a person to work and then not to pay him his wages savours of Begar,\(^{128}\) but a voluntary agreement to do extra work for payment is not begar or forced labour.\(^{129}\)

State to Secure A Social Order For The Promotion of Welfare of The People:

The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social economic and political, shall inform all the institutions of the national life.

The State shall, in particular, strive to minimise the inequalities in income, and endeavour, to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people.

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129. Shama Bai Vs. State of Utter Pradesh AIR 1959 All. 57.
residing in different areas or engaged in different vocations.

Promotion of International Peace And Security:

The State shall endeavour to—

(a) promote international peace and security;
(b) maintain just and honourable relations between nations;
(c) foster respect for international law and treaty obligations in the dealings of organised peoples with one another; and
(d) encourage settlement of international disputes by arbitration.