CHAPTER - 2

RIGHTS OF ACCUSED UNDER THE INDIAN CONSTITUTION

(I) PRELUDE

The Constitution is the basic source of all laws and fundamental rights also emanates from the Constitution. The provisions of all other laws are subject to provisions of the Constitution and in case of any inconsistency they are liable to be struck down. Fundamental rights under Indian Constitution have been incorporated in Part-III of the Constitution. "A constitution is framed for ages to come, and is designed to approach immortality as nearly as human institutions can approach it. Its course can not always be tranquil".\(^1\) No Fundamental rights were available to the people of India before independence. The idea of fundamental rights was cherished long ago. The Congress party had submitted "Nehru Report" on 10th August, 1928, which contained several fundamental rights.\(^2\) The Preamble of the Constitution reflect the aspirations of the people of India to secure justice, liberty and equality to all citizens.\(^3\) A person may become accused when there is any criminal charge against him and he can be put behind bars to face the consequences.

An accused when brought before the court of any category does not cease to be a citizen of this country despite the fact that he has been charge sheeted of an offence, hence under the Constitutional Article 5, even an accused does not become noncitizen on the mere fact that he has been arrested, charge sheeted or incarcerated by the authority. Being a citizen of this free country, the accused is entitled to all those entitlements that any free citizen is entitled except those curtailment that had been restricted by virtue of his arrest according to the law of this land.\(^4\) Prisoners are still persons entitled to all Constitutional rights unless their liberty has been

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2. The Congress party had passed a resolution in 1927 to draft Constitution of India under Chairmanship of Mr. Moti Lal Nehru which finally submitted the report which is popularly known as "Nehru Report". Several rights were listed out in the draft.
Constitutionally curtailed by procedure that satisfy all the requirements of due process. Mr. Justice White's observation in *Charles Wolf's case* was also referred by Supreme Court in *Francis Coralie's* case that, though rights of prisoner "may be diminished by the needs and exigencies of the institutional environment, a prisoner is not wholly stripped of Constitutional protections, when he is imprisoned for crime. There is no iron curtain drawn between the Constitution and the prisons of this country". A person to whom fundamental rights are available does not cease to be so when he is detained or facing criminal trial or convicted for an offence. Except the legal restrictions imposed on him, other fundamental rights are still available to him and he can approach the courts for enforcement of his rights. Basic Constitutional rights cannot be halted at the prison gates and can be enforced within the prison campus.

The prison laws do not swallow up the fundamental rights of the legally unfree... the courts will guard the freedom behind the law.... ‘Prisons are built with stones of law' and so it behoves the court to insist that, in the eye of law, prisoners are persons, not animals, and punish the deviant 'guardians' of the prison system where they go berserk and defile the dignity of the human inmate, prison houses are part of Indian earth and the Indian Constitution cannot be held at bay by jail officials, dressed in a little, brief authority when Part-III is invoked by a convict. For when the prisoner is traumatized, the Constitution suffers a shock, and when the court takes cognizance of such violence and violation, it does, like the hound of Heaven.

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5. Justice Douglas in *Eve Fall's case* (1974) 417: U.S. 817 41 L Ed. 2d 495; This observation was referred by the Supreme Court of India *Francis Coralie v. Union Territory of Delhi*, AIR 1981 SC 746 at 751.
9. See Part III of Constitution of India; A person can move Supreme Court or High Court for enforcement of his fundamental rights under Article 32 and 226 of the Constitution of India.
Convicts are not by mere reason of the conviction denuded of all the fundamental rights which they otherwise possess. A compulsion under the authority of law, following upon a conviction, to live in prison house entail by its own force the deprivation of fundamental freedom like right to move freely through out the territory of India or right to practice a profession.... But the Constitution guarantees other freedoms.... Even a convict is entitled to some precious rights guaranteed by Article 21 that he should not be deprived of life or personal liberty except according to the procedure established by law. In this Chapter, various rights available to accused person under the Constitution of India would be examined. The right to equality in the backdrop of rule of law, right to speech and expression and protection against self-incrimination will be discussed threadbare. The concept of double jeopardy and domain of personal liberty and provisions relating to preventive detention and rights available to accused person or detenu will also find a mention in the Chapter. The study of Constitutional rights of accused would be, in fact incomplete if Constitutional mechanism for enforcement and safeguard of rights of accused is not discussed. Some new rights which have emerged in consequence of judicial interpretation will also find specific mention in the study.

(II) RIGHT TO EQUALITY AND PHILOSOPHY OF DOCTRINE OF RULE OF LAW

Part-III of the Constitution of India, titled as "Fundamental Rights" secure to the people of India certain basic, natural and inalienable rights. These rights have been declared essential rights in order that human liberty may be preserved, human personality developed and an effective social and democratic life promoted. These fundamental rights represent the basic values cherished by the people of this country(India), since the vedic times and they are calculated to protect the dignity of the individual and create conditions in which every human being can develop his personality to the fullest extent. They weave a pattern of guarantee on the basic structure of human rights, and impose negative obligations on the State not to encroach on individual liberty in its various dimensions. The aim behind having a declaration

15. Jain 457 Quoted by Kumar Narender,op.cit.
of fundamental rights is to make inviolable certain elementary rights appertaining to the individual, such as the right to life, liberty to free speech, freedom of worship, etc., under all conditions and to keep them unaffected by the shifting majorities in the legislatures.\(^{17}\) The framers of the Indian Constitution followed by the American model in adopting and incorporating the fundamental rights for the people of India. The Constitution not only secures the fundamental rights, but also provides a speedy and effective remedy for their enforcement. The rights, so secured, are rather more specific and detailed. The Constitution, instead of leaving it for the courts, itself embodies the limitations or conditions subject to which the right may be excercised.\(^{18}\)

According to the philosophy behind fundamental rights, they are available only against State, for, they are limitations upon all the powers of the Government, legislative as well as executive. It is against the might of the State that an individual needs Constitutional protection.\(^{19}\) The definition of the term “the State” is given in Article 12 of the Constitution which reads “In this part, unless the context otherwise requires, “the State” includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India.”\(^{20}\) This Article does not define the term “the State” but states that certain agencies are “the State” for the purposes of Part III & IV of the Constitution.\(^{21}\) A judicial or quasi-judicial authority has not been held to be a ‘State’ for the purposes of Part-III & IV of the Constitution.\(^{22}\) That definition does not say fully what may be included in the word ‘State’ but, although it says that the word includes certain authorities, it does not consider it necessary to say that courts and judges are excluded. The reason is made obvious at once. If we consider Article 13 (2) there the word “State” must obviously includes “courts” because otherwise “courts” will be enabled to make rules which take away or abridge fundamental rights.\(^{23}\) The definition of “State” is not confined to a


\(^{18}\) Kumar, Narender, op. cit., p.51.

\(^{19}\) Ibid, p.53.

\(^{20}\) Article 12 of Constitution of India.

\(^{21}\) Ibid.


Government Department and the Legislature, but extends to any action -administrative (whether statutory or non statutory), judicial or quasi-judicial, which can be brought within the fold of ‘State action’ being action which violates a fundamental right.\(^\text{24}\) The Constitution declares all laws in derogation or inconsistent with the provisions of Part-III of Constitution to be void.\(^\text{25}\) Article 13(2) reads that “the state shall not make any law which takes away or abridges the rights conferred by this part and any law made in contravention of this clause shall, to the extent of the contravention, be void”. Thus, it is clear that even courts cannot make any law which abridges or violates fundamental rights. "It is inappropriate and illogical to conclude positively that the framers of the Constitution intended to exclude the judiciary from the area of “State” so as to put it beyond the reach of fundamental rights. Judiciary is an organ of the “State” and a reading of Part-III clearly supports this view."\(^\text{26}\)

The first fundamental right secured to the people of India is the "Right to Equality."\(^\text{27}\) The provisions are contained in Article 14 to 18 of the Constitution. Article 14 provides for equality before law and reads:

The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.\(^\text{28}\)

The source of Article 14 lies in the American and the Irish Constitutions. It may be mentioned that the Preamble to the Indian Constitution speaks of equality of status and of opportunity and this article gives effect to that principle in the text of the Constitution. In a sense, the demand for equality is linked up with the history of the freedom movement in India. Indians wanted the same rights and privileges that their British masters enjoyed in India and the desire for civil rights was implicit in the formation of the Indian National Congress in 1885.\(^\text{29}\) The right to equality finds place in “Nehru Report”. The Committee under the Chairmanship or Motilal Nehru


\(^{25}\) Article 13(1) of Constitution of India.


\(^{27}\) Kumar, Narender, \textit{op. cit.}, p.84.

\(^{28}\) Article 14.

\(^{29}\) Bakshi P.M., Constitutional Law of India, Delhi (1996), p.15.
was appointed to determine the principles of the Constitution of India.\(^{30}\) Article 4 of the said report reads "All citizens are equal before the law and possess equal civil rights," The Karachi Resolution (March 1931) reiterated, _inter alia_, this right in the resolution on fundamental rights and economic and social change. \(^{31}\) The right was reiterated in Sapru Report that "what the Constitution demands and expects is perfect equality between one section of the community and another in the matter of political and civic rights, equality of liberty and security in the enjoyment of the freedom of religion, worship, and the pursuit of the ordinary applications of life."\(^{32}\) Article 7 of the Universal Declaration of Human Rights provides that "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of the declaration against any incitement of such discrimination. \(^{33}\)

The obligation imposed on the State by Article 14 is for the benefit of all persons within the territory of India. The benefit of Article 14 is, therefore, not limited to citizens. Every person whether natural or artificial, whether he is a citizen or an alien, \(^{34}\) is entitled to the protection of the Article. \(^{35}\) The concept of equality has been held basic to the rule of law. In _Indira Nehru Gandhi v. Raj Narian_, \(^{36}\) the Supreme Court by majority held that right to equality conferred by Article 14 is a basic structure of the Constitution and an essential feature of democracy or rule of law. \(^{37}\) Two concepts are enshrined in the Article—(a) equality before the law; and (b) equal protection of the laws. "Equality before law" is a negative concept which establishes the "Rule of law" and it is direction for the State to treat all persons alike and not to discriminate any person.

\(^{30}\) The "Nehru Report" was submitted by Pt. Moti Lal Nehru in August, 1928.

\(^{31}\) Chakravarty and Bhattacharya, _Congress in Evolution_ (1940), p.28.


\(^{35}\) _Chiranjit Lal Chaudhary v. Union of India_, AIR 1951 SC 41.

\(^{36}\) AIR 1975 SC 2299.

\(^{37}\) _Ibid._
Jennings, explains, “Equality before the law means that among equals the law should be equal and should be equally administered, that like should be treated alike. The rights to sue and be sued, to prosecute and be prosecuted for the same kind of action should be same for all citizens of full age and understanding without distinction of race, religion, wealth, social status or political influence.”38 The guarantee of equality before the law is an aspect of what Dicey calls the Rule of Law in England.39 Dicey observed:

When we say that the supremacy or the rule of law is a characteristic of the English Constitution, we generally include under one expression at least three distinct though kindred conceptions. We mean, in the first place, that no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land. In this sense the rule of law is contrasted with every system of Govt. based on exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint.40 We mean in the second place... not only that with us no man is above the law, but (what is a different thing) that have every man, whatever be his rank and condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.41

“It means that no man is above the law and that every person, whatever be his rank or conditions, is subject to the jurisdiction of orderly courts.” Dicey further wrote “with us every official from the Prime Minister down to Constable or a Collector of taxes is under the same responsibility for every act done without legal justification as any other citizen”. Rule of Law requires that no person shall be subject to harsh, uncivilized or discriminatory treatment even when the object is the securing of the paramount exigencies of law and order.42 The expression “equality before law” is of English origin and used in almost all written constitutions of the world. The object of the Constitution as stated in Preamble, is to establish equality of status which gets expression in this Article. Both the expressions i.e., equality before law and equal pro-

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40 Ibid., p.183.
41 ibid., p.189; See also Anand, C.L., Constitutional Law and History of Government of India (1990), p.123.
42. Ibid; See Rubinder Singh v. Union of India, AIR 1983 SC 65; see also Pandey J.N., Constitutional Law of India, Allahabad (1984), p. 68.
tection of the laws, though appears to be identical but the first concept is "negative" and later is "positive".

Equality before law is a dynamic concept having many facets one facet -the most commonly acknowledged -is that there shall be no privileged person or class or that none shall be above law. A facet which is of immediate relevance herein is the obligation upon the State to bring about, through the machinery of law, a more equal society envisaged by the Preamble and Part-IV of our Constitution. The phrase "equality before law" is somewhat a negative concept for it implies absence of any special privilege in favour of any particular individuals, while the expression "equal protection of laws" is positive in operation, ensuring equality of treatment to all in equal circumstances. However the second expression has been held to be the corollary of the first. It would, therefore, be difficult to imagine a law, having inequality of operation may yet give equality of protection. It would be a contradiction to say that any violation of equal protection of laws would not result in violation of equality before law. It was held both these expressions mean one and the same thing i.e. equality of status and of opportunity. The dominant idea common to both these expressions is that of equal justice. Thus, the fundamental principle is that Article 14 forbids class legislation but permits reasonable classification, for the purpose of legislation classification must satisfy the twin tests of classification being founded on an intelligible differentia. Which distinguishes persons or things that are grouped together from those one left out of the group and that the differentia must have a rational nexus to the object sought to be achieved by the statute in question. All local or other authorities under the governmental control or which are instrumentalities of the State are also "the State" for the purposes of Article 12. The Supreme Court in the matter of *Ajay Hasia v. Khalid Mujib* speaking through Justice P. N Bhagwati

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47. AIR 1981 SC 481.
enunciated the following test to determine whether an entity is an instrumentality or agency of the State:

1) If the entire share capital of the corporation is held by government it would go a long way towards indicating that the corporation is an instrumentality or agency of Government.

2) Where the financial assistance of the State is so much as to meet almost entire expenditure of the corporation, it would afford some indication of the corporation being impregnated with governmental character.

3) It may also be relevant factor whether the corporation enjoys monopoly status which is the State conferred or State protected.

4) Existence of deep and pervasive State control may afford an indication that the corporation is a State agency or instrumentality.

5) If the functions of the corporation are of public importance and closely related to governmental functions, it would be relevant factor in classifying the corporation as an instrumentality or agency of Government.

6) Specifically, if a department of Government is transferred to a corporation, it would be a strong factor supporting this interference of the corporation being an instrumentality or agency of government.48

The rule of equality is not absolute and there are exceptions to it. For instance, foreign diplomats are immune from the jurisdiction of the country’s courts. Article 361, immunes the President, the Governor of a State from the jurisdiction of the courts. Police officers, judges also enjoy some protection and some special groups like the trade unions are accorded special privileges in certain matters. 49 Articles 14 permits classification. Classification is merely a systematic arrangement of things into groups or classes, usually in accordance with some definite scheme.50 All persons are not

49. Kumar, Narender, op. cit., p. 86.
equal by their nature, attainment or circumstances. The varying needs of different
classes of persons often require separate treatment. The reasonable classification
is permissible. By ‘reasonable’, it is meant that classification must not be arbitrary
but must be rational. The test of classification require the fulfillment of two conditions,
namely (1) The classification must be founded on an intelligible differential while
distinguishes those that are grouped together from others, (2) the differential must
have a rational relation to the object sought to be achieved by the law under chal-
genle. Fazl Ali J, observed in Kathi Raning Rawat v. State of Saurashtra that
“a distinction should be drawn between ‘discrimination without reason and ‘discrimi-
nation with reason’ The whole doctrine of classification is based on this distinction

Equality before law is a limitation on the legislative function of the State; a
legislation on the basis of this principle can be reviewed by the court only when an
unequal treatment is alleged to take place on its enforcement. It is because the
legislation itself violates ‘equality before law’ or it leaves to the executive an unguided
discretion which may be arbitrarily exercised; and thereby may lead to the violation
of ‘equal protection of laws’. As regards equal protection of laws as the doctrine
applies to persons similarly situated, i.e. the law that operate alike on all persons
under the like circumstances. Doctrine of equality is a deep rooted base of the
principle of justice. It required that all individuals should be treated alike even though
they are unequal. In this regard the concept of equality visualises a sort of compen-
satory treatment to make all men equal before law without any consideration of caste
and creed, big and small, privileged and unprivileged and rich and poor. It is now

51. Chiranjit Lal Chaudhary v. Union of India, AIR 1951 SC 41; State of Bombay v. F.N. Balsara,
AIR 1951 SC 318.

52. See Bakshi, P.M., Constitutional Law of India (1996), Delhi, p 16; see also Chiranjit Lal v. Union of India, (1950) SCR 869; State of West Bengal v. Anwar Ali 1952 SCR 289; Dhirendra
Kumar v. Superintendent and Legal Remembrancer of Legal Affairs (1955) 1SCR 244;
321; Chitralekha v. State of Mysore,AIR 1964SC 1823, 1827; see also AIR 1979 SC 478; AIR
AIR 1984 SC 1420; AIR 1983 SC 1213; see also R. K. Dalmia v. Justice Tendolkar, AIR 1958

53. AIR 1952 SC 123.

54. Ibid.


well established that while Art 14 forbids class legislation it does not forbid reasonable classification for the purposes of legislation, in order, however, to pass the test of permissible classification, two conditions must be fulfilled, namely classification, must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from other left out of the group and (2) that differentia must have a rational relation to the object sought to be achieved by the Act. What is necessary is that there must be nexus between the basis of classification and the object of the Act. The burden of showing that a classification rests upon an arbitrary and are not reasonable basis is upon the person who impeaches the law as a violation of the guarantee of equal protection. A classification may be reasonable even though a single individual (or object) is treated as a class by himself (or itself), if there are some special circumstances or reasons applicable to him (or it) above and not applicable to others.

This Article not only guarantees equal protection as regards substantive laws but procedural laws also come within its ambit. The implication of the Article is that all litigants similarly situated are entitled to avail themselves of the same procedural rights for relief and for defence with like protection and without discrimination. So there cannot be separate procedure for the persons who have committed the same offence and are subject to same procedure for trial. From the stand point of the latter, (procedural laws) it means that all litigants, who are similarly situated, are able to avail themselves of the same procedural rights for relief and for defence, without discrimination of course, if differences are of a minor unsubstantial character, which have not prejudiced the interest of the person or persons affected, there would not be a denial of equal protection.

The guarantee of equal protection applies against substantive as well as procedural laws. There can be different procedure for trial of a particular offence if it is

59. Mittal v. UOI. AIR 1983 SC 1 pp: 165,179
62. Lachmadas v State of Bombay (1952) SCR 710 at 726.
provided under some Special Act, which will not be derogatory to the equality before law and it will not amount to discrimination. "A law which authorises the trial of any case by special court or by a procedure which differs substantially from the ordinary procedure, to the prejudice of the accused, offends against Art 14. But there is no infringement of the Article if certain offences or classes of offences are prescribed by the legislature to be triable by a special court or under such special procedure, and such classification is reasonable, having regard to the object of the legislation." In A.R. Antulay v. R.S. Nayak, the withdrawal of a case from the special judge and its transfer to Bombay High Court, "with a view to hold expeditious trial" was held discriminatory and hence violative of rights of the appellant guaranteed under Article 14. The direction, the court held, deprived the appellant of his four valuable rights: (i) the right to be tried by a special judge in accordance with the procedure established by law and enacted by Parliament; (ii) the right of revision to the High Court under Section 9 of the Criminal Law Amendment Act, 1952; (iii) the right of first appeal to the High Court under the same section; and (iv) the right to move the Supreme Court under Article 136 thereafter by way of a second appeal, if necessary. The Supreme Court thus held that the direction had caused appellant the denial of rights under Article 14, by denying him the equal protection of laws, by being singled out for a special procedure not provided for by law. The West Bengal government enacted West Bengal Special Courts Act, 1950 with the object "to provide for the speedier trial of certain offences". Section 5 (1) of the Act empowered the State to set up Special Courts to direct by a general or special order "the offences" or "the classes of offences" or "the cases" or "the classes of cases" which were to be tried by the Special Courts. The Supreme Court held in the matter of State of West Bengal v. S Anwar Ali Sarkar that Section 5 (1) of the Act contravened Article 14 and void since it conferred arbitrary power on the Government to classify offences or cases at its pleasure. The court held that Act did not lay down any basis of classification. The court further observed that the object or the policy behind the setting up of Special Courts, stated in the Preamble

63. Special Court Bill 1878 in re AIR 1979 SC 478 Paras 74, 78, 80-84, 87, 89.
64. AIR 1988 SC 1531
65. ibid.; see also. Kumar, Narender., op. cit p. 105.
66. AIR 1952 SC 75.
to the Act, was too vague and uncertain to form the basis of a valid and reasonable classification, which could be permitted under Article 14. In *State of M.P v. Ram Kishna Balothia*, 67 Section 18 of SC and ST (Prevention of Atrocities) Act, 1989 excluded the application of Section 438 of Criminal Procedure Code, 1973 to cases arising under this Act. This Act was enacted to prevent the commission of offences of atrocities against the members of the SCs/STs. Section 438 of Cr.P.C. empowers a Court of sessions and the High Court to grant anticipatory bail. The Supreme Court upheld that the constitutionality of Section 18 and held that the offences which were enumerated under Section 3 of the Act, 1989 were offence which to say the least, designated member of Scheduled Castes/Tribes in the eye of society and prevented them from leading a life of dignity and self respect. Such offences were committed to humiliate and subjugate members of Scheduled Castes/Tribes with a view to keeping them in a state of servitude. These offences thus constituted a separate class.68

Section 321 Cr.P.C. empowers the Public Prosecutor or the Assistant Public Prosecutor to withdraw from the prosecution of any person either generally or in respect of any one or more of the offences for which he is tried with the consent of the court.69 The Section does not indicate the reasons which should weigh with the Public Prosecutor or the Assistant Public Prosecutor to move the court nor the grounds on which the court will grant or refuse permission.70 Nonetheless, it is a duty of the court to see that the permission is not sought on grounds extraneous to the interest of justice or that offences which are offences against the State go unpunished merely because the Govt. as a matter of general policy or expediency unconnected with its duty to prosecute offenders under the law directs of Public Prosecutor or Assistant Public Prosecutor to withdraw from the Prosecution.71 The Section provides for consent of

67. AIR 1995 SC 1198 : The same view has been taken in *Jai Singh v. Union of India*, AIR 1993 Rajasthan 177.
68. Ibid.
70. *M.N.S. Nair v. P.V. Balakrishan*, AIR 1972 SC 496
71. Ibid; see also Ratan Lal, Dhiraj Lal, *op.cit.*, p. 316.
court though it is not mandatory to record reasons. As per figures available total 1,85,432 cases were compounded out of 54,61,004 which comes to 3.4% of the total cases (Annexure). This is Surprising that compounding / withdrawal have been allowed even in cases of murder, attempt to murder, culpable homicide not amounting to murder, rape, kidnapping and abduction, dacoity, robbery, burglary, dowry deaths, theft and cheating. Section 321 Cr.P.C. does not lay down any intelligible differential and apparently derogatory to the right of “equality before law” enshrined in Article 14 of the Constitution. For example if two accused persons are facing a trial for the same offence in the court, the Govt. withdraws the case against one accused it would be violation of right to equality as other one may be tried and convicted. In petty cases compounding of offences is permissible under Section 320 Cr.P.C. where parties can compromise in the case. The withdrawal of cases for serious offences by the Government, would be in fact violative of Article 14. In other words Section 321 Cr.P.C. is discriminatory in nature and incompatible with Article 14 of the Constitution and needs to be scrapped.

In the matter of Mahesh Chand v. State of Rajasthan, a Special Leave Petition challenging validity of conviction under Section 307 I.P.C. came before the Supreme Court for allowing the parties to compound the offence. The accused were acquitted by the trial court but convicted by the High Court for the offence under Section 307 I.P.C. This offence is not compoundable under law. Parties wanted to treat it a special case in view of the peculiar circumstances of the case. Out of the two accused one happened to be a practising lawyer of lower court. There was a counter case arising out of the same transaction. The Apex court after examining nature of

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72 See Section 321; Section only provides for consent of the court; Madras, Patna and Lahore High Court have held that Section does not require court to give reasons, while Nagpur High Court was of the view that it is desirable that reasons are given; See also Sadayan, (1908) 11 Cr.LJ. 193; Gulli Bhagat v. Narain Singh, (1923) 2 Patna. 708; Lakshmi Narain v. Mohammad Hanif, (1932) 33 Cr.LJ 337; AIR 1932 Lah. 368; Satwarao Nagorao Hatkar v. Kanbarao Bhago Rao Hatkar, (1939) Nag. 393; Dattatraya Govindarao Pakode v. Sidheshwar Balakrishna Wakhre, (1939) Nag. 85.


74 AIR 1988 SC 2111

75 Ibid.

the case and the circumstances under which the offence was committed, directed the trial judge to accord permission to compound the offence, after giving an opportunity to the parties and after being satisfied with the compromise agreed upon.\textsuperscript{77}

It is evident that court has allowed compounding of an offence committed under Section 307 I.P.C. duly realizing that this is not a compoundable offence under Section 320 Cr.P.C. The judgment raises the issues whether court can allow compromise even in serious offences like attempt to murder when Cr.P.C. does not provide for it?.. Whether directions given by the Apex Court to the trial court to allow compounding of offences among parties (when Cr.P.C. (Sec. 320) does not provide for it), is in accordance with law.? The court is expected to dispense justice according to law. Is the direction given to lower court legal? The court has allowed compromise in a case considering nature of case and circumstances under which the offence was committed. Can the other offenders who are facing trial for similar offences be not allowed to compound the offences.? If both the parties are allowed to compromise, was the State not a party in a criminal proceedings.? All these questions needs to be examined alongwith right to ‘equality before law’ under Article 14 of the Constitution.

\section*{(III) FREEDOM OF SPEECH AND EXPRESSION}

Article 19 (1) (a) guarantees to all citizens “The right to freedom of speech and expression” and clause (2) of the Article provides, “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 reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign states, public order, decency or morality, or in relation to contempt of Court, defamation or incitement to an offence.”

Freedom of speech and of the press lay at the foundation of all democratic organisation, for without free political discussion no public education, so essential for the proper functioning of the process of popular government, is possible.\textsuperscript{78} Freedom

\begin{itemize}
\item \textsuperscript{77} Ibid.
\item \textsuperscript{78} Ramesh Thapar v. State of Madras, AIR 1950 SC 124.
\end{itemize}
of Speech and expression has been held to be basic and indivisible for a democratic polity.\textsuperscript{79} Article 19 of the Constitution guarantees six freedoms to the citizens of India. Among the freedoms, certain freedoms like “freedoms of movement”, “freedom to reside and settle”, and “freedom of profession, occupation, trade or business” cannot be enjoyed by the prisoners because of the very nature of these freedoms and due to the condition of incarceration.\textsuperscript{80} Every free citizen has an undoubted right to lay what sentiments he pleases before the public. Freedom to air one’s views is the lifeline of any democratic institution and any attempt to stifle, suffocate or gag this right would sound a death knell to democracy and would help usher in autocracy or dictatorship.\textsuperscript{81} The liberty to express one’s self freely is important for a number of reasons. Firstly, self expression is a significant instrument of freedom of conscience and self-fulfillment. Second justifications concerns epistemology. Freedom of expression enables people contribute to debates about social and moral value. The best way to find the best or truest theory or model of anything is to permit the widest possible range of ideas to circulate. Thirdly, the freedom of expression allows political discourse which is necessary in any country which aspires to democracy. And lastly it facilitates artistic scholarly endeavours of all sorts.\textsuperscript{82} The freedom of speech and expression, “means the right to express one’s convictions and opinions freely, by word of mouth, writing, picture or in any other manner (addressed to the eyes or the ears). It would thus include not only the freedom of press, but expression of one’s ideas by any visible representation, such as by gestures and the like. Expression, naturally, presupposes a second party to whom the idea are expressed or communicated. In short, expression includes the idea of “publication”,\textsuperscript{83} and the right to acquire and import ideas and information about matters of common interest.\textsuperscript{84} The freedom of thought and expression, and the freedom of the press are not only valuable freedoms in themselves, but

\textsuperscript{79} Secretary, Ministry of I.B. v. Cricket Association, Bengal, AIR 1995 SC 1236 per B. P. Jeevan Reddy, J. 1293.

\textsuperscript{80} Kumar, Naresh, Constitutional Rights of Prisoners Delhi (1986), p.65


\textsuperscript{82} Feldman, David, Civil liberties and Human Rights" quoted in Secretary, Ministry of I&B v. Cricket Association, Bengal, AIR 1995 SC 1236.


\textsuperscript{84} Hamdard Dawakhana v. Union of India (1960) 2 SCR 671.
are basic to a democratic form of government which proceeds on the theory that problems of government can be solved by the free exchange of thought and by public discussion. It means to freely propagate, communicate or circulate one's opinion or views. It also means to lay what sentiments, a free citizen pleases, before the public.

Article 19 (1) (a) guarantees the freedom of speech and expression. The phrase "speech and expression" is of very wide connotation. "Expression" naturally presupposes a second party to whom the ideas are expressed or communicated. The freedom of expression thus includes the freedom of the propagation of ideas, their publication and circulation in short, the freedom of speech and expression includes the liberty of the press. It will be noticed that this Article guarantees to all citizens freedom of speech and expression but does not specifically or separately provide for liberty of press. It has however, been held that the liberty of the press is implicit in the freedom of speech and expression which is conferred on a citizen. Article 19 (1) (a) does not specifically provide for freedom of press. Dr. B R Ambedkar while explaining the omission, observed that: "The press has no special rights which are not to be given or which are not to be exercised by the citizen in his individual capacity. The editor of a press or the manager are merely exercising the right of the expression, and therefore, no special mention is necessary for the freedom of the press". Under our Constitution, there is no separate guarantee of freedom of the press. It is implicit in the freedom of expression which is conferred on all citizens. In series of discussions, the Supreme Court has ruled out that freedom of the press is implicit in the guarantee of freedom of speech and expression, because it partakes of the same basic nature and character. The legal consequence is that freedom of the press is one of the fundamental rights guaranteed in our Constitution yet one can appreciate

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89. C.A.D. VII 980; see also Brij Bhusan v. State of Delhi, AIR 1950 SC 129.
the sentiment that urges its specific incorporation as a fundamental right in its own independent right, rather than depend upon judicial interpretation.\footnote{Sorabjee, Soli, "On Freedom of The Press In The Constitution, ' in Kashyap ,Subhash., C., Reforming the Constitution, New Delhi. (1992).} Freedom of the press is not expressly mentioned in article 19 but has been held to flow from the general freedom of speech and expression guaranteed to all citizens. As judicially construed, this freedom now includes not merely the freedom to write and publish what the writer considers proper (subject to reasonable restrictions imposed by law for specific purpose), but also the freedom to carry on the business so that information may be disseminated and excessive and prohibitive burden restricting circulation may be avoided.\footnote{Bakshi P.M., Constitution of India, Delhi (1996), p. 31; See also Virendra v. State of Punjab, AIR 1958 SC 986; Express Newspapers v. Union of India, AIR 1953 SC 578; Bennett Coleman v. Union of India, AIR 1973 SC 106; Prabha v. Union of India, AIR 1982 SC 6; Indian Express Newspapers v. Union of India, AIR 1986 SC 515; Sakal Papers v. Union of India, AIR 1982 SC 305; Indian Express Newspapers v. Union of India, AIR 1986 SC 872; Sharma v. Sri Krishna, AIR 1959 SC 395, 402.}

In Virendra v. State of Punjab, \footnote{AIR 1957 SC 896; see also Express Newspapers (P) Ltd., v. Union of India, AIR 1958 SC 578.} the Supreme Court held that banning of publication in the newspapers of its own views or the views of correspondents about the burning topic of the day was "a serious encroachment on the valuable and cherished right to freedom of speech and expression."\footnote{R. Rajagopal v. State of Tamil Nadu, AIR 1995 SC 264.} The right to publish the life-story of a condemned prisoner, is so far as, it appears from the public records, even without his consent or authorisation, has been held to be included in the freedom of the press guaranteed under Article 19 (1) (a). No prior restraint upon such publication can be imposed.\footnote{Ibid.} It has also been held by the Supreme Court in number of cases\footnote{See Romesh Thaper v. State of Madras, AIR 1950 SC 124; Sakal Papers (P) Ltd., v. Union of India, AIR 1962 SC 305; Bennett Coleman and Co., v. Union of India, AIR 1973 p. 148.} that freedom of speech and expression includes the freedom of propagation of one's ideas or views and this freedom is ensured by the "freedom of circulation"\footnote{Kumar, Narender ,op. cit. p. 148.} liberty of circulation is as essential to that freedom as the liberty of publication. Indeed without
circulation the publication would be of little value. The Supreme Court in *Bennett Coleman and Co. v. Union of India* held that freedom of speech and expression was not only in the volume of circulation but also in the volume of news and views. The fixation of maximum number of pages at 10 was struck down being violation of Article 19 (1) (a). The Court held that the newspaper should be left free to determine the pages and their circulation.

In *State of Maharastra v. Prabhaskar Padurang Sanzgiri* a matter came before Supreme Court where a detenu was denied publication of a scientific book. One Prabhaskar Padurang Sanzgiri was detained by Govt of Maharastra under Rule 30 (1) (b) of Defence of India Rules, 1962 in Bombay Distt. Prison. He wrote a book in Marathi under the title “Anucha Antarangaat” (Inside the Atom), a purely scientific book. Maharastra Government rejected the request of petitioner to send the book for publication. Bombay High Court allowed the petitioner to send the book for publication. The High Court of Bombay held that the civil rights and liberties of a citizen were in no way curbed by the order of detention and that it was always open to the detenu to carry on his activities within the conditions governing his detention. It further held that there were no rules prohibiting a detenue from sending a book out side the jail with a view to get it published. State of Maharastra preferred appeal to Supreme Court. The Supreme Court held that “As there is no condition in the Bombay Conditions of Detention Order, 1951, prohibiting a detenu from writing a book or sending it for publication, the State of Maharastra infringed the personal liberty of the respondent in derogation of the law whereunder he is detained.” Hence, it would not be a exaggeration to say that “Freedom of speech and expression is a natural right which a human being acquires on birth. It is, therefore, a basic human right. The words ‘freedom of speech and expression’ has to be broadly construed to include the freedom to circulate one’s views by words of mouth or in writing or through audiovisual instrumentaties. It, therefore, includes the right to propagate one’s views through the print


100. AIR 1986 SC 424

101. Ibid.
media or through any other communicable channel, e.g., the radio and the television. Every citizen of this free country, therefore, has the right to air his or her views through the printing and/or the electronic media subject of course to permissible restrictions imposed under Article 19 (2). The freedom of speech and expression under Article 19 (1) (a) had no geographical limitations. The freedom carried with it, the right to gather information as also to speak and express oneself, at home and abroad and to exchange thoughts and ideas with others, not only in India but also outside. Recently, in Secretary, Ministry of I&B v Cricket Association Bengal the Supreme Court while explaining the scope and content of the freedom of speech and expression, observed that the freedom included the freedom to communicate or circulate one's opinion without interference to as large a population in the country as well as abroad as was possible to reach.

The freedom of speech and expression under Article 19 (1) (a) is not absolute and reasonable restriction can be imposed by the State under clause (2) of Article 19, which reads "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 reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement of an offence." Clause (2) of Article 19 specifies the purposes and grounds in the interest of which or in relation to which the reasonable restrictions can be imposed on the freedom of speech and expression. It may be noticed that reasonable restrictions under clause (2) of Article 19 can be imposed only by a duly enacted law and not by executive action unsupported by law.

The expression "security of the State" refers to serious and aggravated forms of public disorder such as rebellion, waging war against the state, insurrection. Thus the security of the State may be endangered by crimes of violence intended to

104. AIR 1995 SC 1236.
106. Ibid.
overthrow the government, waging of war and rebellion against the Government, external aggression or war etc. The expression "security of the State" in Article 19 (2) does not merely mean as danger to the security of the entire country nor can it be restricted to an upheaval or a rebellion endangering the security of the entire country. Thus endangering the security of a part of the State would involve a threat to the security of the State. A speech advocating a change in the system of Government cannot be said to involve a threat to the security of the State so long as the change advocated is not unconstitutional. In Romesh Thapar v. State of Madras, the Government of Madras, in pursuance of the powers under section 9 (1-A) of the Madras Maintenance of Public Order Act, 1949, banned the entry and circulation of the petitioner's weekly journal "Cross Road". The Government contended that the ban was imposed in the interest of maintenance of public order while expression was covered by the expression "security of the State". But, the Supreme Court rejected the contention of the Government and held that since "public order" had not been included as a permissible ground of restraint, the right to free speech could not be restricted on this ground. The court also held that the concept of "public order" was wider than "security of the State". "Public order" was an expression of wide connotation and stated "That state of tranquillity which prevails among the members of political society as a result of internal regulations enforced by the Government which they have established. Anything that disturbs public peace or tranquillity disturbs public order. Public order implies absence of violence and an orderly state of affairs in which citizens can peacefully pursue their normal avocation of life. The expression "public order" is synonymous with public peace, safety, and tranquillity. Public safety

110. Ram Nandan v State, AIR 1959 All 101.
111. AIR 1950 SC 124
112. Ibid; see also Kumar, Narender, op. cit., p.158.
113. Ibid.
means the safety of the community from the external and internal dangers. Thus creating internal disorder or rebellion would affect public order and public safety.\textsuperscript{117}

Clause (2) of Article 19 provides that a restriction may be imposed in the interests of public order. The words "in the interests of" are of wide connotation. It means that a restriction may be imposed even before the occurrence of disorder. Thus, if certain activities have a tendency to cause public disorder, a law penalising such activities as an offence, cannot but be held to be a law imposing reasonable restriction in the interests of public order\textsuperscript{118} although in some cases those activities may not actually lead to a breach of public order. Restrictions on the freedom of speech and expression can be imposed in the interests of decency or morality. The purpose is to restricting speeches and publications which tend to undermine public morals.\textsuperscript{119} The right to freedom of speech and expression does not entitle a person to commit contempt of Court. The law of contempt of courts\textsuperscript{120} thus imposes reasonable restrictions on the freedom and is within the ambit of Article 19 (2). Though "Courts do not like to assume the posture that they are above criticism and that their functioning needs no improvement", but it was necessary to make it clear that the liberty of free expression was not to be confounded with a licence to make unfounded allegation of

\begin{itemize}
\item \textsuperscript{117} \textit{Brij Bhushan v. State of Delhi}, AIR 1950 SC 129.
\item \textsuperscript{118} \textit{Ramji Lal v State of UP}, AIR 1957 SC 620.
\item \textsuperscript{119} \textit{Ranjit D. Udeshi v. State of Maharashtra}, AIR 1965 SC 881.
\item \textsuperscript{120} \textit{C. K. Daphtary v. O.P. Gupta}, AIR 1971 SC 1132; The expression "Contempt of Court" is defined in Sec 2 (a) of Contempt of Courts Act, 1971, contempt may be civil contempt or criminal contempt.
\end{itemize}
corruption against the judiciary. In a recent case of contempt, Arundati Roy has been convicted for contempt of court by the apex court and sentenced to one day imprisonment and imposed fine of Rs.2000/- for her observations against the judiciary in her book “God of Small Things”. Arundati reacted that “.....if judiciary removes itself from public scrutiny and accountability, it will mean that another pillar of the Indian democracy will eventually crumble”. If every other pillar of democracy in the country the legislature, the judiciary and even the press could be subjected to criticism, why not the judiciary? Much was made of an observation by the court that “all citizens could not be permitted to comment upon the conduct of courts in the name of fair criticism which, if not checked, would destroy the institution itself”. Legal luminary Fali Nariman also feels that the law is deficient, leaving too much to the discretion of the individual judge. “After all, notions such as dignity are amorphous, meaning different things to different people. Moreover, it is most important to avoid anger in contempt jurisdiction, but in this case the judges appear to be angry”. Parshant Bhusan a public interest lawyer avers “They are prosecutor, judges and have powers over which there is no appeal.” The former Justice Rajinder Sachar reacted with reference to Arundati’s case that “judges should allow greater freedom of speech, they should have a little more strength and confidence in their own position. To feel insecure and threatened by criticism does not add to the dignity of the courts. The freedom of speech and expression is not meant to transgress the law relating to defamation. Article 19(2) covers entire law of defamation civil and criminal.

122. See Wadhwa, Soma., Small things matter, Outlook, March 18, 2002, New Delhi/Mumbai, p.48
124. Supra note 122.
125. Ibid.
126. Ibid.
127. Section 499 of IPC, 1860 defines offence of defamation. The Section makes no difference between slander and libel.
to an offence" did not refer to "incitement to break a law". Thus an incitement to a breach of every civil law is not necessarily contemplated by Article 19(2). 128

(IV) EX-POST-FACTO LAWS AND RIGHTS OF ACCUSED

Article 20(1) of the Constitution reads, "No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence". "The very wording of Article 20 and the words used therein -'convicted'; 'commission of the act charged as an offence', 'be subjected to a penalty', 'commission of offence', prosecuted and punished', accused of any offence', would indicate that proceedings therein contemplated are in the nature of criminal proceedings before a court of law or a judicial tribunal and the prosecution in this context would mean an initiation or starting of proceedings of a criminal nature before a court of law or judicial tribunal in accordance with the procedure prescribed in the Statute which creates the offence and regulates the procedure. 129

Present Article 20 was Article 14 of the Draft Constitution. Mr. Naziruddin Ahmad (West Bengal) moved "that in clause (1) of Article 14, after the words, "greater than" the words, or of a kind other than be inserted". And clause (1) may provide : "No person shall be subjected to a penalty greater than that which might have been inflicted under the law at the time of the commission of the offence". This was the first part and the second part of Article 14 which was moved by Pandit Thakur Dass Bhargava, "That in clause (1) of Article 14, for the words, 'under the law at the time of the commission' the words, 'under the law in force at the time of the commission be substituted." 130 In the jurisprudence of Constitutional law, Article 20(1) incorporates a

128. Dr. Ram Manohar Lohia v. Supdt. Central Prison, Fatehgarh, AIR 1955 All 377; Incitement to an offence was added to Act 19(2) by Constitution (First Amendment) Act, 1951.


prohibition against 'ex-post-facto penalty law'. Article 20 provides protection in respect of conviction for offences. It constitutes a limitation on the legislative power of the Parliament or the State Legislature under Article 246 read with three Legislative lists contained in the seventh schedule to the Constitution. Because of the word 'person' used in each clause, the article must be regarded as applicable to a corporation which is accused, prosecuted, convicted or punished for an offence. The protection contained in Article 20 is available to all persons citizens or noncitizens. The term “person” in Article 20 includes a corporation which is accused, prosecuted, convicted or punished for an offence.

An ex-post-facto law is one which gives the pre-enactment conduct a different legal effect from that which it would have had without the passage of the enactment. Thus, it reaches back to attach new legal rights and duties to already completed transactions. In Phillips v. Evre, it was laid down that ex-post-facto laws are laws which violated and punished what had been lawful when done.

The rights guaranteed under Article 20 and the two succeeding Articles namely 21 and 22 can be claimed even by a foreigner, who is of course, not entitled to the rights guaranteed under Article 19.

An 'ex-post facto law' is a law which is enacted subsequent to some occurrence, i.e., the commission of some act or omission. Ex-post-facto laws may fall in three categories:

131. Bakshi, P.M, The Constitution of India, Delhi (1997), p.35; Sharma v. Satish, (1954) SCR 1077; There was no prohibition in Govt. of India Act, 1935 or any other law prior to commencement of the Constitution, against ex-post-facto laws. The Legislature was competent to pass such laws. The courts, however, used to lean against a retrospective interpretation.; see also Basu, D.D., op. cit. VI ed. vol. D (1978), pp. 3-40.
133. Supra note 100.
136. (1170) LR. 6 Q.B.1. at p. 26; see also Chaturvedi A.N., op. cit.,102.
(a) A law which declares some act or omission as an offence for the first time after the completion of that act or omission. 139

(b) A law which enhances the punishment or penalty for an offence subsequent to the commission of that offence. 140

(c) A law which prescribes a new and different procedure for the prosecution of an offence subsequent to the commission of that offence. 141

Clause (1) of Article 20 provides protection only in respect of (a) and (b). "It should be noted that while substantive law imposing liability or penalty cannot be altered to the prejudice of the person supposed to be guilty with retrospective effect, there is no vested right in procedure. Besides this, the thrust of Article 20(1) is in the field of criminal law only, since the word 'offence' as defined in Article 367 read with the General Clauses Act can only denote an act or omission punishable by law." 142

Section 26 of the General Clauses Act, 1897 define the term "offence" as an act or omission made punishable by any law for the time being in force." 143 This is a limitation upon the law making power of the legislatures in India. A law is said prospective, when it affects acts done or omission made after the law comes into effect. The majority of laws are prospective in their operation. But sometimes the legislature may give retrospective effect to a law, that is to say, to bring within the operation of the law, not only future acts and omissions but also acts or omissions committed even prior to the enactment of the law in question. Though ordinarily a legislature can enact prospective as well as retrospective laws, according to the present clause a legislature shall not be competent to make a criminal law retrospective so as to provide that a person may be convicted for an act which was not an offence under the law in force at

the time of commission of that act or to subject an accused 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. In other words, when the legislature declares an act to be an offence or provides a penalty for an offence, it cannot make the law retrospective so as to prejudicially affect the persons who have committed such acts prior to the enactment of that law. The first limitation is in respect of conviction and punishment of a person for an offence which, when committed was not an offence by the law of the land. The second is in regard to the imposition of a greater penalty than that which ought to have been imposed under the existing law on the date of the commission of the offence. The first part of clause (1) of Article 20 relates to the first category of ex-post-facto laws. It says that “no person shall be convicted of any offence except for violation a law in force at the time of the commission of the act charged as an offence”. It explains that a person can only be convicted of an “offence” if the charge against him is an “offence” under the “law in force” at the time of commission of that act. It seems to the Constitutional recognition to the principle that no one can be convicted except for violation of a “law in force.” Although clause (1) is mainly concerned with retroactive penal legislation, it also seems to give Constitutional recognition to the principle that there cannot be a conviction except for violation of a ‘law in force’. It would seem, therefore, that in India, there can be no ‘common law’ offences; and the judiciary cannot, in India, create an offence not created by statute. How far the word ‘violation’ would require that the violation should be personal, is a matter not specifically provided for in the article. The expression “law in force” in Article 20(1) postulates the actual factual existence of law at the relevant time and it excludes the retrospective operation of any subsequent law. The expression “law in force”, refers to the law factually in operation at the time when the offence was committed and does not relate to the law “deemed to be in force” but the retrospective

operation of law subsequently made. The law for the violation of which a person is sought to be convicted must 'have been', in fact in force at the time when the act with which he is charged was committed. But rules and regulations made under Statute which is repealed but continued in force under Section 24 of the General Clauses Act are 'law in force' within the meaning of Article 20 (1), even though they are kept alive by a legal fiction. Article 372 (3), Expl. 1, shows that 'a law in force' means an enacted law even if it, or parts of it, are not in operation either at all or in particular areas. It is clear that such a law is not a law in force within the meaning of Article 20, for, if the law is not in operation it cannot constitute any act a crime during the time it is not in force.

In *Pareed Lubha v. Nilambaram*, the non-payment of panchayat tax was not punishable as an offence under the Kerala Panchayat Act, 1960 when it was enacted. As a result, large number of persons committed defaults in the payment of the tax. The Act was subsequently amended and non payment of tax was made punishable retrospectively. The court held that defaulters, prior to the amendment of the law, could not be convicted for the omission to pay the tax under the amended law. It was held in *Soni Devrajbhai Babubhai v. State of Gujarat* that Section 304-B inserted in the Indian Penal Code, 1860 on November 19, 1986, creating a distinct offence of dowry death and providing a minimum sentence of seven years imprisonment, could not be applied to such death caused before the insertion of the section, because of the prohibition contained in Article 20 (1). In *Om Prakash v. State of Uttar Pradesh*, it was held the accused could not be punished under Section 165-A of Indian Penal Code for offering bribe in 1948 as Section 3 of the Criminal Law (Amendment) Act, 1952 inserted Section 165-A in the Indian Penal Code, 1860 declaring offer of bribe as punishable offence.

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152. AIR 1967 Ker 155.
153. AIR 1991 SC 2173.
154. AIR 1957 SC 388.
Second part of clause (1) of Article 20 prohibits the enhancement of punishment or penalty subsequently. The Prevention of Corruption Act, 1947 provided for punishment of imprisonment and fine for offence committed under the Act. In *Kedar Nath v. State of West Bengal* the accused, managing agent of a company committed an offence in 1947. Subsequently, the criminal law (Special Courts) Amendment Act, 1949 amended the said Act. The amended law enhanced the penalty for the offences committed under the Act by an additional fine to be equivalent to the amount of money found to have been procured by the offender through the offence. It was held that penalty enhanced by amended law, which came into force in 1949, could not be imposed on the accused for the offence committed in 1947, because of the prohibition contained in second part of clause (1) of Article 20.

In *State of West Bengal v. S.K. Ghosh*, the accused, a govt. servant was placed under suspension for commission of embezzlement before August, 1944. Subsequently on August 23, 1944, an ordinance was issued providing for confiscation of the property of a person convicted for embezzlement of government money, to set off the embezzled money. Therefore, property of the accused was forfeited under the ordinance and the ordinance was held valid as it did not impose a penalty but merely provided a speedier remedy for the recovery of the embezzled money. In *Satwant Singh v. State of Punjab*, Section 420 of the Indian Penal Code, 1860, had prescribed an unlimited fine for an offence. The accused committed an offence under this section prior to 1947. In 1949, an ordinance was issued prescribing minimum fine for the person convicted under this section. This minimum fine was imposed on the accused for an offence committed by him in 1947 i.e. prior to the issuance of the ordinance. The court held that the imposition of fine was not violative of Article 20(1). The Supreme Court observed that Article 20(1) was not infringed by the ordinance, because the minimum fine prescribed by it could not be said to be greater

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155. [Kumar, Narender, op. cit., p. 184.](#)
156. [AIR 1953 SC 404.](#)
157. [AIR 1963 SC 255; see also AIR 1953 Mad.337](#)
158. [Ibid.](#)
159. [AIR 1960 SC 266](#)
160. [Ibid](#)
than what could be imposed on the accused under Section 420 at the time at which he committed the offence. The court explained that under Article 20(1), all that had to be considered was, whether the *ex-post facto* law imposed a penalty greater than that which might be inflicted under the law in force at the time of commission of the offence. It could not, therefore, be said that the ordinance imposed any such penalty.\(^\text{161}\)

In *Rattan Lal v. State of Punjab\(^\text{162}\)*, the accused, a boy of 16 years was convicted for the offence of house trespass and outraging the modesty of a girl aged seven years. The Magistrate sentenced the boy for rigorous imprisonment for six months and also the fine. While the accused was undergoing imprisonment, the Probation of Offenders' Act, 1958 came into force, which provided that a person below the age of 21 years should not ordinarily be sentenced to imprisonment. The accused claimed benefit under the Act, a reformation measure. The State contended that the Act in question being an *ex-post-facto* could not be pleaded by the accused. The Supreme Court held that *ex-post facto* law which was beneficial to the accused did not fall within the prohibition of Article 20 (1) and further held that the rule of beneficial construction required that *ex-post facto* law could be applied to reduce the punishment.

The Supreme Court of India appears to have adopted the language of *Cadler v. Bull* in the matter of *Rattan Lal v. State of Punjab\(^\text{163}\)* when it observed "every law that takes away or impairs a vested right is retrospective. Every *ex-post-facto* law is necessarily retrospective. But an *ex-post-facto* law which only mollifies the rigour of a criminal law does not fall within the said prohibition Article 20 (1)\(^\text{164}\)" (emphasis added).

Clause (1) of Article 20 does not prohibit the trial of offences under the *ex-post facto* laws. Therefore, a law enacted subsequent to the commission of the offence, prescribing a new procedure different from the ordinary procedure for prosecution or trial, is not hit by Article 20 (1)\(^\text{165}\). "What is prohibited under Article 20 is only

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161. Kumar, Narender, *op. cit.*, p 185; *ibid*
162. AIR 1965 SC 444; *In T Barai v. Henry Ah. Hoe*, AIR 1983 SC 150; Held that an accused should have the benefit of a retroactive criminal legislation reducing punishment for an offence; see also *Public Prosecutor v. K.C Ayyappan Pillai*, AIR 1953 Mad 337.
163. AIR 1965 SC 444.
conviction or sentence under an *ex-post-facto* law and not the trial thereof. Such trial under a procedure different from what obtained at the time of the commission of the offence….cannot *ipso facto* be held to be unconstitutional. A person accused of the commission of an offence has no fundamental right to trial… by a particular procedure, except in so far as any Constitutional objection by way of discrimination or the violation of any other fundamental right may be involved” 166 (emphasis added). What this article prohibits is only conviction and sentence under ex-post-facto law and not the trial thereof.167 A law which retrospectively changes the venue of trial of an offence from a criminal court to an administrative tribunal, has been held not falling within the prohibition of Article 20 (1).168 Hence, an accused cannot contend on the strength of Article 20 (1) that he cannot be tried under a procedure different from what obtained at the time of the commission of the offence.169

The term ‘penalty’ in Article 20 (1) indicates that the prohibition provided therein applies to punishment imposed for offences and it does not prohibit imposition of civil liability retrospectively. In *Hathsingh Manufacturing Co. v. Union of India*,170 an Act passed in June, 1957 imposed on the employers closing their undertaking, a liability to pay compensation to their employees with effect from November 28, 1956. Failure to discharge the liability was made punishable. It was pleaded that the Act enacted in 1957 infringed Article 20 (1) because it imposed a liability to pay compensation. Since Nov 28, 1956 and non payment was made punishable retrospectively. The Supreme Court upheld the constitutionality of impugned Act and held that liability imposed was a civil liability and its failure was not an offence and Article 20(1) would have no application.171 Likewise, a penalty levied under a tax law has been held to be only a civil

169. *Nayyar v. State* AIR 1979 SC 602 (Para 7); The Constitution of USA provides for protection even against *ex-post-facto* procedural laws and trial under ex-post facto law is barred under US Constitution.
170. AIR 1980 SC 923.
liability not hit by Article 20 (1).\textsuperscript{172} Article 20 (1) has no application in cases of preventive detention\textsuperscript{173} and disciplinary proceedings.\textsuperscript{174}

\textbf{(V) PHILOSOPHY OF SELF- INCrimINATION}

Clause (3) of Article 20 reads that "No person accused of an offence shall be compelled to be a witness against himself." The clause is based on the maxim "\textit{nemo tenetur prodere accusare seipsum}" which means, "no man is bound to accuse himself". The language of Article 20 (3) resembles the fifth amendment of the American Constitution, which lays down that "no person shall be compelled in any criminal case to be a witness against himself." \textsuperscript{175} The English common laws principle "no man is bound to accuse himself" was interpreted as right. David M. Paciocce used the term "principle against self-incrimination" rather than the familiar term "privilege against self-incrimination".\textsuperscript{176} Leonard Levy viewed that "to speak of the privilege against self-incrimination, degrades it, inadvertently, in comparison to other Constitutional rights."\textsuperscript{177}

The privilege against self-incrimination was developed due to reaction to the extensive employment of the oath. Hence, the principle was established in the common law as a revolt against procedure in which accused was questioned under oath by judges, both to get evidence and to get confession. In \textit{Lilaburn's case} the British Parliament established the rule in 1641 that one may not be required to testify against himself.\textsuperscript{178} The doctrine of immunity from self-incrimination is founded on the

\begin{itemize}
\item \textsuperscript{173} \textit{Prahlad Krishna v. State of Bombay}, AIR 1955 Bom.1
\item \textsuperscript{174} \textit{Pandurang Swamy v. State of AP}, AIR 1971 AP 234.
\item \textsuperscript{175} Fifth Amendment of the Constitution of USA; see also \textit{P Rajangam v. State of Madras}, AIR 1959 Mad 294.
\end{itemize}
presumption of innocence which characterises the English system of criminal justice as against inquisitorial system known to its ancient law and at present prevailing in France and some other continental countries.\textsuperscript{179} Section 3 of Act 15 of 1852 recognised that an accused in a criminal proceeding was not a competent or compellable witness to give evidence for or against himself; but it was modified in 1855 by section 32 of Act of 1855 which made him compellable to answer even incriminating questions, but kept him immune from arrest and prosecution on the basis of such evidence except a prosecution for giving a false evidence. This situation still continues under Section 132 of the Evidence Act of 1872. Section 130 of the Indian Evidence Act, 1872 protects a suitor from producing a document but it is not certain whether it applies to an accused or not.\textsuperscript{180} The right against self-incrimination is enshrined in Article 20 (3) of the Constitution of India. Prior to Constitution, the identical provision was available in Section 342 of the Code of Criminal Procedure, 1898, which is still available under Section 313 of the Code of Criminal Procedure, 1973.

The protection contained in Article 20(3) is available to every person. The term "person" in Article 20(3) includes not only natural individuals but also companies and un-incorporated bodies.\textsuperscript{181} The protection is available only if the following ingredients are present\textsuperscript{182}:

\begin{enumerate}
  \item[(i)] It is a right available to a person accused of an offence;
  \item[(ii)] It is a protection against compulsion to be a witness; and
  \item[(iii)] It is a protection against such "compulsion" resulting in his giving evidence against himself.
\end{enumerate}

\textbf{(i) PERSON ACCUSED OF AN OFFENCE}

A person "accused of an offence" means a person against whom a formal accusation relating to the commission of an offence has been levelled, which in

\begin{itemize}
  \item \textsuperscript{179} Chaturvedi, A. N., \textit{op.cit.}, p.206.
  \item \textsuperscript{180} \textit{Ibid.}, p.166
\end{itemize}
normal course may result in a prosecution.\textsuperscript{183} "Accused of an offence" would indicate that the proceedings therein contemplated are of the nature of criminal proceedings before a court of law or a judicial tribunal and the prosecution in this context would mean an initiation or starting of proceedings of a criminal nature before a court of law or a judicial tribunal in accordance with the procedure prescribed in the statute which creates the offence and regulates procedure.\textsuperscript{184} The words "accused of any offence" indicate an accusation made in a criminal prosecution before the court or a judicial tribunal where a person is charged with having committed an act which is punishable under the Indian Penal Code, 1860 or any special or local law.\textsuperscript{185} The word "accused of any offence" makes it clear that the privilege under the Indian Constitution is confined to an accused in a criminal proceedings and does not apply to civil proceedings.\textsuperscript{186} For invoking the Constitutional right against testimonial compulsion guaranteed under Article 20(3) it must appear that a formal accusation has been made against the party pleading the guarantee and that it relates to the commission of an offence which in the normal course may result in prosecution.\textsuperscript{187}

Where a custom officer arrested a person and informed him of the ground of his arrest for the purpose of holding an inquiry into the violation of provisions of the Sea Customs Act, 1898, there being no formal accusation of an offence, it was held that Article 20(3) would not apply.\textsuperscript{188} "Formal accusation" is ordinarily brought into existence by lodging of an FIR or a formal complaint to the appropriate authority or court against the specific individual accused of the commission of a crime.\textsuperscript{189} In \textit{R.K. Dalmia v. Delhi Admn.},\textsuperscript{190} the Court held that there can be no accused without some formal accusation which the Supreme Court considers to be the first information report of the case.\textsuperscript{191} It is, however, not necessary, to avail the privilege contained in

\textsuperscript{183} M.P. Sharma \textit{v. Satish Chandra}, AIR 1954 SC 300.
\textsuperscript{184} AIR 1953 SC 325.
\textsuperscript{185} \textit{Amin v. State}, AIR 1958 All 293.
\textsuperscript{187} \textit{Ibid.}, at p. 38.
\textsuperscript{188} \textit{Veera Ibrahim v. State of Maharastra}, AIR 1976 SC 1167.
\textsuperscript{190} AIR 1962 SC 1821.
Article 20(3), that actual trial or inquiry should have commenced before a court or a judicial tribunal. Article 20(3) does not apply to departmental inquiries into allegations against a government servant, since, there is no accusation of any offence within the meaning of Article 20(3). The protection given to the ‘accused’ commences as soon as a formal accusation is made, whether before or during prosecution. It follows that the lodging of a First Information Report, the filing of a complaint in court or the issue of a show-cause notice under a special criminal statute brings Article 20(3) into play. But these must be a proceeding contemplating action against a particular person.

In *Nandini Sathathy v. P.L. Dani*, the appellant, a former Chief Minister of Orissa was directed to appear at vigilance Police Station Cuttack for examination, in connection with a case under the Prevention of Corruption Act, 1947 and Sections 161/165 and 120-B and 109 of I.P.C. registered against her. On the basis of this first information report, investigation was commenced against her. During the investigation, she was interrogated with reference to long list of questions given to her in writing. She refused to answer those questions claiming protection under Article 20(3). At this, she was prosecuted under Section 179 of Indian Penal Code, 1860, which provides for punishment for a person refusing to answer the questions demanded by public servant. She contended that she was justified in refusing to answer the question on the ground of Article 20(3) as well as Section 161 (2) of the Code of Criminal Procedure, 1973. The Supreme Court held that Section 160(1) of Cr.P.C. bars the calling of a woman to a Police Station which was violated in the case. The Court ruled that Article 20(3) extended back to the stage of police investigation not

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192. Supra note 159 at p. 300.
196. Section 161(2) Cr.P.C., entitles a person not to answer questions which tend to expose him to a criminal charge or to a penalty.
commencing in court only, since such inquiry was of an accusatory nature and could end in prosecution. The ban on self accusation and the right to silence while one investigation or trial was under way, the court viewed, extended beyond that case and protected the accused in regard to other offences pending or imminent, which might deter him from voluntary disclosure of criminatory matter.\(^{197}\) The court held that Section 161(2) of the Code of 1973 and Article 20(3) of the Constitution were co-terminus in the protective area and equal in ambit. In fact, it asserted that Section 161(2) was a parliamentary gloss upon Article 20(3).\(^{198}\) Hence, it can be concluded that “the protection contained in Article 20(3) is also available at the stage of police investigation.”\(^{199}\)

(ii) PROTECTION AGAINST COMPULSION TO BE A WITNESS

Clause (3) of Article 20 also provides the protection against compulsion of the accused “to be a witness against himself.”\(^{200}\) Which can also be said to be a “protection against ‘testimonial compulsion’”\(^{201}\) also. In *M.P Sharma v. Satish Chandra*,\(^{202}\) the Supreme Court gave a wide connotation to the term “to be a witness” so as to include oral, documentary and testimonial evidence. The court held that the protection contained in Article 20(3), covered not merely testimonial compulsion in the court room but also compelled testimony previously obtained from him. The court held that, it would extend to any compulsory process for production of evidentiary documents which is reasonably likely to support prosecution against the accused.\(^{203}\) The proposition laid down in *M.P Sharma’s case*\(^{204}\) was narrowed down in *State of Bombay v. Kathi Kalu Oghad*,\(^{205}\) and observed that it is well established that clause (3) of Article 20 is directed against self-incrimination by the accused person. Self-incrimination

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197. *Nandini’s Case*; see also Kumar, Narender, *op.cit.* ,p. 192-3
200. See later part of clause (3) of Article 20 of Constitution.
201. Bakshi, P.M.,*op.cit.*,p.35.
203. *Ibid*.
204. AIR 1954 SC 300.
must mean conveying information based upon the personal knowledge of the person giving the information and cannot include merely the mechanical process of producing documents in court which may throw a light on any of the points in 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 signatures or his thumb impression. The production of such a document, with a view to comparison of the writing or the signature or the impression, is not the statement of an accused person which can be said to be of the nature of a personal testimony.

An accused person cannot be said to have been compelled to be a witness against himself simply because he made a statement while in police custody without anything more... The mere questioning of an accused person by a police officer, resulting in a voluntary statement, which may ultimately turn out to be incriminatory, is not 'compulsion'. 'Compulsion', in the context must mean what in law is called 'duress'..... The compulsion is in this sense is a physical objective act and not the state of mind of the person making the statement, except where mind has been so conditioned by some extraneous process as to render the making of the statement involuntary and, therefore, extorted. 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 statements but also production of documents or giving materials which may be relevant at a trial to determine the guilt or innocence of the accused. Self-incrimination in the context of Article 20(3) only means conveying information based upon personal knowledge of the person giving information. Therefore, where an accused is compelled to produce a document in his possession, which is not based on personal knowledge of the accused, there is no violation of Article 20(3) because he does not become a witness by the mere fact that he has produced it. The immunity does not

206. AIR 1961 SC 1808; see also Kumar, Narender, op. cit., p. 193.
209. Ibid.
extend to civil proceedings or other than criminal proceedings.\textsuperscript{212} It has also been explained by Supreme Court\textsuperscript{213} that in order to claim the immunity from being compelled to make a self-incriminating statement. It must appear that a formal accusation has been made against the person at the time when he is asked to make the incriminating statement. He cannot claim the immunity at some general inquiry or investigation on the ground that his statement may at some late stage lead to an accusation.\textsuperscript{214}

The right against self incrimination protects only testimonial evidence but no real or physical evidence. The information which is in the mind of the accused person is more private than that of is physically possessed. It was settled in the common law that the right against self-incrimination had nothing to do with the obtaining of real or physical evidence.\textsuperscript{215} Article 14(3) of the U.N. Covenant on Civil And Political Rights, 1966, enunciated that in the determination of any criminal charge against him, everyone shall be entitled... not to be compelled to testify against himself or to confess guilt.\textsuperscript{216} The Constitutional right against self incrimination applies to an accused only. He can invoke the application of Article 20 (3).\textsuperscript{217} As well an accused should be made compelled to be a witness against himself in order to invoke the application of Article 20(3).\textsuperscript{218} The Constitutional bar is against compulsion and not against voluntary offer.\textsuperscript{219} The protection against compulsion ‘to be a witness’ is confined to persons ‘accused of an offence’. There is no Constitutional protection for witnesses (i.e. persons other than the accused). However, the Evidence Act, in Section 132 and 148, confers a limited protection against self-incrimination to witness in civil and criminal courts.\textsuperscript{220} To justify the construction of the word according to the natural sense, the court put forward the argument that the phrase used is “to be a witness” and not to

\begin{footnotes}
\item\textsuperscript{212} Maqbool Hussain v. State of Bombay, AIR 1954 SC 375.
\item\textsuperscript{213} Narayan Lal v. M.P. Mistry, AIR 1954 SC 29.
\item\textsuperscript{214} Ibid.
\item\textsuperscript{215} Paciocco, David, M., \textit{op.cit.}, p. 108.
\item\textsuperscript{216} Article 14(3), U.N. International Covenant On Civil & Political Rights, 1966.
\item\textsuperscript{217} R.K. Dalmia v. Delhi Administration, AIR 1962 SC 1821.
\item\textsuperscript{218} Mohd Dastagir v. State of Madras, AIR 1960 SC 756.
\item\textsuperscript{219} R.S. Bhagat v. Union of India, AIR 1982 Del 191.
\end{footnotes}
"appear as a witness." In Delhi Service Association, Tis Hazari Court Delhi v. State of Gujarat & others, the court opined that the following three conditions must be satisfied in order to avail the protection of Article 20 (3) of the Constitution:

(i) The person must be accused of an offence,
(ii) The element of compulsion to be a witness should be there, and
(iii) It must be against himself.

The Court further observed that all the above three ingredients must necessarily exist before protection of Article 20 (3) is available, and if any of these ingredients do not exist Article 20(3) cannot be invoked. A notice calling upon a person who may be prosecuted for an offence relating to the property to show cause why the attachment order in respect of that property should not be made absolute, does not in any way compel him to be a witness against him.

(iii) HANDWRITING/FINGERPRINTS AND ACCUSED

Practically, "It is difficult, if not impossible, for the suspect or the accused to prove by means of evidence that he was subject to third degree and was compelled to make a statement in the police custody. It may be said that the construction of "compulsion" leaves the accused at the mercy of the police and the very purpose of the guarantee is defeated." Where an order was passed by the Magistrate whereby the investigating officer was allowed to take specimen writings and signature of the accused person, the order was held to be violative of Article 20 (3) of the Constitution as "to be a witness against himself" is not confined to the oral testimony; and the

223. Ibid.
224. Ibid.
protection extends in and out of the court. It was held that "a direction under Section 5 of the Madhya Bharat Identification of Prisoners Act which empowered a Magistrate to direct an accused to give his thumb-impression, specimen writing and signature for comparison with other documents intended to be used against the accused at the trial for an offence was repugnant to the intendment of Article 20 (3) and was void to that extent and consequently the Magistrate's direction was held illegal." To get specimen of handwriting by non-voluntary positive act of the accused thus falls within the inhibition of Article 20 (3) of the Constitution. The problem arises when accused person refuse to give handwriting or thumb impression or identification test. In such cases accused can be compelled for it. Various High Courts are not unanimous on this account. The High Court of Madras, Madhya Pradesh, Jammu and Kashmir and Allahabad have held that accused can't be compelled to give his handwriting, thumb impression or palm or finger prints and such compulsion would be violative of Article 20(3). Other High Courts have held that taking of such evidence, even by use of force does not amount to testimonial compulsion.

In Pakhar Singh v. State, the Punjab High Court held that the compulsion to a person to exhibit his body or identification marks on it on procurement of finger prints by force for establishing his identity was not testimonial compulsion in view of the provisions of Section 5 and 6 of Identification of Prisoners Act, 1920 and also

228. Chaturvedi, AN. , op.cit.,p.183; see also Dorai Swami v. Palaniandi, AIR 1956 Mad 632; Bhaluka Behra v. State AIR 1957 Cut 200; Tarini Kumar v. State, AIR 1960 Cal. 318; 1960 Cr.LJ 579; It has been held that the specimen writing taken by the police while the accused is in their custody amounted to testimonial compulsion.
229. State v. Shankar Nair, AIR 1960 Ker 392 (F.B): 1960 Cr.LJ 1603 (Ker); see also State v. Ram Kumar,AIR 1957 MP 73; Damodaran v. State, 1960 Cr.LJ 75 (Ker).
Sections 5 and 73 of the Evidence Act. *Rama Swarup v. State*, the accused was directed by the court to give handwriting under Section 73 of the Evidence Act. This order was challenged on the ground that submitting handwriting amounted to compulsory evidence. But the court held that the direction to submit handwriting was not violative of the Article 20 (3). In *re Sheikh Mohammad*, the court held that taking of specimen signature, thumb impression etc., is constitutionally valid. The High Court of Madras held that the taking of accused's picture after arrest or handwriting, thumb impression, palm, foot print, blood sample and wine tests, use of emotic stomach pump or similar device for extracting ornaments swallowed, requiring to wear or trying on particular dress or requiring identification parade or perform physical act during trial are not violation of Article 20 (3). The Magistrate's direction regarding taking of specimen handwriting, thumb impression etc., were held constitutionally valid. A direction to an accused to give his handwriting, finger prints and impressions, likewise foot and palm prints and specimen of hair were not held testimonial compulsion.

In *State of Bombay v. Kathi Kalu Oghad*, the following issues were raised - (1) whether a direction given by a court to an accused present in court to give his specimen writing and signature for the purpose of comparison under the provisions of Section 73, Evidence Act, violates Article 20 (3); (2) whether by production of specimen handwriting of the accused, he could be said to have been 'a witness against himself within the ambit of Article 20(3)'; (3) whether the mere fact that the accused was in police custody when specimen handwriting had been given, could by itself amount to compulsion apart from the elements vitiating the consent of the accused; (4) wether the impressions of the accused's palms and fingers taken from him after

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237. AIR 1957 Mad. 47.
239. *In re Sheikh Mohammad*, AIR 1957 Mad 47.
240. *Badri Lal v. State*, AIR 1960 Raj 184; see also *State v. Abu Ismail*, 1959 Cr.LJ 1057 (Bom)
his arrest, which were compared with the impressions on the glass panes and phials were not admissible in view of Article 20 (3); (5) whether Sections 5 and 6 of the Identifications of Prisoners Act, 1920 violated Article 20 (3). The majority judgment held that the voluntary statements were admissible in evidence; Section 27 of the Evidence Act did not contravene Article 20 (3); but the compelled statements were hit by Article 20(3); and hence these propositions were held law. 244 It has now been settled that a direction by a Magistrate requiring an accused person to give his, specimen handwriting, signature, thumb impressions, finger prints or foot prints to be used for comparison with some other signatures, and the handwritings, thumb impressions etc., which the police may require in the course of investigation will not amount to compelling the accused to be a witness against himself. 246 The Rajasthan High Court held that the taking blood from the veins of accused not violative of Article 20 (3) of the Constitution. 246 The court further held that this is neither oral or documentary evidence, but belong to third category of material evidence which is outside the limits of testimony. 247

The Supreme Court ended the differences between the High Court in Oghad’s case.248 Para 22 of the judgment reads: “Article 20 (3) never means that an accused can never be compelled to be a witness. All that Article 20(3) prohibits is that he can not be compelled to be a witness against himself. In giving his specimen writing or thumb impression or finger impressions, the accused is certainly furnishing evidence but cannot be said that in doing so he is furnishing evidence against himself.” 249 The expression ‘to be a witness’ does not include giving thumb impression, impressions of foot or palm or fingers or specimen of writing or showing parts of the body by way of identification.250

244. Ibid; See also Chaturvedi, A.N., op.cit., pp. 185-86.
247. Ibid.
249. Ibid.
250. Ibid at 1877.
An examination of a person under Section 53 of the Code of Criminal Procedure does not only mean to examine the apparent visible signs of the body but also includes the examination of any organ inside the body.\textsuperscript{251} Any compulsion used against a person accused of consuming liquor and taken to the medical doctor for extraction of blood in order to determine alcoholic percentage and intoxication is a procedure established by law.\textsuperscript{252} It has been held in number of cases that "the immunity under Article 20 (3) does not extend to compulsory production of material objects or compulsion to give specimen writing, specimen signature, finger impression or compulsory exhibition of the body or giving of blood specimens."\textsuperscript{253}

It has been held that the tape-recording of statement made by the accused, though the recording was done without his knowledge, but without force or oppression, is not hit by Article 20 (3).\textsuperscript{254} The tape recorded conversation was held admissible.\textsuperscript{255} The tape recorded statements become admissible if (1) the conversation is relevant to the matter issue, (2) the voice is clearly identified, and (3) the accuracy of the tape recorded conversation is proved by eliminating the possibility of erasing the tape recorded conversation is proved by eliminating the possibility of erasing the tape recording. A contemporaneous tape record of a relevant conversation is relevant fact and is admissible under Section 8 of the Evidence Act. It is res gestae.\textsuperscript{256}

The Supreme Court of USA held that the Fifth Amendment prohibits compelling a person to speak and incriminate himself but it does not prohibit compelled revelation of written thoughts.\textsuperscript{257} If a person in custody is to be subjected to interrogation he must first be informed in clear and unequivocal terms that he has the right to

\textsuperscript{251} Anil A Lokhande v. State, 1981 Cr.LJ 125 (Bom); It was held that blood examination of an arrestee is not a testimonial compulsion; see also Delhi Admn. v. Pali Ram, AIR 1979 SC 14 : 1979 Cr.LJ 17 (SC); Anant Kumar v. State of AP, 1977 Cr.LJ 1997 (AP).

\textsuperscript{252} State v. Sheshappa, AIR 1964 Bombay 253 : 1964 (2) Cr.LJ 523 (Bombay).


\textsuperscript{256} Shri N Rama Reddy v. Shri V.V.Giri, AIR 1971 SC 1162.

remain silent..... The warnings of the right to remain silent must be accomplished by
the explanation that anything said can and will be used against the individual in court....an
individual held for interrogation must be clearly informed that he has the right to con­
sult with a lawyer and to have the lawyer with him during interrogation.... it is necessary
to warn him not only that he has the right to consult with an attorney but also that if he is
indigent a lawyer will be appointed to represent him ... once warning has been given,
the subsequent procedure is clear. If the individual indicates in any manner, at any
time prior to or during questioning, that he wishes to remain silent, the interrogation
must cease. In a land mark judgment of Miranda v. Arizona, the court laid down
that once warnings have been given, the subsequent procedure is clear. If the indi­
vidual indicates in any manner, at any time prior to or during questioning that he wishes
to remain silent, the interrogation must cease. At this point he has shown that he
intends to exercise his Fifth Amendment privilege, any statement taken, after the per­
son invokes his privilege cannot be other than the production of compulsion, subtle or
otherwise. Without the right to cut off questioning, the settings of in custody interroga­
tion operates on the individual to overcome free choice in producing a statement after
the privilege has been invoked. However, the accused can waive the right to si­
lence at any time. As such he can waive the right knowingly and voluntarily.

Doreen J. M.C Barnet opined that the accused has a right to silence, he is not
compellable witness and he need not incriminate himself, so that the prosecutor has
to be able to prove his case without co-operation of an accused. In context of posi­
tion in U.K. Mayne in his book “Criminal Law” has observed that “It is the business of
the Crown to prove him guilty and he need not do anything but stand by and see what
case has been made out against him.... He is entitled to rely on the defence that the
evidence as it stands is inconclusive and that the crown is bound to make it conclu­
sive without any help from him.”

260. Ibid.
263. Mayne’s Criminal Law, quoted by James, J., In Subedar v. State 1957 Cr.LJ 698 (All) at p.699.
In India when matter came before Mysore High Court in the case of In re B.N. Rama Krishna, the court held that the answers given by the accused under section 342(2) Section 313(2) of new Code (of Code would not offend Article 20 (3) for two reasons (i) It is matter of option to the accused to answer or not when he is questioned, and no oath is administered to him as to a witness and his testimony cannot be put in evidence in the trial or enquiry, thus Section 342 (New Sec. 313) is not repugnant to clause (3) of Article 20 ; (ii) the Judge or jury have power to draw inference from refusal but that does not mean compelling an accused to be a witness against himself. Section 313 (1) Cr.P.C. provides that "in every inquiry or trial, for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him, the court - (a) may at any stage without previously warning the accused, put such questions to him as the court considers necessary; (b) shall, after the witnesses for prosecution have been examined and before he is called on for his defence, question him generally on the case." No oath shall be administered to the accused when he is examined under sub-Section (1). There is no express right to silence in Constitution of India and Section 161 Cr.P.C. expressly provides that a police officer during investigation may examine any person supposed to be acquainted with the facts and circumstances of the case and "such person shall be bound to answer truly all questions relating to such case put to him by such officer, other than questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture." The words "any person" in this Section (Sec 161 Cr.P.C.) which must be read in conjunction with Section 162, include any person who may subsequently be accused of the crime in respect of which the investigation is made by the police officer. The word "truly" used after the word "answer" indicates that the person examined is legally bound to state the truth. A person who

264. AIR 1955 Mad 100 : 1955 Cr.JJ 452 (Mad).
265. Ibid., see Re Govinda Reddy, AIR 1958 Myr 150.
266. Sub Sec (1) (a) (b) of section 313 CrPC 1973.
267. Sub Sec (2) of Section 313 ibid.
268. Sub Section (1) Section 161 CrPC 1973.
269. Sub Section (2) Ibid.
gives false information in answer to such question can be prosecuted under the provisions of Secs. 202 and 203 of the Indian Penal Code.\textsuperscript{271} No presumption arises, \textit{ipso facto}, from the silence of an accused person. The fact of silence may, with all other circumstances of the case, be taken into account in a proper case, but even then, it must be clearly borne in mind that an accused person always has a right to remain silent if he wishes and, the silence of the accused must never be allowed, to any degree, to become a substitute for proof by the prosecution of its case.\textsuperscript{272} The doctrine of presumption of innocence confers valuable privileges on the accused; and thus he is not bound to confess guilt and to answer any questions and can keep his lips sealed placing his reliance on the presumption of innocence.\textsuperscript{273}

The Supreme Court of U.S.A enunciated a rule that evidence seized through an unlawful search by federal officers could not be used as evidence in the federal courts.\textsuperscript{274} This was a departure from English common law which judged the admissibility and relevance.\textsuperscript{275} In Indian law, there is no basis for the assumption that a search or seizure of a thing or document was in itself to be treated as a compelled production of it.\textsuperscript{276} The Supreme Court has refused to import any prohibition against search and seizure of a person's premises without his consent. The Court held "A power of search and seizure is in any system of jurisprudence an overriding power of the State for the protection of social security and that power is necessarily regulated by law."\textsuperscript{277} It has been held that the protection of Article 20(3) does not extend to searches made in pursuance of a warrant issued under Section 96 (Section 93 new Cr.P.C.) of the Code of Criminal Procedure, 1898.\textsuperscript{278} In \textit{V. S. Kuttan Pillai v. Rama Krishnan},\textsuperscript{279} the

\textsuperscript{271.} Sankaralinga Kone, (1900) 23 Mad.
\textsuperscript{272.} Ghura, (1941) All 912.
\textsuperscript{273.} Ajmer Singh v. State of Punjab (1953), SCR 418.
\textsuperscript{278.} \textit{ibid}; See Section 93 (1) \& (3) of Cr.P.C. 1973.
\textsuperscript{279.} AIR 1980 SC 185.
Supreme Court has held that search of the premises occupied by the accused without the accused being compelled to be a party to such search would not be violative of the Constitutional guarantee enshrined in Article 20 (3).

(VI) DOUBLE JEOPARDY AND RIGHTS OF ACCUSED

Article 20(2) of the Constitution provides that "No Person shall be prosecuted and punished for the same offence more than once." Article 20 (2) incorporates a prohibition against 'double Jeopardy'. This Clause enacts the well known principle of criminal jurisprudence that "no one should be put in jeopardy twice for the same offence" which is based on common law maxim "Nemo debet bis vexari", which means that a person must not be put in peril twice for this same offence. As has been laid down in Venkataraman v. Union of India, Article 20(2) refers to judicial punishment and gives immunity to a person from being prosecuted and punished for the same offence more than once. In other words, if a person has been prosecuted and punished in a previous proceeding of an offence, he cannot be prosecuted and punished for the same offence again in a subsequent proceeding. If any law provides for such double punishment, such law would be void. The Article, however, does not give immunity from proceeding other than proceedings before a court of law or a judicial tribunal. Hence, a Government servant who has been punished for an offence in court of law may yet be subjected to departmental proceedings for the same offence or conversely.

Where a person has been convicted for an offence by a competent court, the conviction is a bar to any further Criminal proceedings against him for the same offence. The object is that no one ought to be punished twice for one and the same offence. It is to avoid the harassment which must be caused to a person for successive criminal proceedings where only one crime has been committed. The doctrine

282. AIR 1954 SC 375
283. Ibid.
284. Kumar, Narender, op.cit., p. 187
of double jeopardy emanating from the common law principles has been universally recognized as an established rule of criminal jurisprudence.\textsuperscript{285} The roots of the principle are found in the common law principles of England,\textsuperscript{286} "that where a person has been convicted of an offence by a court of competent jurisdiction the conviction is a bar to all further criminal proceedings for the same offence."\textsuperscript{287}

*Prangnyaa* (Res judicata) has been referred to as one of the possible defences to an action in ancient times.\textsuperscript{288} Once a decision has been given, it becomes final and cannot be reopened by leading fresh evidence. Narada puts it as follows:\textsuperscript{289}

\begin{enumerate}
\item Yatha pakvesu dhanyesu nisphalah Pravriso gun ah
\item Nir nitev ya vaharanam Pramanam aphalarm Tatha
\end{enumerate}

Black, J., of Supreme Court of the United States in *Green v. U.S.*\textsuperscript{290} has observed that, "The underlying idea one that is deeply ingrained in at least the Anglo-American system of jurisprudence is that the state with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offence, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."\textsuperscript{291} In order to invoke protection conferred by Article 20(2) of the Constitution, there must have been a prosecution and punishment in respect of the same offence before a court of law or a tribunal required by law to decide the matters in controversy judicially on evidence on oath which it must be authorised by law to administer and not before a tribunal which entertains a departmental or an administrative enquiry even though set up by a statute, but not required to proceed on legal evidence on oath.\textsuperscript{292} The Clause guarantee

\begin{itemize}
\item \textsuperscript{285} Chaturvedi, A.N., *op.cit.*, p. 158.
\item \textsuperscript{286} Ibid., p. 130;
\item \textsuperscript{287} Per Charles J., in *Reg. v. Miles* (1890), 24 Queen's Bench Division, 423; see also Cooley, Constitutional Limitations 6th Edn. p. 193, Hennessy, Mortone D.B., "Constitutional Rights of The Accused", *Mass L.R.* Vol. 60, 18 at p. 27 (1975).
\item \textsuperscript{288} Narada II, 5-6
\item \textsuperscript{289} Narada (Introduction I, 62)
\item \textsuperscript{290} (1957) 355 US. 184 at pp. 187-88
\item \textsuperscript{291} Ibid.
\item \textsuperscript{292} Chaturvedi, A.N., *op.cit.*, p. 130.
\end{itemize}
that no person be prosecuted and punished for the same offence more than once. 'And' is used here in the ordinary conductive sense. Hence, Art 20(2) bars a second prosecution only where the accused has been both prosecuted and punished for the same offence previously. In order to enable a citizen to invoke the protection of clause (2) of Article 20 of the Constitution there must have been both prosecution and punishment in respect of same offence. The words "prosecuted and punished" are to be taken not distributively so as to mean prosecuted or punished. Article 20 (2) dealing with double jeopardy what it bars is prosecution and punishment after an earlier punishment for the same offence. ‘Offence’ here means an offence as defined in Section 3 (38) of the General Clauses Act applied to the Constitution by Article 367. The offence must be same, that is to say, involving the same ingredients in all respect and a trial for a separate and distinct offence is not barred under article 20(2). However, this article must be taken as supplemented by Section 26 of the General Clauses Act, 1897 and the provision of the Code of Criminal Procedure, 1973 as to second prosecution after conviction or acquittal for an offence where the second prosecution is excluded by the doctrine of autrefois convict or autrefois acquit. The fundamental right which guaranteed in Article 20(2) enumerates the principle of autrefois convict or "double jeopardy". The roots of the principle are to be found in the well established rule of common law in England that where a person has been convicted of an offence by a court of competent jurisdiction, the conviction is a bar to all further criminal proceedings of the same offence. In Article 20(2) “the words “prosecuted” and “punished” are not to be read disjunctively so as to mean “prosecuted” or “punished” but to be read conjunctively. Both the factors must coexist in order to attract the invocation of Article 20 (2) of the Constitution." 

"Prosecution" has been defined as "A proceeding either by way of indictment or information, in the criminal Courts, in order to put and offender upon his trial in all criminal prosecution, the king is normally the prosecutor." The term "prosecution" is not defined in the Constitution. The court explained the term, "prosecution" means initiation or starting of any proceeding, criminal in nature, before a court or a judicial tribunal. In Narayan Lal Bansilal v. M.P. Mistry, observed that a "prosecution" in Article 20(2) meant a proceeding either by way of indictment of information in a criminal court so as to put an offender on his trial. There are different stages of investigation before prosecution of an offence. In the event of commission of an offence, the law and order machinery can be set in motion by lodging First Information Report in Police Station or filing a complaint in appropriate court. Police conducts investigation for collection of evidence and then file police report before the court and "prosecution" begins when magistrate takes the cognizance of an offence under Section 190 Cr.P.C. Prosecution in this context, thus, means an initiation or starting of proceedings of a criminal nature before a court of law.

Since Article 20 (2) protects an accused from prosecution and punishment twice for the same offence, it does not protect an accused from prosecution and punishment for an offence under which he was previously prosecuted and was acquitted. Thus, in order to claim the protection of Article 20(2) it was necessary to establish three points - a previous prosecution, punishment and the punishment was for the same offence; and unless all the three conditions were fulfilled the clause (2) of that Article could not be invoked. Hence, for application of clause (2) of Article 22 "There must have been a previous proceedings before a court of law or judicial tribunal,"

300. Ibid. 1961 SC 29.
301. Ibid.
303. Police Report is filed in the Court after completion of Investigation under section 173(2) of Cr.PC. 1973.
304. Sec. 190 Cr.P.C provides that Magistrate may take Cognizance of an offence upon receipt of a complaint; upon police report; upon information received from any other person or upon his knowledge about commission of some offence.
The proceedings must be for the commission of an "offence". The "offence" is an act or omission made punishable by any law for the time being in force. The person must have been "prosecuted and punished" in the previous proceedings. The "offence" must be the "same" for which punishment is being awarded in the subsequent proceedings. If the person is prosecuted and acquitted after the trial, this principle will have no application as there must be prosecution as well as the punishment, therefore, in such cases the person can be again prosecuted and punished. In *State of M.P. v. Veereshwar Rao*, the court held that the protection against "double jeopardy" contained in Article 20 (2) would be available only when the accused has been not only prosecuted but also punished after such prosecution. Therefore, if there is no punishment for the offence as a result of the prosecution, clause (2) of Article 20 would have no application. Both prosecution and punishment must co-exist for the operation of Article 20(2). It, thus follows that where a person having been prosecuted for an offence is acquitted, he can be prosecuted for the "same offence" again. Justice Subba Rao observed in the matter of *Bhagwan Swaroop Lal Bishan Lal v. State of Maharashtra*, that "to ascertain that the two offences are the same it is not the identity of the allegation but the identity of the ingredients that matters."

Section 300 of Cr.P.C. provides that a person once convicted or acquitted is not to be tried for same offence. A person who has once been tried by a court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under sub section (1)

309. See Sec. 3 (38) of General Clause Act, 1897.
310. The punishment which a offender is liable under IPC & other laws is (1) death (2) imprisonment for life (3) imprisonment is of two types - rigorous and simple (4) Forfeiture of property and (5) fine; see also *Thomas Dana v. State of Punjab*, AIR 1959 SC 375
311. AIR 1957 SC 592.
313. AIR 1965 SC 682
of Section 221, or for which he might have been convicted under sub-section (2) thereof.\textsuperscript{315} A person acquitted or convicted of any offence may be afterwards tried, with the consent of the State Government, for any distinct offence for which a separate charge might have been made against him at the former trial under sub-section (1) of Section 220.\textsuperscript{316} A person convicted of any offence constituted by any act causing consequences which, together with such act, constituted different offence from that of which he was convicted, may be afterwards tried for such last-mentioned offence, if the consequences had not happened, or were not known to the court to have happened at the time when he was convicted.\textsuperscript{317} A person acquitted or convicted of any offence constituted by any acts may, notwithstanding such acquitted or conviction, be subsequently changed with, and tried for, any other offence constituted by the same acts which he may have committed if the court by which he was first tried was not competent to try the offence with which he is subsequently charged.\textsuperscript{318}

This section lays down that a person once convicted or acquitted cannot be tried for the same offence. It is based on the \textit{maxim nemo debet bis vexari}, which means that a person cannot be tried a second time for an offence which is involved in the offence with which he was previously charged. In order to bar the trial of any person already tried, it must be shown (1) that he has been tried by a competent court for the same offence of one for which he might have been charged or convicted at that trial, on the same facts (2) that he has been convicted or acquitted at the trial, and (3) that such conviction or acquittal is in force.\textsuperscript{319} Where the conviction of a person and the sentence passed on him set aside on the ground of want of proper sanction it cannot be said that there was a proper trial at all and the result of the decision cannot operate under this section as a bar to a fresh trial after receipt of a fresh sanction.\textsuperscript{320}

The acquittal or conviction, in order to be an actual defence to the charge must be by

\begin{itemize}
  \item \textsuperscript{315} Sub Section (1) of Section 300 Cr. P.C.
  \item \textsuperscript{316} Ibid., Sub Section (2)
  \item \textsuperscript{317} Ibid., Sub Section (3)
  \item \textsuperscript{318} Ibid., Sub Section (4)
  \item \textsuperscript{320} M. Gopalakrisha Naidu, (1952) Nag 52.
\end{itemize}
a court of competent jurisdiction. A trial by a court not having jurisdiction is void *ab initio* and the accused, if acquitted, is liable to be retried. If the court which held the first trial was not competent to try the charge put forward as the second trial, this section would have no application. Procedural technicalities do not weigh with the court in giving benefit of the doctrine of double jeopardy. Thus where a fresh trial was ordered after the rectification of order sanctioning prosecution it could not be checked on the plea of double jeopardy. Neither Constitution of India nor the Code of Criminal Procedure confer any immunity where trial is a nullity and prosecution for same offence on same facts is not barred under section 300 CrPC or Article 20(2) of the Constitution.

In *Maqbool Hussain v. State of Bombay*, the appellant, an Indian citizen brought some gold without making a declaration from a foreign country. The customs authorities took action against him under Section 167 of the Sea Customs Act, 1898 and confiscated the gold. Later on, he was charged under Section 8 of the Foreign Exchange Regulation Act, 1947. The court held that the sea customs authorities were not a court or a judicial tribunal and the adjudging of confiscation under the Sea Customs Act, 1898 did not constitute a judgment or as order of a court or a judicial tribunal necessary for the purpose of supporting a plea of double jeopardy. The proceeding taken before the sea customs authorities, therefore, did not amount to prosecution of the appellant nor the order of confiscation constitute a punishment imposed by a court or a judicial tribunal. It was, therefore, held that the prosecution under the Foreign Exchange Regulation Act, 1947 was the first prosecution not barred by Article 20 (2). In *Leo Roy v. Supdt. District Jail*, the proceedings before the

323. *Pumananda Das Gupta*, (1939), Cal 1, SB.
325. See Article 20 (2).
326. See Section 300 Cr.P.C.
327. AIR 1953 SC 325.
customs authorities were under section 167 (8) of the Sea Customs Act where the petitioner's contraband were confiscated. A subsequent criminal prosecution for the charge of criminal conspiracy under Section 120-B of the Indian Penal Code on the same facts were held not to be violative of Article 20(2) of the Constitution. The Court observed "... The offence of conspiracy to commit a crime is a different offence from the crime that is the object of the conspiracy because the conspiracy preceded the commission of the crime and is complete before the crime is attempted or completed, equally the crime attempted or completed does not require the element of conspiracy as one of its ingredients. They are, therefore, quite separate offences."^330

In S.A. Venkataraman v. Union of India,^331 the appellant, a government servant has charged with committing corruption. An enquiry was held against him under the Public Servants (Injuries) Act, 1850. As a result of report of Enquiry Commissioner, he was dismissed from service. Thereafter, he was prosecuted before the court for having committed offence under sections 161 and 165 of the Indian Penal Code 1860 and Section 5 (2) of the Prevention of Corruption Act, 1947. The Supreme Court held that the proceeding taken before the Enquiry Commissioner did not amount to a prosecution for an offence. It was in the nature of a fact finding inquiry held to advise the Government for taking any disciplinary action against the appellant, if so called for. Therefore, the prosecution under the Indian Penal Code, 1860 and the Prevention of Corruption Act, 1947, was the first prosecution not barred by Article 20 (2).

Departmental Enquiry is not a prosecution and the award of such proceeding is not a punishment,^332 and there is no bar of Clause (2) of Article 20 in holding a departmental enquiry before commencement and after the conclusion of the criminal prosecution.^333 It must be noted that an appeal against an acquittal is in substance a continuance of the prosecution. A prosecution starts at the court of first instance and concludes at the final court of appeal. In Kalawati v. State of H.P.,^334 the appellant

330. Ibid. at p. 262.
331. AIR 1954 SC 375; 1954 Cr.LJ 993.
332. Ibid.
333. Ibid.
334. Kumar, Narender,op.cit., p.188.
335. AIR 1953 SC 131.
charged for committing murder of her husband was prosecuted but acquitted by the District Judge. The State preferred an appeal against acquittal in High Court. The accused contended that proceedings before High Court contravened Article 20(2). The court held that appeal against the acquittal was not second prosecution, but continuance of the original prosecution, therefore, Article 20(2) would not be attracted. Besides, there was no punishment for the offence in the earlier prosecution.

The plea of "double jeopardy" may be distinguished from the rule of "issue estoppel"; the rule of issue estoppel precludes evidence being led to prove a fact in issue as regards which evidence has already been led and a specific finding recorded at an earlier criminal trial before a competent court. The rule related only to the admissibility of evidence. While Article 20(2) bars double punishment, the rule of issue estoppel finding was in favour of the accused of a previous trial. Article 20(2) has no direct bearing on the question at issue while the rule of issue estoppel relates to evidence on the question in issue at the two trials. What is required for the application of the rule of estoppel is the identity of issue and the acquittal of the accused at a previous trial on the same issue, while Article 20(2) would be attracted if the "offence" is the same in the second prosecution for which the accused has earlier been prosecuted and punished.

(VII) DOMAIN OF PERSONAL LIBERTY AND RIGHTS OF ACCUSED

The concepts of 'right to life' and 'personal liberty' were not known to the people of earlier periods. The origin of these concepts may be traced in ancient Greek civilization. Greeks distinguished between the liberty of the group and liberty of the individual. The Preamble to the Constitution of India assures among other things "dignity of the individual". Personal liberty and human dignity are most cherished values of our Constitution. These are the necessary epitomes which help in the development of an individual personality and the realisation of human rights.

Article 21 of the Constitution pertains to protection of life and personal liberty. The Article provides, "No person shall be deprived of his life or personal liberty except according to procedure established by law." Liberty in ordinary sense is freedom of external control, interference or freedom from bondage captivity or physical restraint. But under law the expression is not confined to “freedom from bodily restraint” but extends to the conduct in which an individual is free to pursue. The word liberty is qualified by the word “personal” in our Constitution. Hence the expression “whatever it may be either restricted interpretation, whatever it may be either restricted or liberal interpretation. “Personal liberty” is too precious a thing to be taken lightly by anyone much less the state and its functionaries and nothing could be more precious and sacrosanct than the liberty of an individual. Montesquieu observed that liberty is the right to do whatever the laws permit. Personal Liberty means Personal Rights not to be subjected to imprisonment, arrest or other physical coercion in any manner that, does not admit legal justification. Hence liberty of an individual is a matter of great Constitutional importance in our system of governance.

Right to personal liberty is one of the most, if not the most important, of the human rights. An important issue arises as to whether Article 21 “is the sole repository of the right to life and personal liberty or that this right exists independent of Article 21 as a common law right.” The Supreme Court in the matter of ADM Jabalpur v. Shiv Kant Shukla observed “If any right existed before the commencement of the Constitution and the same right with its same contents is conferred by Part-III as a fundamental right, the source of that right is in Part-III and none is an preexisting right. Such pre-Constitution right has been elevated by Part-III as a Fundamental Right. If there is a pre-Constitution right which has become now a Fundamental Right, the common law right has no separate existence under our

340. See heading of Article 21.
341. Article 21.
348. AIR 1976 SC 1207, p. 1241
Constitution.\textsuperscript{349} If there be any right other than and more extensive than Fundamental Right in Part-III, such right may continue to exist under Article 372. \textsuperscript{350} In \textit{A K Gopalan v. State of Madras},\textsuperscript{351} while interpreting the term personal liberty in a restricted form, J. Mukherjee observed "In the ordinary language 'personal liberty' means liberty relating to or concerning the person or body of the individual and personal liberty in this sense is the antithesis of physical restraint or coercion. According to Dicey, who is an acknowledged authority on the subject, 'personal liberty' means a personal right not to be subjected to imprisonment, arrest, or other physical coercion in any manner that does not admit of legal justification... this negative right of not being subject to any form of physical restraint or coercion that constitutes the essence of personal liberty.\textsuperscript{352}

Neither Articles mention with regard to 'Right to Life.' Article 21 simply says that "no person shall be deprived of his life or personal liberty except according to procedure established by law", therefore personal liberty guaranteed under Article 21 is a protected one but restricted since deprivation of it would be done only through procedure established by law. Rather Right to Life and Personal Liberty which in its contents is not an absolute right but a limited right having its ambit circumscribed by the risk of its being taken away by following procedure established by law made by appropriate authority.\textsuperscript{353} In \textit{A. K. Gopalan v. State of Madras},\textsuperscript{354} the majority took the view that as the word 'law' was not preceded by any of the articles like 'a', 'the', 'any; or 'all', it should not be confined to State made law but it should mean a just law including the principles of natural justice.\textsuperscript{355} It is submitted that the minority opinion is incorrect, Firstly, law is preceded by the word 'established' which does not indicate a law with changing contents, but the enacted law. Secondly, the word 'due' does not find any place in the personal liberty clause, so the principles of natural justice can not be brought within the term 'law'. And lastly the term cannot be given any expanded

\textsuperscript{349} \textit{Ibid}; see also \textit{B.S.Rao Badami v. State of Mysore}, AIR 1969 SC 45
\textsuperscript{350} \textit{Supra note 9}. (AIR 1976 SC 1207)
\textsuperscript{351} AIR 1950 SC 27.
\textsuperscript{352} \textit{Ibid}. pp 96-97.
\textsuperscript{353} \textit{A K Gopalan v. State of Madras}, AIR 1950 SC 27 at p 118.
\textsuperscript{354} AIR 1950 SC 27
\textsuperscript{355} \textit{Ibid}. p. 58-60.
meaning as it has been defined in Article 13. It will be interesting to note that the word 'law' has been defined in Article 13 so as to include any ordinance, order, by law, rule, regulation, notification or usage having in the territory of India the force of law. It cannot be said that this definition within its scope includes natural law or principles of natural justice. Therefore, there seems to be no justification to give the meaning of 'jus' to 'law'. The right secured by Article 21 is available to every person, citizen or non-citizen. Thus, even a foreigner can claim this right. Article 21 applies only to natural persons. It has no application to corporate bodies. Liquidation of a society cannot, thus, be equated to deprivation of life or personal liberty. Article 21 can be claimed only when a person is deprived of his "Life" or 'personal liberty" by the "State" as defined in Article 12. Violation of the right to personal liberty by a private individual is not within the purview of Article 21.

'LIFE' as observed by Field in Munn v. Illinois (1877) 94 US 113 (142) means something more than mere animal existence and the inhibition against the deprivation of the life extends to all those limits and faculties through which life is enjoyed. The right to life does not merely mean the continuance of a person's animal existence. It means "the fullest opportunity to develop one's personality and potentiality to the highest level possible in the existing stage of our civilization." The right to life does not mean the possession of his organs his-arms, legs etc. The right to life, thus means right to live with full human dignity, without humiliation and deprivation, or denial of any sort. Article 21 declares that no person shall be deprived of his life or personal liberty except according to the procedure established by law. It is true that the Article is worded in negative term but it is now well settled that Article 21 has both a negative and an affirmative dimension. Right to live includes the right to live consistently with

356. Deshtas op. cit. p. 16.
361. Kumar, Narender, op. cit., p.196; A note of Fundamental Rights by, B Shiva Rao, Framing of India's Constitution, II; 1967, 41 K.T.Shah ; supra note 318
human dignity and decency. The definition of "life" has undergone a drastic change in the history of mankind. In the beginning "life" was brutish and short as observed by Hobbes. Then nutrition, clothing and shelter became its inseparable parts. The Supreme Court of India in *Francis Coralie v U.T. of Delhi*, observed that, "the question which arises is whether the right to life is limited only to protection of limb or faculty or does it go further and embrace something more. 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 and mixing and commingling with fellow human beings". In *Kharak Singh v. State of UP* the Supreme Court quoted Field J.S. observation in *Munn v. Illinois* and held:

> By the term "Life" as here used something more is meant than mere 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 amputation of an arm or leg or the pulling out of an eye, or the destruction of any other organ of the body through which the soul communicates with the outer world.

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, mixing and commingling with fellow human beings. In *A.K.Gopalan v State of Madras*, the Supreme Court propounded the thesis that "Personal liberty" in Article 21 was used as a compendious term to include with in itself all the varieties of rights which went to make up "personal liberty' of a man minus the right guaranteed under Article 19(1). In *Sunil Batra v Delhi Administration*, the

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367. AIR 1963 SC 1295.
368. (1877) 94 US 113.
369. AIR 1979 SC 146 p. 152 Para 5.
370. AIR 1950 SC 27
371. AIR 1978 SC 1675
Supreme Court held that the "right to life" prohibited the mutilation of the body or destruction of any other organ of the body through which the soul communicates with the outer world. In another case, the Court held that "the right to life is the most precious right to human beings in civilised society. Article 21 has both the negative and positive contents. Positive aspect demands conditions and environment conducive for living with dignity. Its negative contents requires that none should be deprived of his life- in its broader connotation, without a just, fair and reasonable procedure. The right to life, does not mean the continuance of a person's animal existence but a right to the possession of each of his limbs and faculties by which life is enjoyed." The expression 'life' assured in Article 21 does not connote mere animal existence or continued drudgery through life. It has a much wider meaning which includes right to livelihood, better standard of life, hygienic conditions in work place and leisure facilities.

Right to live is a fundamental right under Article 21 of the Constitution and it includes the right of enjoyment of pollution free water and air for full enjoyment of life. If anything endangers or impairs that quality of life in derogation of laws, a citizen has right to have recourse to Article 32 of the Constitution for removing the pollution of water or air which may be detrimental to the quality of life.

(i) ARE PRISONERS PERSONS?

The right to life and personal liberty is available to "person" and question arises whether these rights are available to prisoners and are they persons? The Supreme Court came up with the answer in *Sunil Batra v Delhi Administration*, and observed that "yes, of course. To answer in the negative is to convict the nation and the Constitution of de-humanization and to repudiate the world legal order, which recognises rights of prisoners in the international covenant on prisoners. Rights to which our country has signed assent. .... Thus in a democratic society governed by the

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concept of Rule of law even the rights of accused are sacrosanct for though accused of an offence he does not become a non person." The duty of the authority is to give effect to court sentence and "to give effect to the sentence means that it is illegal to exceed it so it follows that a prison official who goes beyond mere imprisonment or deprivation of locomotion and assaults or otherwise compels the doing of things not covered by the sentence acts in violation of Art 19. Punishments of rigorous imprisonment oblige the inmates to do hard labour, not harsh labour and so a vindictive officer victimising a prisoner by forcing on him particularly harsh and degrading job, violates the laws' mandate." Human dignity is a clear value of our Constitution not to be bartered away for mere apprehensions entertained by jail officials. The Supreme Court while rejecting the contentions of jail authorities and emphasising rights of prisoners observed that "we cannot agree that either the Section or Rules can be read in the absolutest expansionism the prison authorities would like us to read. That would virtually mean that prisoners are not persons to be dealt with at the mercy of the prison echelons. This country has no totalitarian territory even within the walled world, we call prison. Articles 14, 19 and 21 operate within the prisons in the manner explained in Sunil Batra (1), by the Constitution Bench of this Court."

A prisoner remains a human being notwithstanding his imprisonment and would be entitled to those minimum human rights which are inalienable from a human being. But the court in its quest for fairness or reasonableness, would not question the "penal policy" behind a law. To protect a citizen's liberty includes that of an accused, thus making the right of an accused person as sacrosanct, for though accused of an offence he/she does not become a non-person. The founding fathers of the Indian Constitution inserted in Article 21 that no person shall be deprived of his life or personal liberty except according to the procedure established by law, which meant fair

377. Ibid., at 1590.
380. Ibid.
legal procedure. The protection of this Article is available to citizens as well as non citizens, and extends even to a convict behind prison bars subject only to limitation imposed by his conviction under the law. Convicts are not, by mere reason of the conviction, denuded of all the fundamental rights which they otherwise possess. Likewise, even a convict is entitled to the precious right guaranteed by Article 21 of the Constitution that he shall not be deprived of his life or personal liberty except according to procedure established by law. Dr. Paras Diwan had rightly observed, that, “The Supreme Court has dwelt length on all aspects of personal liberty which gives reality and meaning to the right to liberty. These relate to the full enjoyment of personal liberty of an individual without any fetters and unreasonable and unfair restrictions. The remarkable feature of the development of the right to dignity is that the Supreme Court has been upheld the dignity of a person who is behind the bars”.

A person accused of a crime, historically speaking, at one time was considered as an evil and was condemned with all possible brutalities. In the process of implementing the sentence authorised by courts, jail authorities cannot exceed the limits and cannot impose their own orders. It was held in Sunil Batra’s case that for example, a prisoner if forced to carry night soil, may seek a habeas writ. ‘Hard labour’ in Sec. 53 (of Prisoners Act, 1900) has to receive a humane meaning. A girl student or a male weakling sentenced to rigorous imprisonment may not be forced to break stones for nine hours a day. The prisoner can’t demand soft jobs but may reasonably be assigned congenial jobs. Sense and sympathy are not enemies of penal asylums. The prisoner or detenu, obviously cannot move freely by going outside the prison walls nor can be socialise at his free will with persons outside the jail. But, as part of the right to live with human dignity and therefore, as a necessary component of the right to life, he would be entitled to have interviews with the members of his family.

386 See Diwan, Paras, Constitution of India (1st edn.)
389 Ibid., p.1594.
and friends and no prison regulation or procedure laid down by prison regulation regulat­
ing the right to have interviews with the members of the family and friends can be
upheld as Constitutionally valid under Articles 14 and 21, unless it is reasonable, fair
and just. Thus, it is now clear law that a prisoner wears the armour of basic freedom
even behind bars and that on breach thereof by lawless officials the law will respond
to his distress signals through 'writ' aid. The Indian human has a constant companion
- the Court armed with the Constitution. The weapon is habeas, the power is Part - III
and projectile is Batra.

Taking one's own life intentionally and voluntarily i.e. suicide, was objected by
Plato and Aristotle on the ground that the State loses a citizen. The verdict of the
Supreme Court holding that right to life under Article 21 of the Constitution does not
include 'right to die' or 'right to be killed' settles the debate on this issue by laying
down the law that one cannot take away one's own life and cannot also permit to
deprive him of it. The 'right of life' include the right to live with human dignity would
mean the existence of such a right upto the end of natural life. Therefore, 'right to life'
includes the right to be a dignified life upto the point of death including a dignified
procedure of death. In other words, this may include the right of a dying man to also
die with dignity when his life is ebbing out. But the 'right to die' with dignity at the end
of life is not to be confused or equated with the 'right to die' an unnatural death curtailing
the natural span of life.

(ii) PERSONAL LIBERTY AND ACCUSED

Article 21 guarantees "Right to life and personal liberty". The personal liberty
of the individual was ensured even during Kautilya's time when the accused was kept
in Judge's prison house. Arthasastra provides "For hindrance of sleep, sitting down,
meals, answering calls of nature, or movement, putting fetters (in judge's lock up or in
prison house) the fine shall be three panas increased by three panas for him who

391 Ibid., p 1591; The Batra's case referred here is earlier case of Sunil Batra v. Delhi
Administration, AIR 1978 SC 1675: (1979) 4 SCC 494 at p 495.
392 Deshta, Sunil, Deshta, Kran, op. cit., p. 7; See also Krishna, Bal, "Whose Death is it Anyway?, The Hindustan
does it and for him who cause it to be done successively." The word liberty, derived from Latin words *liber* and *libertas*, is defined in Encyclopedia Britanica as a "State of freedom" which is "specially opposed to political subjection, imprisonment or slavery" (emphasis added). Harold J. Laski, argues that liberty is essentially an absence of restraint, and he further clarified that liberty is a positive thing, it does not merely mean absence of restraint. Liberty is the right to do whatever the laws permit. Right to personal liberty is one of the most, if not the most important, of the human rights. The "personal liberty" was given narrow interpretation by the Supreme Court in *A.K. Gopalan v. State of Madras*. The Court held that word "liberty" was qualified by the word "personal" which was a narrow concept and the expression "personal liberty" did not include all that was implied in the term "liberty". The expression "Personal liberty" meant nothing more than the liberty of the physical body i.e. freedom from arrest and detention from false imprisonment or wrongful confinement. The Constitution in Article 21 has used the words personal liberty which have definite connotation in law. Personal liberty does not mean only liberty of that person but means liberty or the rights attached to the person (*jus personam*). According to Kania, C.J., 'Personal liberty' would primarily mean liberty of the physical body. Patanjali Santri J. also described that 'personal liberty' meant 'freedom from bodily restraint' In *Kharak Singh v. State of UP*, the Court while abandoning restrictive view, held that "personal liberty" is used in Article 21 as a compendious term to include within itself all the varieties of rights which go to make up the personal liberty of a man other than those dealt with in the several clauses of Article 19 (1). While Art

397. Montesquieu.
399. AIR 1950 SC 27.
400. *Ibid*.
404. AIR 1963 SC 1295.
19(1) deals with particulars species of attributes of that freedom, ‘personal liberty’ in Article 21 takes in and compromises the residue. \(^{405}\) “Personal Liberty” includes many freedoms like freedom to move freely, freedom from physical restraint, freedom to speak, write, worship etc. It also includes right to livelihood. \(^{406}\) Justice Mukherjee held\(^{407}\) in A. K. Gopalan’s case that “In ordinary language ‘personal liberty’ means liberty relating to or concerning the person or body of the individual and personal liberty’ in this sense is the anti-thesis of physical restraint or coercion”. While referring to Dicey’s definition of personal liberty, he said “... It is in my opinion this negative right of not being subjected to any form of personal restraint or coercion that constitute the essence of personal liberty and not mere freedom to move to any part of the Indian territory. \(^{408}\) In A.K.Gopalan v. State of Madras, \(^{409}\) the court held that personal liberty \textit{inter alia} includes the right to eat or sleep when one likes or to work or not to work as and when one pleases and several such rights. The Supreme Court struck down the U.P. Police Regulation under which Police was resorting to domiciliary visits and surveillance was held as violative of personal liberty of the petitioner. The Court laid down that an unauthorised intrusion into a person’s home and the disturbance caused to him thereby violated his right to “personal liberty” enshrined in Article 21.\(^{410}\) While identical matter came before Supreme Court in Govind v. State of M.P.\(^{411}\) In this case impugned Regulation No 855 and 856 were held to have force of law and it was also held that they were not violative of Article 21 as framed by Govt. Of Madhya Pradesh under Section 42(2)(c) of Police Act and the \textit{Kharak Singh}\(^{412}\) was overruled. However the domiciliary visits were held Constitutionally valid in Govind v. State of MP\(^{413}\) after 12 years. The horizons of ‘personal liberty’ were expanded and scope was broadened by assigning new and dynamic meaning to the right ‘personal liberty’ in

\[\begin{align*}
\text{405. } & \text{Ibid.} \\
\text{407. } & \text{Supra note 66-A p. 96.} \\
\text{408. } & \text{Ibid. p. 97.} \\
\text{409. } & \text{AIR 1950 SC 27.} \\
\text{410. } & \text{Ibid.} \\
\text{411. } & \text{AIR 1975 SC 1378.} \\
\text{412. } & \text{AIR 1963 SC 1295.} \\
\text{413. } & \text{AIR 1975 SC 1379.}
\end{align*}\]
the case of \textit{Maneka Gandhi v. Union of India}.\textsuperscript{414} The Court held that 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 a man and some of them have been raised to the status of distinct fundamental rights and given additional protection under Article 21.\textsuperscript{415} The Court also held that “The law must, therefore, now be settled that Article 21 does not exclude Article 19 and that even if there is a law prescribing a procedure for depriving a person of personal liberty, and there is consequently no infringement of the fundamental right conferred Article 21 such a law in so far as it abridges or takes away any fundamental right under Article 19, would have to meet the challenges of that Article.\textsuperscript{416}

In Francis Coralie Mullin \textit{v. Administration UT of Delhi},\textsuperscript{417} the petitioner a British national detained under C.O.F.E.P.O.S.A. in Tihar Central Jail was experiencing considerable difficulty in having interview with her lawyer and members of her family. To have interview with the petitioner prior appointment of District Magistrate, Delhi was required and interview could be held in the presence of Custom Officer nominated by Collector of customs and that too once in a month. These restrictions on interview were imposed by prison authorities by virtue of clause 3(b) of sub clause (i) and (ii) of the condition of detention laid down by Delhi Administration. These restrictions were challenged and the court observed:

The right of a detenu to consult a legal adviser of his choice for any purpose not necessarily limited to defence in a criminal proceeding but also for securing release from preventive detention or filing a writ petition or prosecuting any claim or proceeding, civil or criminal, is obviously included in the right to live with human dignity and is also part of personal liberty and the detenu cannot be deprived of this right nor can this right of the detenu be interfered with except in accordance with reasonable, fair and just procedure established by a valid law. A prison regulation may, therefore, regulate the right of a detenu to have interview with a legal adviser in a manner which is reasonable, fair and just but it cannot prescribe an arbitrary or unreasonable procedure for regu-

\begin{itemize}
  \item \textsuperscript{414} AIR 1978 SC 597
  \item \textsuperscript{415} Ibid.
  \item \textsuperscript{416} Ibid
  \item \textsuperscript{417} AIR 1981 SC 746; ‘COFEPOSA’ means the Conservation of Foreign Exchange and Prevention of Smuggling Act.
\end{itemize}
lating such an interview and if it does so, it would be violation of Articles 14 and 21.\(^{418}\) (emphasis added).

The rights relating to the criminal justice are not only ensured to the citizens of India, but ensured to foreigners also. The Supreme Court decided that the rights guaranteed under the Articles 20, 21 and 22 of the Constitution can be claimed even by foreigners.\(^{419}\)

### (iii) RIGHT TO PRIVACY AND ACCUSED

The “right to privacy” is not specifically provided in the Constitution of India. In *Rajgopal v. State of Tamil Nadu*\(^{420}\), the scope of “right to privacy” was explained by the Supreme Court and it was held to be implicit in the “right to life and personal liberty” guaranteed under Article 21 of the Constitution. The Court held that the “right to privacy” meant a “right to be let alone” The Court observed that “A Citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child bearing and education among other matters. None can publish anything concerning the above matters without his consent - whether truthful or otherwise and whether laudatory or critical. If he does so, he would be violating the right to privacy of the person concerned and would be liable in an action for damage.”\(^{421}\) The court further held that there would be no violation of right to privacy if person concerned “voluntarily thrusts himself into controversy or voluntarily invites or raises a controversy” The court also recognised the exception to the rule where publication is based on public record the right to privacy would no longer be available. However, court held that a female, who was victim of sexual assault, kidnapping, abduction or a like offence should not be further subjected to indignity by publishing her name in press/media.\(^{422}\)

Privacy is a confusing and complicated idea. It denotes the seclusion or withdrawal of an individual from public affairs. The term “privacy” defined as an outcome of a person’s wish to withhold from others certain knowledge as to his past and present experience and action and his intention for the future: a desire to be an enigma to

\(^{418}\) *Ibid.* 754.
\(^{420}\) *AIR 1995 SC 264.*
\(^{421}\) *Ibid.*
\(^{422}\) *Ibid.*
others or to control others perceptions and beliefs about the self. The right to privacy is not envisaged in particular Article of the Constitution but envisaged in Part-III of the Constitution. Justice Mathew observed in Govind’s case that “Rights and freedoms of citizens are set forth in the Constitution in order to guarantee that the individual, his personality and these things stamped with his personality shall be free from official interference except where a reasonable basis for intrusion exists. “Liberty against government”, a phrase coined by Professor Corwin, expressed this idea forcefully. In this sense, many of the fundamental rights of citizen can be described as contributing to the right to privacy. The shield of privacy under Article 21 of the Constitution was used for the first time in Kharak Singh v. State of U.P. The Supreme Court discussed various aspects of right of privacy in the instant case. The majority judges of Supreme Court held that Regulation 236 (b) of the UP Police Regulations which authorised domiciliary visits was violative of Article 21 as there was no law on which the same could be justified, it was unconstitutional. In 1954 Justice Jagannathdas observed that the Constitution of India did not recognise the right to privacy and there is no justification to import it by some process of strained Constitution. In Govind v. State of M.P. it was held that right to personal liberty, and the rights to move freely and speech could be described as contributing to the right to privacy. However, the right was not absolute and would always be subjected to reasonable restrictions. The right would necessarily have to go through a process of case by case development. F.S.Nariman, while commenting upon Govind’s case observed “the right to privacy had two rounds in court-first before a Bench of 8 then before a Bench of 6. In both it had been buried - a more appropriately, burnt to a cinder. But the ashes of lost freedoms are ever smouldering. In Govind the cherished

425. Ibid. p 1385.
426. AIR 1963 SC 1295
427. Ibid.
429. AIR 1975 SC 1378
430. Ibid; see also Kumar, Narender, op.cit., p 207.
431. AIR 1975 SC 1378.
right has arisen phoenix-like from the ashes . . . Neatly side stepping the ratio of larger benches the court has given the right a new base of life.” In a recent case, the Supreme Court held that even a woman of easy virtue was entitled to the “right to privacy” under Article 21 and that no one could invade her privacy as and when he liked. The right to privacy has been upheld by several High Courts.

James Madison’s draft of Bill of Rights which later became Fourth Amendment to Constitution of USA reads, “The right of the people to be secured in their persons, houses, papers and effects, shall not be violated by warrants issuing without probable cause, supported by an oath or affirmation, and not particularly describing the place to be searched or the persons or things to be seized.” Elbridge Gerry modified draft of James Madison by changing “secured” to secure and inserted the clause “against unreasonable searches and seizures” in the original draft. The words “by warrants issuing” also changed to “and no warrant shall issue” by some other delegate. Thus, the Fourth Amendment to the U.S.A. constitution which was finally enacted, reads:

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The basic purpose of this amendment, as recognised in countless decisions .... is to safeguard the privacy and security of individuals against arbitrary invasion by

433. State of Maharastra v. Madhulkar Narain, AIR 1991 SC 207; Re Ratanmala AIR1962 Mad. 31
434. Ibid.
436. Elliot, Jonathan; (ed) The Debates In The Several Conventions On The Adoption Of The Federal Constitution, (New Yord: Burt Franklin, 1974), pp. 448-49. This draft was later modified by Elbridge Gerry.
437. Ibid.
government officials. The Fourth Amendment thus gives concrete expression to a right of people which is basic to a free society.\footnote{439}

The quality of a nation's civilization can be largely measured by the methods is uses in the enforcement of criminal law.\footnote{440} In India “Criminal Procedure Code permits search and seizure, while the Indian Constitution guarantees specifically neither the right to privacy nor right against search and seizure.”\footnote{441} The Supreme Court of USA recognised that “the security of one’s privacy against intrusion by police.......is....basis for a free society and is implicit in the concept of ordered liberty.”\footnote{442} Plato had laid down centuries ago the procedure for searches that “If a person wishes to find anything in the house of another, he shall enter naked or wearing only a short tunic and without a girdle having first taken an oath by the customary goods that he expects to find it there; he shall then make his search and other shall throw open his house and allow him to search things both sealed and unsealed.”\footnote{443} The Supreme Court of U.S.A. has held that any evidence secured as a result of the illegal search is inadmissible in a criminal prosecution. Hence, all the lawful searches are, permissible and unlawful searches are prohibited. The Supreme Court of U.S.A. once again declared that it must always be remembered that what the Constitution forbids is not all searches and seizures, but unlawful searches and seizures.\footnote{444} A search is inevitable in case of an arrested person. The policemen are empowered by law to enter the premises, by force if necessary to search for possible evidence. Search and seizure is an important part of the pretrial process of case. But, it encroaches upon a person's privacy and sanctity of his home. It has been rightly observed that an intrusion of one's privacy is demanding to individuality and is an affront to personal liberty.\footnote{445}

\footnotesize{439. US Supreme Court in Canara Municipal Court Case. (1) 387 US 523(1967); see also See v. City of Seattle 387 US 541 (1967).


Indian legal system prohibits intruding life and dignity of anyone. A police officer should not proceed to anyone’s house without knocking the door otherwise it constitute misuse of police powers. The search of places or persons can be carried out by police officer or any other person under various provisions of Cr.P.C. while upholding validity of Section 96 of Cr.P.C. 1898 (Section 93 of Cr.P.C., 1973) the Court held that “the power of search and seizure is in any system of jurisprudence an overriding power of the State for the protection of social security and that power is necessarily regulated by law. There is no law that the search officer and witness is required to give their personal search before entering into a house or a place to be searched. However, this must be done in every case as the judiciary hold established principle that personal search avoids the chances of implanting the alleged article. Unlike the Constitution of U.S.A., the Constitution of India does not guarantee right against unreasonable search and seizure and law provides for a procedure where under search can be effected by police officer or other person under a warrant. The policy of the law is that each individual accused included, by virtue of his guaranteed dignity, has a right to a private enclave where he may lead a free life without overbearing investigatory invasion or even crypto-coercion. An Indian citizen’s house, it must always be remembered, as his castle, because next to his personal freedom comes the freedom of his home. Just as a citizen cannot be deprived of his personal liberty except under authority of law, similarly no officer of the State has a prerogative right to forcibly enter a citizen’s house except under the authority of law....

The privacy of communication during marriage is also protected. “No person who is or has been married, shall be compelled to disclose any communication made

447. See Chapter VII CrPC, Secs., 91 to 101; See also Secs. 47, 51 & 100 Cr.P.C., 1973.
450. See chapter VII Cr.PC, 1973 ; also see Sections 91 to 101, 47, 51 & 100 Cr.PC 1973.
to him during marriage by any person to whom he is or has been married; nor shall he be permitted to disclose any such communication, under the person who made it or his representative-in-interest consents except in suits between married persons or proceedings in which one married person is prosecuted for any crime committed against the other." 453 Similarly, no barrister, attorney, vakil or pleader can be permitted to disclose professional communication between him and the client. 454

(iv) PROCEDURE ESTABLISHED BY LAW

Article 21 provides that no person shall be deprived of his life or personal liberty except according to procedure established by law. 455 The term "procedure established by law" has been a subject matter for interpretation in the catena of cases. 456 "On the plain reading of this Article, the meaning seems to be that you cannot deprive a man of his personal liberty, unless you follow and act according to the law which provides for deprivation of such liberty, the expression 'procedure' means the manner and form of enforcing the law." 457 Das J, observed that the term 'procedure' refers to some step, manner or method of proceeding to the deprivation of life or personal liberty. 458 But it does not give any vested right to any particular form of procedure. 459 Procedure established by law in Article 21 meant the law prescribed by Parliament at any given point of time. Parliament has the power to change the procedure by enacting a law or amending it, and when the procedure is so changed, it becomes the procedure established by law. 460 No law can deprive a person of his life or personal liberty unless it prescribes a procedure which is reasonable, fair and just and it would be for the court to determine whether the procedure is reasonable, fair and just and if

453. See Section 122 of Indian Evidence Act, 1872.
454. Ibid.
455. See Art. 21; The expression 'procedure established by law' has been borrowed from Article 31 of the Japanese Constitution of 1946.
457. A K Gopalan v. State of Madras, AIR 1950 SC27; This is the observation of Justice B K Mukherjee.
458. Ibid.
459. Abdul Khadar v. State of Mysore, AIR 1951, Mys. 72 (F.B.)
460. AIR 1967 SC 1639 (1642); AIR 1951 SCR 621.
it is not, the court will strike down the law as invalid. But the Supreme Court in another case observed that no person shall be deprived of his life or personal liberty except according to fair, just and reasonable procedure established by a valid law. But the mere prescription of some kind of procedure cannot ever meet the mandate of Article 21. The procedure prescribed by law has to be fair, just and reasonable not fanciful, oppressive or arbitrary. The principle of reasonableness, which legally as well as philosophically is an essential element of equality or nor arbitrariness pervades Article 14 like a brooding omnipresence and the procedure contemplated by Article 21 must answer the test of reasonableness in order to be conformity with Article 14. It must be “right and just and fair” and not arbitrary, fanciful or oppressive, otherwise it would not be a procedure at all and the requirement of Article 21 would not be satisfied.  

Again the court reiterated Maneka Gandhi’s case in C. Ramkonda Reddy v. State of AP that “though our Constitution did not adopt the words “due process of law” and choose to employ in their place, the words “procedure established by law”, the distinction if any, between the two expressions has become academic, in view of the decision of the Supreme Court in Maneka Gandhi. It is held in Maneka Gandhi that the procedure contemplated by Article 21 should be fair and reasonable; that it should be “right and just and fair” and not arbitrary, fanciful or oppressive otherwise it was held, it would be no procedure at all, and the requirements of Article 21 is so fundamental and basic that no compromise is possible with this right. It is ‘non negotiable’. This is the minimum requirement which must be guaranteed to enable a citizen to live with human dignity. The State has no right to take any action which will deprive a citizen of the enjoyment of this basic right except in accordance with a law which is reasonable, fair and just. When, in a matter arising under Article 21, the person aggrieved is found to have been totally deprived of his personal liberty or is being deprived of his right to life, the burden of proving that the procedure established

465. Ibid.
466. AIR 1989 AP 235.
467. AIR 1978 SC597.
468. Supra note 467 at p. 247.
by law for such deprivation is just, fair and reasonable lies heavily upon the State.\footnote{Deena v. UOI, AIR 1983 SC 1155(1169).}

In Attorney General of India v. Lachma Devi,\footnote{AIR 1986 SC 467.} an order passed by Rajasthan High Court for public hanging was set aside by the Supreme Court on the ground \textit{inter alia}, that public hanging is un-constitutional and violative of Article 21 of the Constitution. The Court held that even if the crime committed by the accused was barbaric, disgraceful and a shame on any civilized society which no society should tolerate “a barbaric crime does not have to be visited with a barabric pernalty such as public hanging.”\footnote{Ibid.}

The term “procedure established by law” came before Supreme Court for interpretation in A. K. Gopalan v. State of Madras.\footnote{AIR 1950 SC 27.} The petitioner, a communist leader, detained under the Prevention Detention Act, 1950 contended that the Act was violative of Article 21 since it did not prescribe the deprivation of his personal liberty in accordance with procedure established by law which was the essence of Article 21. That the term “law” in Article 21 should be understood as signifying the \textit{universal principles of natural justice and not merely in the sense of an enacted piece of legislation}, He, therefore, argued that a law which did not incorporate the principles of natural justice, could not be valid under Article 21. It was further argued that the expression “procedure established by law” meant the same thing as the American phrase “due process of law”\footnote{Ibid; see also Kumar, Narender, \textit{op cit.}, p.226.} (emphasis added). The Supreme Court rejected the above contentions and held that “procedure established by law” did not mean “due process of law” under American Constitution. The Supreme Court while referring to Constituent Assembly debates held that framers of Constitution deliberately adopted expression “procedure established by law”. It was held by majority of Supreme Court that expression meant procedure prescribed by the law of the State.\footnote{Kumar, Narender, \textit{op cit.}, p.226; see also A K Gopalan v. State of Madras AIR 1950 SC 27.}

The term ‘law’ used in Article 21 of the Constitution has wide meaning. The term is explicitly defined in Article 13. In A. K. Roy v. Union of India\footnote{AIR 1982 SC 710.} the apex court observed that “the contention that word ‘law’ in Article 21 must be construed to mean a...
law made by the legislature only and cannot include an ordinance contradicts the express provisions of Article 123(2) and 367(2) of the Constitution. Besides, it an ordinance is not law within the meaning of Article 21 it will stand released from the wholesome and salutary restraint imposed upon the legislative power by Article 13(2) of the Constitution. The words 'except according to procedure established by law' suggest that Article 21 does not apply where a person is detained by a private individual and not by or under the authority of the State. By the use of words 'established by law' our Constitution accepts the English principle of the supremacy of law, in preference to American doctrine of judicial review of legislation, so far as personal liberty is concerned. Therefore, liberty according to this view, is a liberty which is controlled by law. Law in this expression means State made law or enacted law and not the general principles like that of natural justice. The procedure established by law thus means procedure prescribed by legislature.

(v) HANDCUFFING, FETTERS AND PERSONAL LIBERTY

Handcuffs and fetters are instruments for securing the hands or feet of prisoners under arrest or as a means of punishment. In Sunil Batra v. Delhi Administration, the Supreme Court laid down that "handcuffing is prima facie inhuman and therefore, is over harsh and at the first flush arbitrary. Absent fair procedure and objective monitoring, to inflict "irons" is to resort to zoological repugnant to Article 21 in putting bar fetters for an unusually long period without due regard for the safety of the prisoner and the security of the prison would certainly be not justified. In Sunil Batra v. Delhi Administration, the Supreme Court "pronounced that undertrials shall be deemed to be in custody, but not undergoing punitive imprisonment. Fetters, especially bar fetters, shall be shunned as violative of human dignity, within and without prisons. The indiscriminate resort to handcuffs when accused persons are taken to and from court and the expedient of forcing irons on prison inmates are
illegal and shall be stopped forthwith save in small category of cases where an undertrial has credible tendency for violence and escape a humanly graduated degree of "irons" restraint is permissible if other disciplinary alternatives are unworkable. The burden of proof of the ground is on the custodian. And if he fails, he will be liable in law. Reckless handcuffing and chaining in public degrades, put to shame finer sensibilities and is a slur on our culture." 483 In Prem Shanker v. Delhi Administration, 484 the Supreme Court by majority struck down para 26.22 of the Punjab Police Rules,, 1934 as violative of Articles 14, 19 and 21. Para 26.22 provided that every undertrial who was accused of a non-bailable offence punishable with more than three years prison term would be routinely handcuffed. The Court ruled that handcuffing should be resorted to only when there was "clear and present danger of escape" of the accused undertrial, breaking out of police control. In extreme circumstances, the application of iron is not ruled out. But, even in extreme circumstances where handcuffs have to be put on the prisoner, it is required that the escorting authority must record contemporaneously the reasons for doing so. It has been held to be implicit in Article 21 which "insist upon fairness reasonableness and justice" in the very procedure which authorises stringent deprivation of life and liberty. 485 In Harbans Singh v. State of UP, 486 the Supreme Court has observed:

When undertrials are in jail no fetters are to be used and when they are taken out of jail, no fetters are to be used and when they are taken out of jail, extra guards can be posted for security reasons. The court observed "we fail to understand why proper security arrangements cannot be made in jail to guard these undertrials. Armed guards can be posted to guard them if security reasons so demand but it seems inhuman to keep them in fetters while they are awaiting trial which is delayed, not withstanding the courts order to expedite them. We are therefore, of the opinion that while they are in jail proper arrangements may be made but it is not necessary to keep them in fetters all the time. It will however, be open to the authorities to place extra security restrictions of the type they consider appropriate when these undertrials required to be

484. AIR 1980 SC 1535.
486. AIR 1991 SC 531.
taken out of jail for any purpose. We, therefore, direct that they will not be kept in fetters in jail. 487

In *Sunil Gupta v. State of MP*, 488 the petitioners who were educated and social workers were remanded to judicial custody. The court directed the Govt. to take appropriate action against erring escort party for handcuffing the petitioners without giving reasons for so doing. 489

In *President Citizen for Democracy v. State of Assam*, 490 seven ULFA detenues were lodged inside the ward of Gawahati Medical Collage Hospital who were handcuffed and on top of that tied with a long rope to contain their movement. 491 It was categorically held in *Shukla's case* 492 that handcuffing is *prima facie* inhuman, unreasonable arbitrary and as such repugnant to Article 21 of the Constitution of India. To prevent the escape of an under trial is, no doubt, in public interest, but “to bind a man hand-and-foot, fetter his limbs with hoops of steel, shuffle him along in the street and stand him for hours in the Courts is to torture him, defile his dignity vulgarize society and foul the soul of our Constitutional culture.” 493 Krishna Iyer J, had observed in *Shukla's case* that “insurance against escape does not compulsorily require handcuffing. There are other measures where by an escort can keep safe custody of a detenue without the indignity and cruelty implicit in handcuffs or other iron contraptions. Indeed, binding together either the hands or the feet or both has not merely a preventive impact, but also a punitive hurtfulness. Manacles are mayhem on the human person and inflict humiliation on the bearer.” 494 The three components of 'irons' forced on the human person must be distinctly understood. Firstly to handcuff is to hoop harshly. Further to handcuff is to punish humiliating and to vulgarize the viewers also. Iron straps are insult and pain writ large, animalizing victim and keeper.

487. Ibid.
489. Ibid.
490. AIR 1996 SC 2193.
491. The WP was filed by Sh. Kuldip Nayyer, an eminent journalist in his capacity as President of "Citizens for Democracy" by writing letter dated December 22, 1991 to the judge of Supreme Court. The letter was treated as a writ petition under Article 32 of the Constitution.
493. Supra note, 489, p. 2196.
Since there are other ways of ensuring security, it cannot be laid down as a rule that handcuffs or other fetters shall not be forced on the person of an under-trial prisoner ordinarily...........as necessarily implicit in Articles 14 and 19 that when there is no compulsive need to fetter a person's limbs, it is sadistic, capricious despotic and demoralizing to humble a man by manacling him. Such arbitrary conduct surely slaps Article 14 on the face. The minimal freedom of movement which even a detainee is entitled to under Article 19 (see Sunil Batra supra) can't be cut down cruelly by application of handcuffs or other hoops. It will be unreasonable so to do unless the State is able to make out that no other practical way of bidding escape is available to prisoner being so dangerous and desperate and the circumstances so hostile to safe keeping... But even here, the policeman's easy assumption of scary apprehension or subjective satisfaction of likely escape if fetters are not fitted on the prisoner is not enough. The heavy deprivation of personal liberty must be justifiable as reasonable restriction in the circumstances, ignominy. Inhumanity and affliction, implicit in chains and shackles are permissible, as not unreasonable, only if every other less cruel means is fraught with risks or beyond availability. So it is that to be consistent with Arts. 14 and 19 handcuffs must be last refuge, not the routine regimen. If a few more guards will suffice, then no handcuffs. If a close watch by armed policemen will do, than no handcuffs. If alternate measures may be provided, then no iron bondage. This is the legal norm. In President Citizen for Democracy v. State Assam, the Court laid down following rules with regard to handcuffing:

i) The police and jail authorities are under public duty to prevent the escape of prisoners and provide them with safe custody but at the same time the rights of the prisoners guaranteed to them under Articles 14, 19 and 21 of the Constitution of India cannot be infracted. The authorities are justified in taking suitable measures, legally permissible to safeguard to the custody of the prisoners, but the use of fetters purely at the whims of subjective discretion of the authorities is not permissible.

ii) Handcuffs or other fetters shall not be forced on a prisoner - convicted or

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495. Ibid.
496. AIR 1996 SC 2193.
497. Ibid., p. 2197.
under trial - while lodged in a jail anywhere in the country or while transporting or in transit from one jail to another or from jail to court and back. The police and the jail authorities, on their own, shall have no authority to direct the handcuffing of any inmate of a jail in the country or during transport from one jail to another or from jail to court and back. 498

iii) Where the police or the jail authorities have well grounded basis for drawing a strong inference that a particular prisoner is likely to jump jail or break out of the custody then the said prisoner be produced before the Magistrate concerned and a prayer for permission to handcuff the prisoner be made before the said Magistrate. Save in rare cases of concrete proof regarding prone-ness of the prisoner to violence, his tendency to escape, he being so dangerous / desperate and the finding that no such practical way of forbidding escape is available, the Magistrate may grant permission to handcuff the prisoner. 499

iv) In all cases where a person arrested by police, is produced before the Magistrate and remand - judicial or non-judicial is given by the Magistrate the person concerned shall not be handcuffed unless special orders in that respect are obtained from the Magistrate at the time of the grant of the remand. 500

v) When police arrests a person in execution of a warrant of arrest obtained from a Magistrate, the person arrested shall not be handcuffed unless the police has also obtained orders from the Magistrate for the handcuffing of the person to be so arrested. 501

vi) Where is person is arrested by the police without warrant the police officer concerned may if he is satisfied, on the basis of the guidelines given .... that it is necessary to handcuff such a person, he may do so till the time he is taken to police station and thereafter his production before the Magistrate. Further use of fetters thereafter can only be under the orders of the Magistrate .... 502
An undertrial person should not be handcuffed and also be not taken into procession through the streets which would amount to violation of principles against humanity. Recently, the Supreme Court held in *State of Maharashtra v. Rabikant S. Patil*, that handcuffing of an undertrial and taking him in a procession through the streets of the city is against the principles of humanity and Article 21 of the Constitution. The court further held that the undertrial concerned should be compensated for such act.

**(vi) SURVEILLANCE AND PERSONAL LIBERTY**

Surveillance means “vigilant supervision” or “spy like watching”. It has been defined as the covert observation of places, persons and vehicles for the purpose of obtaining information concerning the identities or activities of subjects.” Surveillance is not the new concept in the police administration. Notwithstanding variation in its methodology, it has been recognised as one of the basic police functions from the earliest times. In ancient India, crime could be prevented and criminals could be controlled timely by organising patrol and surveillance. The *Arthasastra* of Kautilya refers to the existence of a network of spies to assist the police, thereby leaving no room for doubt that surveillance was quite effective during this period. This is further confirmed by seizure of criminals on suspicion or while committing crime. Article 21 of the Constitution ensure personal liberty and on the other hand police has to resort to surveillance to check activities and movement of individuals to prevent commission of offences and to safeguard the community. Surveillance may be pre-conviction or post conviction and it is done by way of domiciliary visits, picketing or shadowing.

It was pointed out by some of the experts that the traditional methods of surveillance led to infringement of freedom and personal liberty guaranteed in the Constitution. Despite this police continued to persist with the old system of surveillance in the

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504. *ibid*.
505. *ibid*.
absence of a more suitable alternative. The traditional method of surveillance was challenged in *Kharak Singh v. UP*. Though surveillance was held to be lawful but court also observed that this method should be adopted for those persons who are clear cases of danger to community security and should not be adopted in routine after every conviction. Kharak Singh was a history sheeter and he was kept under surveillance while police made domiciliary visits to check his presence in the house at odd hours as per regulations of U.P. police. This was challenged by him in Supreme Court as violative of right to life and personal liberty. Supreme Court held that life does not mean animal existence but to live with human dignity and interference in the personal liberty of individual violates fundamental right under Article 21 of the Constitution. Later on the same question came before Supreme Court in *Govind v. State of Madhya Pradesh*. This time the similar Regulations of M.P. police were held Constitutional and keeping the person under surveillance was held as per spirit of Constitution as the regulation had statutory basis unlike U.P. police regulations and judgement of *Kharak Singh v. State of UP* was reversed. The Court held that “depending upon the character and antecedents of the person subjected to surveillance as also the objects and the limitation under which surveillance is made, it cannot be said surveillance by domiciliary visits would always be unreasonable restriction upon the rights of privacy. Assuming that the fundamental rights explicitly guaranteed to a citizen have penumbral zones and that the right to privacy is itself subjected to restriction on the basis of compelling public interest. As Regulation 856 has the force of law, it cannot be said that the fundamental right of petitioners' under Article 21 has been violated by the provision contained in it for what is guaranteed under that Article is that no person shall be deprived of his life or personal liberty except by the procedure established by law. We think that the procedure is reasonable having regard to provision of Regulation 853(c) and 857. Even if we hold that Article 19(1)(d) guarantees to a citizen right to privacy in his movement as an examination from that Article and is

510. AIR 1963 SC 1295.
511. See *ibid*.
512. AIR 1975 SC 1378.
513. *Supra note* 510.
itself a fundamental right, the question will arise whether Regulation 856 is a law imposing reasonable restriction in public interest on the freedom of movement falling within Article 19 (5); or even if it be assumed that Article 19 (5) does not apply in terms, as the right to privacy of movement cannot be absolute, a law imposing reasonable restriction upon it for compelling interest of State must be upheld as valid.\textsuperscript{514}

Though surveillance was held to be lawful but Court observed that this method should be adopted only for those cases who are clear cases of danger to community security and not in routine after conviction and expected the State to revise old police regulation. The Court observed.

Regulation 855, in our view empowers surveillance only of person against whom reasonable material exist to induce the opinion that they show a determination, to lead a life of crime. Crime in the context being confined to such as involve public peace or security only and if they are dangerous security risks. Mere conviction in criminal cases where nothing gravely imperils safety of society can (is involved cannot?) be regarded as warranting surveillance under the Regulation. Similarly domiciliary visits and picketing by the police should be reduced to the clearest cases of danger to community security and not routine follow up at the end of a conviction or release of a person or at the whim of a police officer. In truth, legality apart, these regulations ill accord with the essence of personal freedoms and the State will do well to revise these old police regulations verging perilously near unconstitutionality\textsuperscript{515}.

In \textit{Malak Ram v. State of Punjab},\textsuperscript{516} the question came before the court where police resorted to surveillance for the purpose of prevention of crimes and confined to the limits prescribed by law, no person could complain against the inclusion of his name in the surveillance register, but if it was excessive and went beyond the prescribed limits, its validity could be challenged as violative of right to privacy of a citizen as part of personal liberty guarantee under Article 21 and Article 19 (1) (d).\textsuperscript{517}

\begin{flushleft}
\textsuperscript{514.} Supra note 63 p. 1386. \\
\textsuperscript{515.} Ibid., p. 1378. \\
\textsuperscript{516.} AIR 1981 SC 761. \\
\textsuperscript{517.} Ibid.
\end{flushleft}
(vii) SPEEDY TRIAL AND ARTICLE 21

The right to speedy trial dates from the Magna Carta in 1215 and guaranteed that an accused cannot be held in jail without trial for an excessively long period of time. Although the right to speedy trial is not specifically mentioned as a fundamental right, it is implicit in the broad sweep and content of Article 21. No procedure which does not ensure reasonably a quick trial can be regarded as reasonable, fair or just and it would fall foul of Article 21. There can, therefore, be no doubt that speedy trial, and by speedy trial mean reasonably expeditious trial, is an integral and essential part of fundamental right to life, liberty enshrined in Article 21. When undertrial prisoners are put behind the bars and the State forget that they are to be speedily tried it attracts attention of the judiciary. In *Mohammed Giasuddin v. State of Andhra Pradesh*, Justice Krishna Iyer observed:

...... The State will not hesitate, we expect, to respect the personality in each onvict in the spirit of the preamble to the Constitution and will not permit the colonial hangover of putting people behind the bars, and then forget about them......

If the judicial system does not provide effective redress for the wrongs, the parties may, in their despair, think of extra-judicial methods of seeking redress. Such methods in their own turn, give rise to fresh problems of law and order and this add to the load of Courts. Prolonged trial is a chronic disease in the administration of criminal justice. It denies the important rights to the accused, it reduces the effectiveness of prosecution, it weakens the criminal justice system's ability to deter crimes and it frustrates citizen in their role as witnesses and victims. The Supreme Court of

522. *Ibid.*,
India in the case of *Sheela Barse v. Union of India*,\(^525\) observed that the word trial in the context of speedy trial includes the stage of investigation also. The concerned departments are required to complete the prosecution within the legally allowed period. The delay in prosecution affects to decide the case within reasonable period of time.\(^526\) A speedy trial in a criminal prosecution includes within it both the police investigation of the crime and later adjudication in court.\(^527\) If an accused is not speedily tried and his case remains pending before the Magistrate or Sessions Court for an unreasonable length of time, it is clear that his fundamental right to speedy trial would be violated unless the trial is held up on account of some interim order passed by the superior court or the accused is responsible for the delay in the trial of the case.\(^528\) The need for speedy trial is inevitable, otherwise the loss suffered by the accused will be irreparable. The prolonged trial of case unnecessarily exposes the accused to the hazardous experiences which is, of course, violation of the expanded meaning of personal liberty to which accused is entitled.\(^529\) Article 21 of the Constitution occupies a higher place in the scheme of fundamental rights and virtually became a sanctuary for human values. The right to life and personal liberty is not only available to a free citizen but also to the person inside the prison walls. Justice Krishna Iyer opined that Article 21 enshrines the high value of human dignity and the worth of human person.\(^530\) Article 21 has also been held to be the sole repository of a right to life and personal liberty against the State which embraces all aspects of the personal liberty.\(^531\) The right to speedy trial is also considered as one of the dimensions of the fundamental right guaranteed by the Article 21 of the Constitution.\(^532\)

The denial of speedy trial may with or without proof of something more led to an inevitable interference of prejudice and denial of justice. It is prejudicial to a man to

\(^{525}\) AIR 1986 SC 1773.
\(^{526}\) Ibid.
\(^{528}\) Sheela, Barse v. UOI, AIR 1986 SC 1773.
\(^{529}\) Deb, R., "Rights of Accused Under The Indian Legal System," 1967 Cr. LJ. (Jour) 17.
be detained without trial. It is prejudice to a man to be denied a fair trial. 533 Right to speedy trial is a fundamental right and if trial is delayed it would amount to the denial of justice. 534 In Hussainara Khatoon’s Case, 535 the Supreme Court suggested that “in those cases where police investigations has been delayed over two years, the final report or charge sheet must be submitted by the police within a further period of three months and if that is not done the State government might well withdraw such cases, because if after a period of over two years plus a additional period of three months, the police is not able to file a charge sheet, one can reasonably assume that there is no case against the arrested person.” 536 So far as the child accused of an offence punishable with imprisonment of not more than seven years is concerned, the court would regard a period of three months from the date of filing of complaint or lodging of First Information Report as the maximum time permissible for investigation and the period of six months for the filing of charge sheet as reasonable period within which the trial of the child accused must be completed. If that is not done, the prosecution against the child accused would be liable to be quashed. 537

In Babu Lal v. State of U.P., 538 the apex Court observed that “our judicial system in grave cases, suffers from a slow motion syndrome, which is lethal to ..... 'fair trial’, whatever the ultimate decision.” 539 An accused person can approach Supreme Court in exercise of writ jurisdiction of Supreme Court in case of denial of speedy trial. 540 Expressing its concern at the “shocking state of affairs prevalent in some of the High Courts” for delay in pronouncing judgements after conclusion of arguments, 541 Justice R. P. Sethi observed that “it is policy and purpose of law, to have speedy justice for which efforts are required to be made to come to the expectation of society for ensuring speedy, untainted and unpolluted justice.” 542 The Judge further added that “delay in disposal of the cases facilitates the people to raise eyebrows,

536. Ibid. at 1367.
538. AIR 1978 SC 527.
539. Ibid. at p.528.
541. The Hindu, Delhi, August7, 2001 page 11 (col 5-7).
542. Ibid.
sometime genuinely which, if not checked, may shake the confidence of the people in the judicial system. ... a time has come when the judiciary itself has to assert for preserving its stature, respect and regards for the attainment of the rule of law.”543 While delivering the judgement in some criminal appeals against a verdict of Patna High Court, Mr. Justice R. P. Sethi laid down the following guidelines:

1. The Chief Justices of the High Courts may issue appropriate directions to the Registry that in a case where the judgement is reserved and is pronounced later, a column be added in the judgement where, on the first page after the cause-title date, the date of reserving the judgement and date of pronouncing it be separately mentioned by the Court Officer concerned.

2. The Chief Justices of the High Courts, on their administrative side, should direct the Court Officers/Readers of various benches in the High Courts to furnish every month the list of cases in the matters where the judgements reserved are not pronounced within the period of that month.

3. On noticing that after conclusion of the arguments the judgement is not pronounced within two months the Chief Justice concerned shall draw the attention of the bench concerned to the pending matter. The Chief Justice may also see the desirability of circulating the statement of such cases in which the judgments have been pronounced with in six weeks from the date of conclusion of the arguments among the Judges of the High Court for their information. Such communication be conveyed as confidential and in a sealed cover.

4. Where the judgment is not pronounced within three months from the date of reserving judgement any of the parties in the case is permitted to file an application in the High Court, with prayer for early judgment. Such application as and when filed, shall be listed before the bench concerned within two days excluding the intervening holidays.

5. If the judgment, for any reason is not pronounced within six months any

543. Ibid.
of the parties of the said list shall be entitled to move an application before the Chief Justice of the High Court with a prayer to withdraw the said case and to make it over to any other bench for fresh arguments. It is open to the Chief Justice to grant the said prayer or to pass any other order as he deems fit in the circumstances. 544

The "right to speedy trial" has been interpreted to be a part of the fundamental right to life and personal liberty enshrined in Article 21. Article 21 requires that a person can be deprived of his liberty only in accordance with the procedure established by law which should be a just, fair and reasonable procedure. 545 In other words, such laws should provide a procedure which is fair, reasonable and just. Then alone, would it be in consonance with the command of Article 21. Indeed whenever necessary, such fairness must be read into such law. Now, can it be said that a law which does not provide for a reasonably prompt investigation, trial and conclusion of a criminal case is fair, just and reasonable? It is both in the interest of the accused as well as the society that a criminal case is concluded soon. If the accused is guilty, he ought to be declared so. Social interest lies in punishing the guilty and exonerating the innocent but this determination (of guilt or innocence) must be arrived at with reasonable despatch—reasonable in all the circumstances of the case. 546 The common man understands that the "Justice delayed is justice denied." 547 Justice R. P. Sethi has rightly observed that "it is the policy and purpose of law, to have speedy justice for which efforts are required to be made to come to the expectation of the society for ensuring speedy, untainted and unpolluted justice. 548 Delay in disposal of the cases facilitates the people to raise eyebrows, sometime genuinely which, if not checked, may shake the confidence of the people in the judicial system. 549

In Hussainara Khatoon v. Home Secretary, State of Bihar 550 (No.1), a large

544. Ibid.
545. Kumar, Narender, op.cit., p.213.
547. See Pickles, James (Judge), Straight From Bench, (Melbourne: Phoenix House, 1987) Chap.-V.
548. Supra note 89.
549. Ibid.
550. AIR 1979 SC 1360.
number of men, women and children found behind the bars for years awaiting trial for trivial offences. Justice Bhagwati directed release of under trials and observed that “they have in fact some jail term to their credit. We, therefore, direct that these under trial prisoners... be released forthwith as continuance of their detention is clearly illegal and in violation of their fundamental rights under Article 21 of the Constitution.” 551

Another case identical to Hussainara Khatoon’s 552 came before the Supreme Court in the matter of Kadra Pahadiya v. State of Bihar 553 where persons were detained in jail for 8 years without trial. The Court took the matter aggressively and observed that it is a crying shame upon our judicial system which keeps men in jail for years without a trial. The Judge observed that “we pointed out in Hussainara Khatoon’s case that the speedy trial is a fundamental right of an accused implicit in Article 21 of the Constitution but we notice that in case of these four petitioners this fundamental right has merely remained a paper promise and has been grossly violated.” 554 When people approach the courts for redress of their grievances, they do so in the fond hope that relief would be granted to them at a reasonably early date. As it is, what we find is that cases which on account of their very nature need an early disposal and call for promoting relief. 555 The utility of criminal justice system comes down to zero when speedy trial is not attempted and affected persons languish in jail for years. The Supreme Court while realizing the gravity came out with heavy words. 556 The court observed “we are shouting from house tops about the protection and enforcement of human rights. We are talking passionately and eloquently for maintenance and observation of basic freedom. But, are we not denying human rights to these nameless persons who are languishing in jails for years for offences which perhaps they might ultimately be found not to have committed. Are we not withholding basic freedoms from these neglected and helpless human beings who have been condemned to a life of

551. Ibid.
552. Ibid.
553. AIR 1981 SC 939.
554. Ibid.
556. (1980) 1 SCC 84.
imprisonment and degradation for years on end? Are expeditious trial and freedom from detention not parts of human rights and basic freedoms? Many of these unfortunate men and women must not even be remembering when they entered the jail and for what offence? They have over the years ceased to be human beings. They are mere ticket numbers. Law has become for them an instrument of injustice and they are helpless and despairing victims of the callousness of the legal and judicial system. What faith these left souls can have in the judicial system which denies them a fair trial for so many years and keeps them behind bars, not because they are guilty, but because they are too poor to afford bail and courts have no time to try them.\textsuperscript{557}

**(viii) RIGHT TO GO ABROAD**

The Roman Empire has been fortunate enough to witness the inception of a number of laws in their embryonic state. The history of passport also starts with the same Empire, where for the first time a Passport was deemed necessary for free and safe exit through foreign territories.\textsuperscript{558} The First and Second World Wars made the question of passport so effective as to attract the minds of the top authorities to give a thought over it. The history of passport in India starts with the period of the First World War. The Indian Passports Act of 1917 made it necessary to obtain a passport not only for entering India but also for leaving her territory. However, the obligation to obtain a passport to leave India was abandoned in the Indian Passport Act, 1920. Again in the year of 1950, the Indian Passport Rules were framed to lay down the condition for the grant of passports. Rights to travel abroad is one of vital elements of “personal liberty.” It is also a human right. According to the Universal Declaration of Human Rights , 1948.\textsuperscript{559}

In *Maneka Gandhi v. Union of India*,\textsuperscript{560} the Supreme Court observed that “in

\textsuperscript{557} Ibid.


\textsuperscript{559} Deshta, Sunil and Deshta, Kiran op. cit., p. 116; see also Article 13, Para 2; see also *International Covenant on Civil and Political Rights*, 1966 Article 12.

\textsuperscript{560} AIR 1978 SC 597
an interdependent world requiring for its future peace and progress an over-growing measure of international understanding, it is desirable to facilitate individual contacts between people and to remove all unjustifiable restraints on their movement which may hamper such contacts.\textsuperscript{561} It was held in \textit{Satwant Singh v. Assistant Passport Officer, New Delhi},\textsuperscript{562} that "right to travel abroad" was included within the expression "personal liberty" within the meaning of Article 21.\textsuperscript{563} In \textit{Maneka Gandhi v. Union of India},\textsuperscript{564} the passport of the petitioner was impounded under Section 10(3) (C) of the Passport Act, 1967, as government was empowered to do so in the interest of general public. The government explained that as the presence of petitioner before a commission of Inquiry was necessary in connection with various complaints against her; therefore passport was impounded to restrict her leaving the country. The petitioner challenged the validity of the said order as violative of her fundamental right under Articles 14 and 21. It was contended that Section 10 (3) (c) of the Act was violative of Article 14 as it confers arbitrary power on the government to impound the passport without affording an opportunity of hearing to the holder of the passport. Secondly, right to go abroad being part of right to "personal liberty" the impugned Section did not prescribe any procedure to deprive her of her liberty hence violative of Article 21. Bhagwati J., (the then) upheld the constitutionality of Section 10(3) (c) of the Passport Act, 1967 as not violative of Articles 14, 19(1) (a) or (g) or Article 21. However, the court laid down the principles in respect of scope of rights conferred by Article 14 and 21. The court observed:

\begin{itemize}
  \item[a)] Articles 19 and 21 are not water tight compartments on the other hand the expression of personal liberty in Article 21 is of the widest amplitude covering a variety of rights of which some have been included in Article 19 and given additional protection. Hence there may be some
\end{itemize}

\begin{flushleft}
\textsuperscript{561} \textit{Ibid.}, at p. 657.
\textsuperscript{562} \textit{AIR 1967 SC 1836}.
\textsuperscript{563} \textit{Ibid}.
\textsuperscript{564} \textit{AIR 1978 SC 597}.
\end{flushleft}
overlapping between Article 19 and 21.

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

c) Once the test of reasonableness is imparted to determine the validity of laws depriving a person of his liberty; it follows that such law shall be invalid if it violates the principles of natural justice.565

The principle of reasonableness, which legally as well as philosophically is an essential element of equality or non arbitrariness pervades Article 14 like a brooding omnipresence and the procedure contemplated by Article 21 must answer the test of arbitrariness in order to be conformity with Article 14. It must be “right and just and fair” and not arbitrary, fanciful or oppressive; otherwise it would be no procedure at all and the requirement of Article 21 would not be satisfied.566

(ix) DOCTRINE OF WAIVER OF RIGHTS AND ACCUSED

The “Doctrine of Waiver” explains that a person entitled to a right or privilege is free to waive that right or privilege. It is voluntary relinquishment or abandonment of a known existing legal right or privilege.567 Once a person has so waived his right, he would not be allowed to claim afterwards. It thus means that an agreement in which a person voluntarily waives his right, is enforceable against him, provided other requirements relating to enforceable agreements are complied with. The question arises as to whether the “doctrine of waiver” is applicable to fundamental rights also.568

The doctrine of waiver is based on the premise that a person is the judge and

565. Ibid.
566. Ibid at 624.
568. Ibid.
that he has the liberty to waive the enjoyment of such rights as are conferred on him by
the State, the only requisite being that the person must have knowledge of his rights
and that the waiver should be voluntary.\(^{569}\) The doctrine is of American origin and can
this doctrine be adopted in Indian situations in toto. The Supreme Court observed that
"in our opinion, doctrine of waiver enunciated by some American Judges in construing
the American Constitution cannot be introduced in our Constitution without the further
discussion on the matter.\(^{570}\) Mahajan, C.J., observed, "in a criminal prosecution it is
not open to an accused person to waive his constitutional right and get convicted.\(^{571}\)
He further said, "we think that the rights described as fundamental rights are a neces­
sary consequences of the declaration in the preamble that the people of India have
solemnly resolved to constitute India into a sovereign democratic republic to secure
to all its citizens, justice, social, economic and political, liberty of thought, expression,
belief, faith and worship; equality of status and of opportunity. These fundamental rights
have not been put in the Constitution merely for individual benefit, though ultimately
they came into operation in considering individual rights. They have been put there as
a matter of public policy and the doctrine of waiver can have no application to provi­sions of law which have been enacted as a matter of constitutional policy. Reference
to some of the Articles, "inter alia" Article 15(1), 20, 21 makes the proposition quite
plain. A citizen cannot get discriminated by telling the "State" you can discriminate," or
get convicted by waiving the protection given under Articles 20 and 21.\(^{572}\) The Su­
preme Court have thus expounded the following views:

(a) It is not open to a citizen to waive his fundamental rights conferred by
Part-III of the Constitution. The Supreme Court is the bulwark of the fundamental
rights which have been for the first time enacted in the Constitution and it would be a sacrilege to
while down these rights.

(b) Whatever be the position in America, no distinction can be drawn here,
as has been attempted in the United States pof America, between the
fundamental rights which may be said to have been enacted for the

\(^{569}\) Behram Khurshid v. Bombay, AIR 1955 SC 123.
\(^{570}\) ibid., at p. 146.
\(^{571}\) ibid.
\(^{572}\) ibid.
benefits of the individuals and those enacted in public interest or on grounds of public policy.

(c) Ours is a nacent democracy and situated as we are, socially, economically, educationally and politically, it is the sacred duty of the Supreme Court to safeguard the fundamental rights. 573

Hence, the fundamental rights available to the accused person can't be waived as these are embodied in our Constitution as a matter of Constitutional policy and the citizen could no voluntarily get discriminated or waive his fundamental rights against discrimination. 574

(VIII) PREVENTIVE DETENTION JURISPRUDENCE AND THE PHILOSOPHY OF RIGHTS OF ACCUSED

It is well established that the greatest heritage of democracy to mankind is the right to personal liberty and dignity. 575 According to Article 21, "no person can be deprived of his life or personal liberty except according to procedure established by law". This means that a person can be deprived of his life or personal liberty provided his deprivation was brought about in accordance with the procedure prescribed by law. 576 Article 22 provides those procedural requirements which must be adopted and included in any procedure enacted by the legislature. If these procedural requirements are not complied with it would then be deprivation of personal liberty which is not in accordance with the procedure established by law. 577

Article 22 provides that "No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of


Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty four hours of such arrest excluding the time necessary for the journey from the place of arrest to Court of the Magistrate and no such person shall be detained in custody beyond the said period without the authority of a Magistrate. Clause (3) of Article 22 of the Constitution is exception to clause (1) and (2) and it reads "Nothing in clause (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."

Clause (4) to (7) of Article 22 provides the procedure which is to be followed if a person is arrested under the law of preventive detention. There is no authoritative definition of the term 'preventive detention' in Indian law. The word 'preventive' is used in contradistinction of the word 'punitive'. It is not a punitive but a preventive measure. While the object of the punitive detention is to punish a person for what he has already done, the objective of preventive detention is not to punish a man for having done something but to intercept him before he does it and to prevent from doing it. No offence is proved, nor any charge is formulated. The sole justification of such detention is suspicion or reasonable probability of the detenu committing some act likely to cause harm to the society or endanger the security of the Government and not criminal conviction which can only be warranted by legal evidence.

Dr. Bakshi Tek Chand member of Constituent Assembly observed during debates with reference to preventive detention (Article 15A), that "in no Constitution in the world such preventive detention is provided for..." and Shri Jaspat Roy Kapoor another

578. Clause (1) of Article 22.
579. Ibid.,
580. Clause (3) of Article 22.
581. Supra note 12, p.91 (This was observation of Mukherjee, J. in the case).
582. CAD., Vol.9 p.1545; The Constitvent Assembly was constituted for framing the Constitution of India. The Assembly consisted of elected representatives of Provincial States and of the Princely States who were chosen according to a formulate evolved in consequence of the Cabinet Mission Plan of May, 16, 1946.
member observed that "this is very hard and strikes at the very root of fundamental rights and personal liberty. The person detained may be kept in detention without the sanction of the magistrate and for any length of time and without even reason for detention being told to him. There shall be only one review of his case and there shall be no periodical review." 583

As a matter of fact, even to the introduction of Article 15-A in the Assembly, the Home Affairs Ministry took 'very strong objections' to the powers provided for Advisory Boards. 584 The Govt. categorically stated in its letter to the Assembly Secretariat that 'it would not be possible for the executive to surrender their judgement to an Advisory Board as a matter of Constitutional compulsion 585 and the Ministry wanted the details of detention to be left to the Legislature. It was on the face of this objection of the Home Ministry; Ambedkar introduced in the Assembly Article 15-A, 586 which was eventually passed by the members with all the reservations they had.

The power of preventive detention is qualitatively different from punitive detention. The power of preventive detention is a precautionary power exercised in reasonable anticipation. It may or may not relate to an offence. It is not a parallel proceeding. It does not overlap with prosecution even if it relies on certain facts for which prosecution may be launched or may have been launched. An order of preventive detention may be made before or during prosecution. An order of preventive detention may be made with or without prosecution and in anticipation after discharge or even acquittal. The pendency of prosecution is no bar to an order of preventive detention. An order of preventive detention is also not a bar to prosecution. 587 Preventive detention is a precautionary measure and since no charge is made and there is no conviction, no punishment is intended and so it is claimed it is not punitive and therefore no objection is to be taken. 588

583. Ibid, p.1543.
584. See letter from S.N., Mukerji (Assembly Secretary) to H.V.R. Iyenger, Home Secretary, dated 16th August, 1948 and the reply to it. Letter from H.V.R. Iyenger to S.N. Mukerji, dated 19-20 August, 1949, Law Ministry, Archives; See G.Austin., The Indian Constitution; Cornerstone of a Nation, (1976), p. 110.
585. Ibid.
586. Ibid; see also Deshta, Sunil and Deshta, Kiran, op.cit., p.57.
Clause (4) of Article 22 reads, "No laws providing for preventive detention shall authorize 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:..." 589

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. 590 Under Article 22(6) disclosure of facts which are considered to be against public interest may not be furnished to the detenu. Hence it follows that both the obligations to furnish particulars and the duty to consider whether the disclosure of any facts involved therein is against public interest, are vested in the detaining authority not in any other. 591 Clause (7) authorize Parliament to prescribe by law –

(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 an Advisory Board in any inquiry under subclause (a) of clause (4). 592

Clauses (4) to (7) of Article 22 of the Constitution of India have provided some safeguards against preventive detention but they are "pale shadow of safeguards" 593

589. Clause (4) of Article 22.
590. Clause (5) of Article 22.
592. Clause (7) of Art. 22 of Constitution.
Preventive detention is a legacy of the British regime in which it was first introduced as the Bengal State Prisoner’s Regulation III of 1818 which was extended to Bombay Presidency in 1827 and to the other parts of the British regime between 1779 and 1829. Preventive detention has existed in India ever since, 1818 except 1977. The Government of India Act of 1935 empowered the Central Legislature the exclusive power to enact laws on preventive detention in British India for reasons related to Defence, External Affairs, or the discharge of the functions of the Crown in its relation with the Indian States.

The term “preventive detention” has not been defined in the Constitution or any other Indian legislation. However, it finds mention in entry 9 of list I which empowers the Central Legislature to pass law with regard to preventive detention. It also appears in entry 3 of list III under Schedule VII which empowers both the Central and the State Legislatures to make laws on preventive detention. 'Preventive detention' means the detention of a person without trial in such circumstances that the evidence in possession of the authority is not sufficient to make a legal charge or to secure the conviction of the detenu by legal proof. Kania, C.J., described preventive detention in A. K. Gopalan v. State of Madras, as not a punitive but a precautionary measure.” He further observed that in preventive detention “no offence is proved nor any charge is formulated” and that “the jurisdiction for detention is suspicion or reasonable probability and not criminal conviction which will be warranted by legal evidence.” The word “preventive” is used in Article 22 in contradistinction to the word “punitive”. Preventive detention is thus a preventive measure, a precautionary measure and not punitive one. The object is not to punish the person, but to intercept, to prevent him from doing something prejudicial to the State.

595. Ibid., p. 74.
598. Mehta, Satinder Mohan, op. cit., p.117.
600. AIR 1950 SC 27.
601. Ibid.
602. Kumar, Narendra, op. cit., p. 233.
explains the difference between preventive and punitive detentions by holding that "the basis of preventive detention is the satisfaction of the executive of a reasonable probability of the likelihood of the detenu acting in a manner similar to his past and preventing him by detention from doing the same," whereas "a criminal conviction is for an act already done which can be possible only by a trial and legal evidence..... on proof of guilt....beyond reasonable doubt." The justification for preventive detention is suspicion, reasonable apprehension of impending commission of an act prejudicial to State. Sh. Alladi Krishnaswami Ayyar, a member of the Drafting Committee of the Constituent Assembly observed, "preventive detention, particularly in the prevailing conditions in the country, was a necessary evil, since there were certain undesirable people determined to undermine the sanctity of the Constitution, the security of the State and even individual liberty itself." Patanjali Sastri, J., while explaining necessity of law of preventive detention in Gopalan's case, observed: ...This sinister-looking feature, so strangely out of place in a democratic Constitution which insists personal liberty with the sacrosanctity of a fundamental right and so incompatible with the promises of its preamble in doubtless designed to prevent the abuse of freedom by antisocial and subversive elements which might imperil the national welfare of the infant Republic.

A detenu is not a convict... Power to detain primarily intended to be exercised in those rare cases when the larger interest of State demands that restrictions shall be placed upon the liberty of a citizen curbing his future activities. The power to detain is not the power to punish for offences which the executive authority in his subjective satisfaction believes a citizen to have committed.

The first Preventive Detention Act was enacted by the Parliament on 26th February, 1950. The object of the Act was to provide for detention, to prevent any person from acting in a manner prejudicial to the defence of India, the relations of India with foreign powers, the security of India or a State or the maintenance of public order, the maintenance of supplies and services essential to the community. Section 3

607. Ibid.
empowered the Central and the State Governments and some officers under them to make orders of detention on the subjective satisfaction. The Preventive Detention Act, 1950 was enacted as purely a temporary measure and was to cease to have effect on 1st April, 1951. The Act was, however, extended from time to time till it lapsed on December, 31, 1969. The prominent features of the Preventive Detention Act, 1950, were as follows:

(i) The authority ordering detention of a person was not bound to disclose the facts pertaining to arrest to the detenu , the disclosure of which according to detaining authority, was against public interest.

(ii) The Act authorised the government to continue detention of the person for an indefinite period of time once it was confirmed by the Advisory Board.

(iii) In special cases, a person could be detained for one year without obtaining the opinion of the Advisory Board.

(iv) The detention order was not to be disclosed to the court and any person who disclosed the order including the jail authorities were punishable with imprisonment for a term which could extend to one year or with fine or both.

The new preventive detention law was revived in the name of the Maintenance of Internal Security Act, 1971 (MISA) which continued in operation till 3rd August 1977. The Supreme Court amplified the necessity of enacting MISA, 1971 in Mohd. Subrati alias Mohd. Karim v. State of WB that “The act was brought on the statute book in 1971. Its enactment was necessitated because in view of the prevailing situation in the country and the developments across border. It was considered necessary for

608. Grounds of detention have been taken from entry 9 of Union list, entry 3 of List III concurrent list of Seventh Schedule of the Constitution. “Public order” falls in the State list under entry I, II of Seventh Schedule.

609. Sec. 7(2) The Preventive Detention Act, 1950.

610. Sec. 11 ibid.

611. Sec. 12 (1) ibid.

612. Sec. 14(1) and (2) ibid.

613. The Maintenance of Internal Security Act broadly incorporated the provisions contained in the Preventive Detention Act, 1950.

urgent and effective preventive action in the interest of national security to have powers of preventive detention to deal effectively with threats to the defence and the security of India because the existing laws available to deal with the situation were not found to be adequate.”

This Act contained many of the earlier provisions of Preventive Detention Act along with new provisions such as Section 17A which made provision for detention under certain circumstances without reference to the Advisory Board. But Section 17-A was struck down by the Supreme Court. In 1980, President promulgated National Security Ordinance and later on National Security Act, 1980 was enacted. The Central Government, State Government and some officers of State Government can order detention on the grounds specified in Section 3 of the Act:

The Central Government or the State Government may:

(a) if satisfied with respect to any person that with a view to preventing him from acting in any manner prejudicial to the defence of India, the relations with foreign powers, or the security of India; or

(b) if satisfied with respect to any foreigner that with a view to regulating his continued presence in India or with a view to making arrangements for his expulsion from India.

It is necessary so to do, make an order directing that such person be detained.

The Central Government or State Government may also detain a person for preventing him from acting in any manner prejudicial to the Security of State Government, or maintenance or public order or supplies and services essential to the community. The State Government may by specific written order may confer power to detain persons under clause (2) of Section 3 to Distt. Magistrate or a Commissioner of Police in their jurisdiction and such order shall remain in force for not more than twelve days unless approved by the State Government.

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615. Ibid., Justice Dua’s observation.
617. See section 3(1) of National Security Act, 1980.
618. See clause (2) of Section 3 ibid.
619. See clause (3) ibid; The D.M. or Commissioner of Police may be conferred powers by State Govt. only for the purpose of clause (2) of Sec 3 of NSA, 1980 and powers for detention under clause (1) of Section 3 can be utilised by Central or State Government and can’t be further delegated.
620. Clause 4 of Sec. 3 NSA; Where grounds of detention are communicated by officer detaining within 5 days but not later than 10 days detention will remain in force for 15 days as provided in provision to clause (4) of Sec 3.
It has been held that it is necessary in each case to examine the facts to determine not the sufficiency of the grounds, nor the truth of the grounds but nature of the grounds alleged and see whether these are relevant or not for considering whether the detention of detenu is necessary for maintenance of public order. In view of nature of the allegation mentioned in the grounds, in the instant case, are not of such nature as to lead to any apprehension that the even tempo of the community would be endangered. Therefore, the detention of the detenu under Sec.3 (2) of the Act was not justified. A detention order may be challenged on the ground that the law under which it is issued is invalid or it is contravention of the provision of law under it is made or if it is made in contravention of the provision of the Constitution.

When a man has been detained, it is unquestionably his right to know the grounds upon which he has been arrested and detained. The grounds, "means all the basic facts and materials which have been taken into consideration by the detaining authority in making the order of detention and on which the detention is based." In another case the Court explained that "Grounds" means the conclusions drawn by the authorities from the 'facts' or 'particulars' which have led the authority to pass the order of detention. It has been held that the grounds must be self-explanatory and self-sufficient and the copies of documents referred to in the grounds, must be supplied. If the grounds are only verbally explained to the detenu and nothing in writing is left with him in a language which he understands, it has been held that the purpose of Article 22(5) is not served.

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623. CAD, Vol. 9 p.1550 observation of Dr. P.K. Sen, member Constituent Assembly during debates.


India, service of grounds in English was no sufficient compliance with the requirement contained in Article 22(5). Simply by reason that the detenu signed in English, did not mean that he could understand the grounds communicated in English when he did not have working knowledge of English. The non-furnishing the copies of statements prevented the appellant from making effective representation against detention and since the Constitutional safeguard in this behalf was clearly breached the impugned detention order cannot be sustained. In case the particulars of the grounds were not communicated and so detention order was set aside. There was no question of subsequent communication of particulars and particulars of each of the grounds were held required to be communicated. The Supreme Court was not happy with the label "supplementary grounds" and suggested that the Court should look beyond the label to find if the particulars were supplementary grounds or supporting the existing grounds.

In actual practice the grounds supplied as an objective test for determining the question whether a nexus reasonably exists between grounds of detention and detention order or whether some infirmities had crept in. A conjoined reading of the detention order and the grounds of detention is, therefore, necessary. It is largely from prior events showing tendencies or inclinations of a man that inference can be drawn whether he is likely in future to act in a prejudicial manner. But such conduct should be reasonably proximate and have a rational connection with the conclusion that the detention order must be carefully considered. Though the possibility of prosecution being launched is not an irrelevant consideration. Failure to consider such possibility would not vitiate the detention order. Where detention is made on the two or more grounds such order of detention shall be deemed to have been made separately on each of such grounds and such order shall not be deemed to be invalid or inoperative merely because one or some of the grounds is or are vague, non existent,

629. AIR 1981 SC 1153.
630. Ibid; see also Lallubhai v. Union of India, AIR 1981 SC 728.
631. see Yammam Mangibabu Singh v. State of Manipur, AIR 1983 SC 300 at p.302; 1983 Cr LJ 445; see also Madan Gopal v. Union of India, 1993(1) All India Cr. LR 533(Delhi).
non-relevant, not connected or not proximately connected with such person, or invalid for any other reason whatsoever.  

When a person is detained in pursuance of a detention order, the authority, making the order, shall as soon as may be, but ordinarily not later than five days and in exceptional circumstances and for reason to be recorded in writing, not later than ten days from the date of detention, communicate to him the ground on which the order has been made and shall afford him the earliest opportunity of making representation against the order to the appropriate authority. The Authority, however may not disclose the facts which it considers to be against the public interest to disclose.

On the issue of nondisclosure of document on the grounds of privilege, the Supreme Court held “The executive is not the organ solely responsible for public interest. It represents only an important element in it but there are other elements. One such element is the administration of justice …. When there are more aspects of public interests to be considered the court will, with reference to the pending litigation, be in a better position to decide where the weight of public interest predominates”.  

In Kailash Pandey v. State of Uttar Pradesh, the grounds of detention were based upon the confessional statements and the confessional statements were the very core of the grounds. Yet copies of those statements were not furnished to the detenu alongwith the grounds of detention. Thereby the detenue was denied the opportunity of making a proper and adequate representation, therefore, the detenue was directed to be released. Right to represent has been given not only by Art. 22(5) of the Constitution, but also by Sec. 8 of the National Security Act. The right is, “therefore to be treated as an extension of the Constitutional right already available to a detenue under Art. 22(5). The Legislature has, in fact, given effect to the constitutional right by providing in Sec 8 of the National Security Act that the detenue shall have the right of

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635. Section 5A of NSA, 1980. This section was inserted by Sec 2 of Act No. 60 of 1984 (w.e.f. 21st June, 1984) published in the Gazette of India, Extraordinary, pt.-II Sec.1, dated 1st September, 1984.
636. See 8(1) NSA, 1980.
637. Clause (2) of Sec.8, ibid.
640. Ibid; see also State of Rajasthan v. Talib Khan, 1997(1) EastCr.C.193 at p.198 (SC).
making a representation to the appropriate Government. Duty is cast on the detain­ing authority to inform a detenue about his right to make a representation to the Central Government. Failure to inform of his right invalidates the detention. The inevitable conclusion is that non-intimation to detenue of his right to make representation to the Central Government has in the case at hand made the order of detention invalid. 641 Article 22(5) requires that the detenue shall be afforded the earliest opportunity of making representation against the order of detention. No avoidable delay, no short­fall in the materials communicated shall stand in the way of the detenue in making an earlier, yet comprehensive and effective representation in regard to all basic facts and materials which may have influenced the detaining authority in making the order of detention depriving him of his freedom. There are the legal safeguards enacted by the Constitution makers against arbitrary or improper exercise of the vast powers of preventive detention which may be vested in the Executive by a law of Preventive Detention. 642 Article 22(5) enjoins the detaining authority to afford the detenue the earliest opportunity to make a representation against the order of detention. The right to make a representation implies that the detenue should have such information as will enable him to make a representation. All basic and material facts which influenced the detaining authority to order detention must be communicated to the detenue. Unless such information is furnished to him, it is not possible for the detenue to make the representation. In that case, the right guaranteed under Article 22(5) will be illusory but not a real at all. 643

In Pushpa v. Union of India. 644 Desai J., followed John Martin’s case and ruled:

1. The appropriate authority was bound to give an opportunity to the detenue to make a representation and to consider the representation as early as possible.

2. The detenue must be afforded an earliest opportunity of making a representation against the order.

3. There should be no delay in consideration of representation.

4. The appropriate authority should exercise its opinion and judgement on the representation before referring it to the Advisory Board.

5. The Consideration of representation of the detenue should be independent of its consideration by the Advisory Board.

The N.S.A. provides for constitution of one or more advisory boards by the appropriate government which shall within three weeks from the date of detention of detenue place before it grounds on which order has been made together with representation of detenue, if any. Article 22(5) permits the detenue to make a representation. But the Constitution is silent as to the person to whom it has to be made or how it has to be dealt with. A law of preventive detention which makes no provision on these points is not, therefore, unconstitutional. The right to representation loses both its purpose and meaning without expeditious disposal of the same. When the explanation is unsatisfactory or there is unexplained delay in considering detenue's representation, the order of detention becomes invalid but the order is valid if the

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645. See also Sec. 9 of NSA, 1980; one or more Advisory Boards can be constituted by Central or State Government. Each such Board shall consist of 3 members who are or have been or are qualified to be appointed as judges of High Court and one of them is to be appointed as Chairman; The term "appropriate government" means Central or State Govt. as the case may be as defined in Sec 2(a) of NSA, 1980.

646. Section 10, NSA; If detention is made on orders of an officer mentioned in sub Section (3) of Sec. 3 of NSA, the report of such officer is also to be placed before Advisory Board.

647. A.K. Gopalan v. State of Madras, AIR 1950 SC 27; Section 8 of NSA, 1980 provides for affording an opportunity to the detenue to make representation to the appropriate Government but Act is silent about its form and manner in which it is to be dealt by appropriate Govt.

delay is explained satisfactorily. 649 The duty of the government to consider representation without waiting for the opinion of the Advisory Board was affirmed in Nagendra v. Gujral. 650 If the order of detention, becomes immediately invalid, and any subsequent reference to the Board for consideration and rejection will not validate detention. 651 However, where the Government did not consider the representation but waited for the opinion of the Board, the detention was held invalid. Therefore, the representation has to be considered without any delay. 652

Article 22 (4) provides for preventive detention and an Advisory Board is to recommend as to whether “there is in its opinion sufficient cause for such detention”. This provision therefore presupposes that there will be no need for the detenues to have access to Courts for redress when there is an Advisory Board to give such redress. But redress cannot be done properly if the representation is not made properly. To make access to Court by detenues really unnecessary, it will be necessary that main procedural rules regulating rights of accused in trial in courts of law should be made available to detenues to make effective representation before the Advisory Board. From the point of view the right of the detene to make representation by his own counsel assumes special significance. 653 A consideration of the representation by the Board is an additional safeguard and not a substitute for consideration of the representation by the Government which is required by Article 22 (5). 654 In Jayanarain Sukul v. State of W.B., 655 the Supreme Court laid down four principles which are to be followed with regard to representation of the detene:


650. AIR 1979 SC 420.


655. AIR 1970 SC 675.
(1) The appropriate authority is bound to give an opportunity to the
detenue to make a representation and to consider the representation of the detenue
as early as possible.

(2) The consideration of representation of the detenue by appropriate authority is entirely independent of any action by the Advisory Board including the consideration of the representation of the detenue by the Advisory Board.

(3) It is true that no hard and fast rule can be laid down as to the measure of time taken by the appropriate authority for consideration but it has to be remembered that the Government has to be vigilant in the governance of the citizens.

(4) The appropriate Government is to exercise its opinion and judgment on the representation before sending the case along with the detenue’s representation to the Advisory Board. If the appropriate government releases the detenue, the Government will not send the case along with the detenue’s representation to the Advisory Board. If the Government does not release the detenue, it will send the case to the Board. If thereafter the Advisory Board will express an opinion in favour of release of the detenue, the Government will release the detenue. If the Advisory Board will express any opinion against the release of the detenue, the Government may still exercise the power to release the detenue.\(^\text{656}\)

The Advisory Board has to consider the material before it and any other further information from appropriate Government or any person through the appropriate Government and in any particular case if the person desires to be heard in person, after hearing him the person, submit its report to the appropriate Government within 7 weeks from the date of detention of such person.\(^\text{657}\)

Clause (4) of Section 11 of N.S.A. makes it clear that “nothing in this section entitle any person against whom the detention order has been made to appear by any legal practitioner in any matter connected with the reference to the Advisory Board.” However, the detenue’s right to representation through counsel was conceded by the Supreme Court in *Francis Coralie v. Union of India*\(^\text{658}\) and it was also concluded in


\(^{657}\) Clause (1) of Section 11 NSA, 1980.

\(^{658}\) AIR 1981 SC 746.
Hemlata v. State of Maharashtra,\textsuperscript{659} that only "in certain cases complicated" and it cannot be claimed "as of right". In A. K. Roy v. Union of India,\textsuperscript{660} the Court dismissed the view. The Supreme Court, however, allows the detenue to consult a lawyer only to prepare his representation or to file writ petitions to court for release but is \textit{not permitted to appear before the Advisory Board} \textsuperscript{661} (emphasis added). Nand Lal v. State of Punjab,\textsuperscript{662} the validity of detention order made under Section 3 of the Prevention of Black Marketing and Maintenance of Supplies of Essential Commodities Act, 1982, was challenged that the procedure adopted by the Advisory Board in allowing legal assistance to the State but denying such assistance to the detenue was held arbitrary, unreasonable and violative of Article 21 read with Article 14 of the Constitution.\textsuperscript{663} However, "without representation by legal counsel, the procedure of trial or consideration of detention will not be fair and just"\textsuperscript{664} as was observed by Sutherland, J., in American case of Ozie Powell v. State of Alabama,\textsuperscript{665} that the "right to be heard by counsel."\textsuperscript{666} He argues that "even the intelligent and educated layman has small and sometimes no skill in the Science of law. He is unfamiliar with the rules of evidence and left with out the aid of a counsel, he may be put on trial without charge and convicted upon incompetent evidence or evidence irrelevant to the issue or otherwise inadmissible."\textsuperscript{667} Secondly, "he lacks both the skill and knowledge adequately to prepare his defence.... And without it (the aid to counsel) though not guilty he faces the danger of conviction because he does not know how to establish his innocence."\textsuperscript{668} In any case where the Advisory Board has reported that there is, in its opinion sufficient cause for the detention of a person, the appropriate Government may confirm the detention order and continue the detention of the person concerned for such pe-

\textsuperscript{659} AIR 1982 SC 8 Para 6.
\textsuperscript{660} AIR 1982 SC 710.
\textsuperscript{661} Ibid., p.748.
\textsuperscript{662} AIR, 1981 SC 2041
\textsuperscript{663} Ibid.; see also Deshta, Sunil and Deshta, Kiran,\textit{op. cit.}, p. 18
\textsuperscript{664} Dhar, Panna Lal,\textit{op cit.}, p.110
\textsuperscript{665} (1932) 77 LED, 158
\textsuperscript{666} Ibid; see also Dhar, Panna Lal, \textit{op cit.}, p.110.
\textsuperscript{667} Ibid.
\textsuperscript{668} Ibid.
period as it thinks fit.\textsuperscript{669} Where Advisory Board opines that there is no sufficient ground for detention of the person appropriate Government shall revoke the detention order and cause the person concerned to be released forthwith.\textsuperscript{670}

The maximum period of detention where detention is confirmed by Advisory Board, shall be twelve months,\textsuperscript{671} but appropriate Government is empowered to revoke or modify the detention order at any time.\textsuperscript{672} The appropriate Government may also release the detained person temporarily with or without conditions or after entering a bond with or without sureties.\textsuperscript{673} The breach of conditions and failure to surrender himself in manner specified is punishable with imprisonment for a term which may extend to two years with or without fine.\textsuperscript{674}

Hence, under the Constitution of India,\textsuperscript{675} the National Security Act and other laws\textsuperscript{676} enacted by the States, a person can be detained if he is acting in a manner prejudicial to the defence of India or relation of India or a foreigner with a view to regulate his continued presence in India or expulsion from India. The person can also be detained with a view to preventing him from acting in any manner prejudicial to the security of the State Government or public order or from acting in any manner prejudicial to the maintenance of Supplies and Service essential to the community.\textsuperscript{677} Detenue has the right to know the grounds of detention and to make representation against the detention order.\textsuperscript{678} The detenue's representation together with grounds of detention

\textsuperscript{669} Clause (1) of Section 12 \textit{ibid.}
\textsuperscript{670} Clause (2), \textit{ibid.}
\textsuperscript{671} Section 13, NSA, 1980; Section 14-A was inserted in the Act for its application to the State of Punjab and Union Territory of Chandigarh by National Security (Amendment)Act, 1987 (27 of 1987), Sec.3 (wef. 9th June, 1987), published in Gazette of India, Extraordinary, pt. II.1, dated 31st August, 1987; The maximum period of detention in terrorist affected and disturbed areas is 24 months and person can be detained for six months without obtaining opinion of Advisory Board; See Sec. 14-A.
\textsuperscript{672} Sec. 14 NSA.
\textsuperscript{673} Sec. 15(1) and (2) of NSA.
\textsuperscript{674} Clause (3) and (4) of Sec. 15 NSA.
\textsuperscript{675} Article 22 of Constitution of India.
\textsuperscript{676} National Security Act, 1980; There are different laws enacted by State Governments.
\textsuperscript{677} See entry of list I of Schedule VII; entry 3 list III Schedule VII of Constitution of India; see also section 3 of National Security Act, 1980; The Supreme Court clarified the difference between law and order, public order in the matter of Ram Manohar Lohia v. State of Bihar, AIR 1966 SC 740.
\textsuperscript{678} Clause (5) of Article 22 of Constitution; See Sec 8 of NSA, 1980.
are to be placed before the Advisory Board.\textsuperscript{679} The detenu has right to be released if in the opinion of the Advisory Board there is no sufficient cause.\textsuperscript{680} On the query raised by Sh H. V. Kamath during Constituent Assembly debates, Dr B. R. Ambedkar replied that a writ of \textit{habeas corpus} can be asked for and issued in any case but the other writs depend upon the circumstances of each different man, because the object of the writ of \textit{habeas corpus} is very limited one.\textsuperscript{681} Article 22 and the provisions of the National Security Act, 1980 are not beyond the purview of Article 32 and 226 of the Constitution and in case of non disclosure of grounds of detention and violation of procedure, Supreme Court or High Court can be approached for release.

The procedural provisions contained in clauses 3 to 7 of Article 22 of the Constitution relating to the scheme of preventive detention in India have come up for much criticism as not confirming to the principles of natural justice. Denial of right of representation by detenu’s own counsel, denial of other rights like the right to speaking order etc., are often sought to be tested on the anvil of natural justice...”\textsuperscript{682}

The judicial attitude has varied from A K Gopalan v. State of Madras (1950)\textsuperscript{683} to A. K. Roy’s case (1982)\textsuperscript{684} and Vijay Narain’s case (1984)\textsuperscript{685} In Gopalan’s case,\textsuperscript{686} the attitude of the Supreme Court reflected the mood of the government of the time to maintain order and stability after the large scale communal bloodshed before and subsequent to partition.\textsuperscript{687} Kania, C.J., observed with reference to validity of Preventive Detention law:

\begin{quote}
If the legislature prescribes a procedure by a validly enacted law and such procedure in the case of preventive detention does not come in conflict with express provisions of Part-III or Article 22(4) to (7), the Preventive Detention Act must be held valid notwithstanding that the Court may not fully approve of the procedure prescribed under such Act.\textsuperscript{688}
\end{quote}

\begin{enumerate}
\item Sec. 10 NSA, 1980.
\item Sec. 12 \textit{Ibid.}
\item C.A.D., Vol. 9. p. 1564.
\item Dhar, Panna Lal, \textit{op. cit.}, p. 102.
\item AIR 1950 SC 27.
\item A. K. Roy v. Union of India, AIR 1982 SC 710.
\item Vijay Narain Singh v. State of Bihar, AIR 1984 SC 1334.
\item Supra note 73.
\item Dhar, Panna Lal, \textit{op. cit.}, p. 239.
\end{enumerate}
In State of Bombay v. Atma Ram, both Patanjali Sastri and Das, J.J., gave a restricted construction to clause (5) of Article 22 dealing with representation of the detenue. According to Das, J., if sufficiency of grounds is not justiciable at the initial stage when the order of detention made, it is wholly illogical to say that the sufficiency of the same becomes justiciable as soon as they are communicated to the detenue for representation. According to him there are provisions in clause (5) to supply particulars apart from the grounds already supplied. Patanjali J., also held the view that clause (5) of Article 22 did not contain any provision to warrant the view that the grounds of detention must be such that they are sufficient to make a adequate representation. In A. K. Roy the Court held that “Court has no power to judge the fairness and justness of procedure established by law for the purposes of Article 21.” In Vijay Narain’s case, the Court observed that, “the sufficiency of grounds is not for the Court but for the detaining authority for the formation of his subjective satisfaction that the detention of a person is necessary.” Shri. H.V. Kamath observed in the Constituent Assembly that personal liberty can’t be absolute. He further said that, “No man can have absolute personal liberty if he wants to live within the social framework. If a man leaves the world and becomes an absolute sanyasi, not in the customary sense of the term but in the truest sense, the case is different. If any man was to live in society, his personal liberty must be restrained. Liberty without restraint will become licence.”

(IX) CONSTITUTIONAL MECHANISM FOR THE SAFEGUARD OF RIGHTS OF ACCUSED

The Preamble to the Constitution of India envisages a solemn form of all ideals and aspirations for which the country had struggled during British regime. It

689. AIR 1951 SC 157.
690. Ibid; see para 26 and 38 of judgment.
693. Ibid.
694. CAD, Vol. 9,p.1518.
695. The preamble to the Constitution has been called “a key to open the mind of the makers and shows the general purposes for which they made the several provisions in the Constitution,” see Re Berubari Union and Exchange of Enclaves, AIR 1960 SC 845.
declares to secure to all citizens: justice, liberty of thought and expression, belief, faith and worship; equality of status and of opportunity. There is also a strong assurance to protect the dignity of the individual, high or low. A reading of Part-III of the Constitution reveals that a series of human rights have been guaranteed which are actually prohibitions against the State.\textsuperscript{696}

The talk of all human rights declaring them as fundamental rights in the Constitution is meaningless unless the enforcement by effective machinery is provided.\textsuperscript{697} Effective enjoyment of human rights calls for the establishment of a national infrastructure for their promotion and protection.\textsuperscript{698} The Constitution of India provides for two tier system for ensuring enforcement and protection of fundamental rights which are also human rights. The Apex Court in India i.e. Supreme Court and High Courts at State level can be approached directly in the matters relating to fundamental rights.\textsuperscript{699} National Machinery is necessary for effective realization of human right as mere existence of laws is meaningless in the absence of a reformed vigilant mechanism.\textsuperscript{700}

Therefore, "declaration of fundamental rights is meaningless unless there is effective machinery for the enforcement of the rights. It is the remedy which makes the right real. If there is no remedy there is no right at all. It is, therefore, in the fitness of things that our Constitution-makers having incorporated a long list of fundamental rights have also been provided for an effective remedy for the enforcement of these rights under Article 32 of the Constitution. Article 32 is itself a fundamental right. Article 226 also empowers all the High courts to issue the writs for enforcement of fundamental rights."\textsuperscript{701}

(i) SUPREME COURT AS GUARANTOR OF FUNDAMENTAL RIGHTS

Article 32 of the Constitution confers a guaranteed right to move the Supreme Court for enforcement of fundamental rights enshrined in Part-III of the Constitution.\textsuperscript{702}

\textsuperscript{696} For details of fundamental rights see Part-III of Constitution from Article 12 to 35.
\textsuperscript{697} Article 32 pertaining to Remedies for enforcement of fundamental rights conferred by Part-III is a fundamental right itself.
\textsuperscript{699} See Articles 32 and 226 of the Constitution of India.
\textsuperscript{700} Human Rights Newsletter, NHRC, New Delhi, December, 1997 p.4
\textsuperscript{702} See Article 32.
Article 32(1) provides “the right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this part in guaranteed.” This right has been held to be an “important and integral part of the basic structure of the Constitution.” The Supreme Court has been rightly held “as the protector and guarantor of fundamental rights” and Article 32 as the cornerstone of the democratic edifice raised by the Constitution. Dr. B. R. Ambedkar while commenting about the importance of this Article (Art. 32) in the Constituent Assembly observed:

If I was asked to name any particular article of the Constitution as the most important an article without which this Constitution would be a nullity — I would not refer to any other article except this one. It is the very soul of the Constitution and the very heart of it.

The expression “appropriate proceedings” has reference to proceedings which may be appropriate having regard to the nature of the order, direction or writ which the petitioner seeks to obtain from the Court (Supreme Court). The appropriateness of the proceedings would depend upon the particular writ or order which he claims and it is not in that sense that the right has been conferred on the citizen to move this Court by appropriate proceedings.

(ii) SUPREME COURT AS GUARANTOR OF RIGHTS OF ACCUSED

Clause (1) of Article 32 guarantees the fundamental right to move the Supreme Court by “appropriate proceedings” for the enforcement of fundamental rights enshrined in Part-III of the Constitution. The power of the Supreme Court under this clause is very wide. Article 32 (1) makes a mention about ‘appropriate proceedings” and it means that the requirement of the appropriateness of the proceedings must be judged in the light of purpose of proceedings. In *Mukti Morcha v. Union of India*, the Supreme Court clarified that the Constitution makers deliberately did not lay down

703. Clause (1) of Article 32 of Constitution.
709. See Article 32 (1).
710. See supra note 708.
711. AIR 1984 SC 802.
any particular form of proceeding for enforcement of a fundamental right nor did they stipulate that such proceedings should conform to any right pattern or straight jacket formula because they know that in a country like India where there was so much of poverty, ignorance, illiteracy, deprivation and exploitation, any insistence on a rigid formula of proceeding for enforcement of a fundamental right would become self-defeating.\textsuperscript{712} It was held in \textit{Ramesh Thapar v. State of Madras} \textsuperscript{713} that Article 32 does not merely confer powers on the Supreme Court, as Article 226 does on the High Court to issue certain writs for the enforcement of the rights conferred by Part-III or for any other purpose as part of its general jurisdiction. The Article provides “guaranteed” remedy for the enforcement of those rights and this remedial right is itself a fundamental right by being included in Part-III. The Supreme Court is thus constituted the protector and guarantor of fundamental rights and it cannot consistently with the responsibility so laid upon it, refuse to entertain application seeking protection against infringement of such rights, on technical grounds.

Even the stone walls and iron bars of the prison can’t flout the protection available under Article 32. Explaining it in the matter of \textit{Charles Sobhraj v. Supdt. Central Jail}, \textsuperscript{714} the Supreme Court observed that Article 32 enshrines a very valuable right. If a prisoner’s fundamental right is flouted or legislative protection is ignored; the Supreme Court writ will run, breaking through stone walls and iron bars to right the wrong and restore the rule of law. \textsuperscript{715}

Clause (2) of Article 32 reads “The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of \textit{habeas corpus, mandamus, prohibition, quo warrants and certiorari}, whichever may be appropriate, for the enforcement of any of the rights conferred by this part.”\textsuperscript{716} Clause (2) of Article 32 does not require the Court to observe all procedural technicalities which were

\begin{itemize}
  \item \textsuperscript{712} Kumar, Narendra, \textit{op. cit.}, p.287.
  \item \textsuperscript{713} AIR 1950 SC 124.
  \item \textsuperscript{714} AIR 1978 SC 1514.
  \item \textsuperscript{715} \textit{Ibid}.
  \item \textsuperscript{716} Clause (2) of Article 32; “This part” referred in clause (2) means Part-III of the Constitution of India pertaining to Fundamental Rights.
\end{itemize}
relevant for the issuance of writs under English Law.\textsuperscript{17} The language used in Article 32(2) is very wide. The power of the Supreme Court is not confined to issuing of writs in the nature of habeas corpus, mandamus, prohibition, quo-warranto, certiorari.\textsuperscript{18} The Supreme Court of India may not only issue the above writs but also directions, orders or writs, similar to the above so far as to fit in with any circumstances peculiar to follow the procedural technicalities of English law, but it has been held that in granting these writs it will follow the broad and fundamental principles.\textsuperscript{19}

Thus, the wording of Article 32(2) is so elastic that it permits all necessary adoption without legislative sanction from time to time so as to enable effective enforcement of the fundamental rights. Even if a proper writ has not been prayed for by the petitioner in a case his application cannot be thrown out. Article 32 permits large discretion to the Supreme Court to give the appropriate relief. The Court can frame such writs as the exigencies of a particular case demand.\textsuperscript{20} Clause (2) of Article 32 is of wide amplitude. It does not confine the power of the Supreme Court to the issuance of the named writs, but the court may issue any direction or order whichever may be appropriate for the enforcement of the fundamental rights.\textsuperscript{21} In \textit{Ramesh Thappar v. State of Madras}\textsuperscript{22} the court observed that Supreme Court has been constituted as a protected and guarantor of fundamental rights and once a citizen has shown that there is infringement of his fundamental right the Court cannot refuse to entertain petitions seeking enforcement of fundamental rights.\textsuperscript{23}

The right to move Supreme Court is only available to those whose fundamental rights are infringed.\textsuperscript{24} According to the traditional rule of \textit{locus standi}, the right to move the Supreme Court is available only to those whose fundamental right is infringed. This rule has been considerably relaxed by the Supreme Court over a period.

\begin{itemize}
\item \textsuperscript{17} Rashid Ahmed \textit{v. Municipal Board}, Kairana, AIR 1950 SC 210; T. C. Basappa \textit{v. T. Nagappa}, AIR 1954 SC 440.
\item \textsuperscript{18} Rashid Ahmed \textit{v. Municipal Board}, Kairana, AIR 1950 SC 163.
\item \textsuperscript{19} Pandey, J.N., \textit{op.cit.}, p. 202; These writs are of English origin.
\item \textsuperscript{20} Chiranjilal \textit{v. Union of India}, AIR 1951 SC 41; see also Pandey, J.N.,\textit{op.cit.}, p. 206.
\item \textsuperscript{21} See Article 32 of the Constitution.
\item \textsuperscript{22} AIR 1950 SC 124 at p. 126.
\item \textsuperscript{23} \textit{Ibid.}
\item \textsuperscript{24} In the matter of Madhu Limye, AIR 1969 SC 1014; Andhra Industrial Works \textit{v. Chief Controller}, imports, AIR 1974 SC 1539; see also Pandey, J.N.,\textit{op.cit.}, p. 202.
\end{itemize}
of time. The Court has taken a dynamic approach and public interest litigation at the issuance of "public spirited persons", for the enforcement of fundamental rights of any person, has been permitted (emphasis added). In A. B. S. K. Sangh (Rly.) v. Union of India, it was held that Akhil Bhartiya Soshit Karamchari Sangh (Railway), though an unregistered association can maintain a writ petition under Art. 32 for the redressal of a common grievance. Access to justice through 'class actions', 'public interest' and 'representative proceedings' is the present Constitutional jurisprudence. Justice P. N. Bhagwati reiterated in a case and observed, "Where a legal injury is caused to a person or to a determinate class of persons by reason of violation of any constitutional or legal right and such person or determinate class of persons is by reason of poverty, helplessness or disability or socially or economically disadvantaged position unable to approach the public can mention an application for an appropriate direction or order or writ in the High Court under Article 226 or in case of breach of any Fundamental Right... to this Court under Article 32". There were some apprehensions that 'public interest litigation' would create arrears of cases and therefore they should not be encouraged. Bhagwati J. had different observation and he declared that "No State had the right to tell its citizens that because a large number of cases of the rich are pending in our Courts we will not help the poor to come to the Courts for seeking justice until the staggering load of cases of people who can afford rich lawyers is disposed off."

In Simranjit Singh Mann v. Union of India, the Supreme Court held that in criminal matters, as far as possible, the Court should be approached only by the accused. A third party who was a total stranger to the prosecution culminating in the conviction of the accused, had no 'locus standi' to challenge the conviction and the sentence awarded to the convict in a petition under Article 32. The Supreme Court

725. Kumar, Narender, op. cit. p. 287.
726. AIR 1981 SC 298.
727. Ibid; See also Pandey, J.N., op. cit., p. 203.
728. S. P. Gupta and others v. President of India and other, AIR 1982 SC 142; This case is popularly known as "Judges Transfer Case".
729. Ibid.
730. Ibid.
731. See People's Union for Democratic Rights v. Union of India, AIR 1980 SC 1579.
732. Ibid.
733. Ibid.
has considerably broadened the scope of Article 32 and Court is ready to interfere whenever there is "injustice" being done to helpless persons, children in jail, protection of pavement dwellers in Bombay and payment of wages and other benefits to workers and Court has issued appropriate orders and directions on the representative actions. 734

The Supreme Court of India diluted the concept of Sovereign immunity and evolved the right to compensation on case to case basis. In addition to awarding other reliefs Court have been awarding monetary compensation in the nature of palliative", 735 in "appropriate cases" 736 as in the opinion of the Court "such a remedy is not only salutary but essential for good governance." 737

(iii) HIGH COURT AS PROTECTOR OF RIGHTS OF ACCUSED

Article 226(1) provides that "Notwithstanding anything in Article 32 every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo-warranto, certiorari, or any of them, for the enforcement of any of the rights conferred by Part -III and any other purpose". 738 Thus the jurisdiction of a High Court is not limited to the protection of the fundamental rights but also other legal rights as is clear from the words "any other purpose". These words make the jurisdiction of the High Court more extensive than that of the Supreme Court which is confined to only for the enforcement of

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738. Clause (1) of Article 226; Prior to the enactment of the Constitution of India only Presidency High Courts of Calcutta, Madras and Bombay had the power to issue writs under Section 494 of Cr.P.C., 1898. The Section is repealed; see also Diwan, Paras, and Diwan, Peeyushi, Human Rights and the Law, (1992), Delhi. p.20.
fundamental rights.\(^{739}\) Article 32 confers writ jurisdiction on the Supreme Court. However the writ jurisdiction conferred by Article 226(1) on the High Courts is wider, for a High Court may issue writs not only for enforcement of fundamental rights (Article 32 confines it to fundamental rights only) but also for any other purposes.\(^{740}\) The words “for any other purpose” refer to enforcement of a legal right or legal duty. They do not mean that a High Court can issue writs for any purpose it pleases.\(^{741}\)

Article 226 thus provides important machinery for judicial review of administrative action in the country. It’s scope can’t be curtailed or whittled down by legislation. Even when the legislature declares the action or decisions of an authority final, and ordinary jurisdiction of the courts is barred, a High Court is still entitled to exercise its writ jurisdiction which remains unaffected by legislation.\(^{742}\) The expression “in the nature of” in Article 226(1) explains that the Court is not obliged to follow all the procedural technicalities of the English law relating to writs except that it may keep to the broad and fundamental features of these writs as following under English Law.\(^{743}\) High Courts can also issue directions, orders or writs other than the prerogative writs. It follows that the courts may mould the relief to meet the peculiar and complicated requirements of our country.\(^{744}\) This remedy cannot be claimed as a matter of right. The High Court must exercise its discretion on judicial consideration and on well established principles unless the High Court is satisfied that the normal statutory remedy is likely to be too dilatory or difficult to give reasonable, quick relief, it should be loath to act under Art. 226. The High Court should be careful to be extremely circumspect in granting these reliefs especially during the pendency of criminal investigations. The investigation of a criminal case is a very sensitive phase where the


\(^{742}\) Kanu Sehgal v, District Magistrate, Darjeeling, AIR 1973 SC 2684; see also T. C. Basappa v T. Nagappa, AIR 1954 SC 440; B D Narsimha Setty v. Dy. CTO, AIR 1963 Mad. 166.

\(^{743}\) Bandhua Mukti Morcha v. Union of India, AIR 1984 SC 802; see also Narender Kumar, op cit., p.440.
investigating authority has to collect evidence from all odd corners and anything that is likely to thwart its course may inhibit the interest of justice.\(^\text{745}\)

The Court "may refuse to grant any writ where alternative remedy is available is only a rule of direction and not a rule of law."\(^\text{746}\) The power conferred by clause (1) to issue directions orders or writs to any Government, authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories.\(^\text{747}\) The scope of the power to enforce fundamental right (under Article 32 or 226) is both protective and remedial. Hence, to reject such petition on the simple ground that it cannot be entertained because of a rule of practice of the Court cannot be justified.\(^\text{748}\)

The term "authority" used in Article 226, the context must receive a liberal meaning unlike the term in Article 12. Article 12 is relevant only for the purpose of enforcement of fundamental rights under Article 32. Article 226 confers power on the High Courts to issue writs for enforcement of the fundamental rights as well as non fundamental rights. The words "any person or authority" used in Article 226 are, therefore, not to be confined not to statutory authorities and instrumentalities of the State. They may cover any other or body powering public duty. The form of the body concerned is not very much relevant. What is relevant is the nature of duty imposed on the body, the duty must be judged in the light of the positive obligation owed by the person or authority to the affected party.\(^\text{749}\) The makers of the Constitution having decided to

\(^{745}\) Assistant Collector, Central Excise v. J H Industries, AIR 1979 SC 1889.

\(^{746}\) A V. Venkateswaran v. R S Wadhwani, AIR 1961 SC 1506; There have been numerous instances where a writ has been issued in spite of the fact that aggrieved party had other legal remedy; see State of UP v. Mohd. Nooh, AIR 1958 SC 86; Himmat Lal v. State of UP, AIR 1954 SC 403; Tata Engineering and Locomotive Co. v. Assistant Commissioner, Commercial Taxes, AIR 1967 SC 1401; Shyam v. Municipal Corporation, (1993), 1 SCC 22, Paragraph 45.

\(^{747}\) Clause (2) of Article 226 of the Constitution; The recommendation for amendments to the contents of clause (2) was made by the Law Commission of India, Report XIV, 1956, 66 removal of limitations of jurisdiction of High Court, later on Amendment was made by the Constitution (fifteenth amendment) Act, 1963.


\(^{749}\) Subba Rao, Justice in Dwarkanath v. I.T.O., AIR 1966 SC 81 at p. 84,85.
provide for certain basic safeguards for the people in new set up, which they call the Fundamental Rights, evidently, thought it necessary to provide also a quick and inexpensive remedy for enforcement of such rights and, finding that the prerogative writs which the courts in England had developed and used whenever urgent necessity demanded immediate and decisive interposition, were particularly suited for the purpose, they conferred in the 'States' sphere, new and wide powers on the High Courts of issuing directions, orders or writs, primarily for the enforcement of Fundamental Rights, the power to issue such directions, "for any other purpose" being also included. 750 Thus, "the jurisdiction of the High Court is wider than that of the Supreme Court because the Supreme Court under Article 32 cannot issue the writ against a private person, while the High Court under Article 226 can issue it against a private person also." 751 It may, however, be noted that writ jurisdiction of Supreme Court of India and High Courts under Article 32 and 226 respectively is supervisory and visitatorial. It is never appellate, revisional, advisory or consultative. It may further be pointed out that the writ jurisdiction is prospective and not retrospective. 752

Clause (1) of Article 226 while conferring power upon the High Courts to issue writs expressly provides that the writs may be issued against any person or authority including in appropriate cases, any Government. Therefore, if the occasion demands, the High Court will not be lacking in the power to issue writs against Government. Can we say the same thing as regards the writ jurisdiction of the Supreme Court under Article 32. Admitted by Article 32(2) which corresponds to Article 226(1) is differently worded and makes no express mention as to whether Supreme Court can issue writs against Government. But there is no prohibition in Article 32(2) that the writs cannot be issued against Government. Being the highest Court of the land, it would be absurd to hold that the Supreme Court cannot issue writs against Government although the High Courts can, therefore, concluded that the Supreme Court equally with the High Courts, possesses power to issue writs in appropriate cases against any government. 753 The only difference between the writ jurisdiction of the Supreme Court and

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750. Election Commissioner of India, v. Venketa Subha Rao, AIR 1953 SC 210 at 212
High Courts is that one can move the Supreme Court only for the enforcement of fundamental rights whereas in High Courts, it may be for the enforcement of fundamental rights or for any other purpose. From this point, the writ jurisdiction of the High Court is wider in scope. However, one must remember that “the law declared by the Supreme Court shall be binding on all courts with in territory of India.”

The Supreme Court and High Courts have been entertaining public interest litigations (P.I.L.) to provide access to justice through “class actions”, “public interest litigation” or “representative proceedings.” Any member of the public having “sufficient interest” can approach the court. Public interest litigation or social action litigation have also been entertained by the court where matter of public interest is involved or where aggrieved party is unable to approach the court due to poverty, ignorance or disablement. In such circumstances “even a letter addressed to him (to the Court) can legitimately be regarded as appropriate proceedings.” Thus Supreme Court and High Court have been active for enforcement and protection of fundamental human rights in India.

(X) SUM UP

In the preceding Chapter it has been discussed that according to right to equality enshrined in the Constitution, a person arrested, charge-sheeted or incarcerated cannot be discriminated except the legal restrictions according to law of the land. A prisoner is not wholly stripped of Constitutional protections, when he is imprisoned for crime, and there is no iron curtain drawn between the Constitution and the prison of this country. Convicts are not denied of all fundamental rights which they otherwise possess except that when person is in prison he is deprived of

756. Bandhua Mukti Morcha v. Union of India, AIR 1984 SC 802; see also the Times of India, New Delhi, 18th April 2001, Page.1 Col.(5).
757. Article 14 of Constitution of India.
759. See Francis Coralie v. Union Territory of Delhi, AIR 1981 SC 746 at 751.
fundamental freedom like right to move freely throughout the territory of India, right to practice a profession etc. Right to equality under Article 14 is available to all persons whether natural, artificial, citizen or aliens. Two concepts are enshrined in Right to equality i.e. (a) equality before the law and (b) equal protection of the laws. “Equality before law” is negative concept and establishes the “Rule of Law” and State is to treat all persons alike and not discriminate against them. The dominant idea common to both these expressions is that of equal justice. The Right of equality does not forbid reasonable classification based on intelligible differentia based on rationality. The guarantee of equal protection is available (to the accused) person under substantive as well as procedural laws, there cannot be separate procedure for persons who have been committed same offence, but there can be different procedure for trial of a particular offence if provided by some special law.

The right to freedom of speech and expression is one of fundamental freedom guaranteed to all citizens under Article 19 (1) (a) of the Constitution. Reasonable restrictions in the interest of security of State, friendly relations with foreign States, public order, decency or morality, contempt of Court, defamation or incitement of an offence can be imposed on this right. This right also includes freedom of thought and expression and freedom of press is included in it. A detenue is not barred from

767. Special Courts Bill, 1878 in re AIR 1979 SC 478 para 74,78,80-84,87-89.
768. The right is available to ‘citizens’ and not to all persons as provided in Article 14. of Constitution.
769. Clause (2) of Article 19.
publishing a book while being in jail as every citizen has right to air his views through print or electronic media subject of course to permissible restrictions.

Article 20 (1) provides that "no person shall be convicted of any offence for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of offence." According to this clause, the legislature shall not be competent to make a criminal law retrospectively to declare an act to be an offence or to provide penalty for an offence to prejudicially affect the persons who have committed such acts prior to enactment of that law. The first limitation is in respect of conviction and punishment of a person for an offence which, when committed was not an offence by the law of the land. The second is in regard to the imposition of a greater penalty than that which ought to have been imposed under the existing law on the date of the commission of the offence. The term 'penalty' used in Article 20 (1) indicates that the prohibition provided therein applies to punishment imposed for offences and does not prohibit imposition of civil liability.

No person accused of an offence shall be compelled to be a witness against himself, as provided by clause (3) of Article 20 of the Constitution. The clause is based on maxim "nemo tenetur prodere accussare seipsum" which means that "no man is bound to accuse himself." Hence the protection against self incrimination is available (i) "to a person accused of an offence (ii) It is a protection against compulsion to be a witness; and (iii) It is a protection against such 'compulsions' resulting in his giving evidence against himself." Mere questioning of accused by police voluntarily

773. Clause (1) of Article 20.
777. Clause (3) of Article 20.
and ultimately turning to be incriminatory is not ‘complusion’. Magistrate may direct the accused to give his specimen handwriting, signature, thumb impressions, fingerprints, footprints for the purpose of comparison by police and it would not mean compelling the accused to be a witness against himself. The tape recorded statement of the accused without his knowledge is admissible if relevant in the case. However the accused has right to remain silent. Protection of 20 (3) does not, however, extend to searches made in pursuance of a warrant issued under Section 93 of Cr.P.C.

Article 20 (2) provides for prohibition against double jeopardy that “no person shall be prosecuted and punished for the same offence more than once” based on common law maxim “nemo debet bis vexari.” The object is that no one ought to be punished twice for one and the same offence. It is to avoid the harassment caused to a person for successive criminal proceedings where only one crime has been committed. In order to invoke “Article 20 (2) of the Constitution, there must have been a prosecution and punishment in respect of the same offence before a Court of Law or a tribunal.” Cr.P.C. also provides that a person once convicted or acquitted is not to be tried for the same offence. However, a departmental enquiry is not a prosecution and the award of such proceeding is not a punishment, within the meaning of Article 20 (2) of the Constitution.

Clause (4) to (7) of Article 22 of the Constitution provides for preventive detention of a person and Article lays down the procedure to be followed after the person has been detained. The term “preventive detention” is not defined in the Constitution, however, it finds place in Schedule VII in List I (entry 9), List III (entry 3) and it is kept in Union List as well as in the Concurrent List. Though the detention is to be resorted to as preventive or precautionary measure but it depends on subjective satisfaction of the Government. The justification for preventive detention is suspicion, or apprehension.

781. Clause (2) of Article 20.
782. See Kumar, Narender, op.cit., p.187.
783. See Chaturvedi, A.N., op.cit., p.130
784. See Section 300 Cr.P.C. 1973
The detenue has a right to make representation to the government against his detention.\footnote{786} and grounds of detention are to be communicated to the detenue within specified time.\footnote{787} The Advisory Board examines the case including the material placed before it by government, representation of detenue and hearing the detenue if he so desires and make its recommendations to the appropriate government.\footnote{788} If confirmed detenue can be detained in custody for one year and govt. can revoke or modify its order at any time.\footnote{789} The detenue is not authorized to be represented by legal practitioner before the Advisory Board.\footnote{790}

The Constitution of India provides for a mechanism under Article 32 and 226 for making fundamental rights as enforceable rights in Supreme Court and High Court. The enforcement of fundamental rights are guaranteed by the Supreme Court under Article 32 (1). The Supreme Court has been rightly held “as the protector and guarantor of fundamental rights.”\footnote{791} In case of infringement of any fundamental right Court can be approached by “appropriate proceedings”\footnote{792} and appropriateness of the proceedings would depend upon particular writ,\footnote{793} and Court has been taking cognizance even on post cards\footnote{794} and proceedings in certain cases by public spirited persons have also been accepted by the Court.

The Power and jurisdiction of High Court under Article 226 is wide and court may issue writ not only for enforcement of fundamental right but “also for any other purposes”.\footnote{795} The concept of \textit{locus standi} has also been relaxed to a great extent and where due to poverty, ignorance or disablement person is unable to approach the Court can be approached by any public spirited person.\footnote{796}