CHAPTER - 6
APPRAISAL, SUGGESTIONS AND PROBABLE FUTURE TRENDS

(I) APPRAISAL

In the forgoing study an effort has been made in Chapter 1 to trace out the rights which were available to the "accused" person in ancient, medieval and British India period in India. Though concept of human rights is of recent origin but various human rights were available. These rights were available in Vedas, epics like Mahabharata, Samitis, Smritis and Dharmastra. The accused is a human person and he does not lose all rights when kept behind the bars or jail. The dispensation of justice in ancient period was done according to religious rules, ethics or according to the majority opinion of jury. Certain rights were available to accused person and these rights find mention in Manusmriti of Manu and Arthasastra of Kautiliya and accused had basic rights to sleep, food and rights against illegal confinement and beating in custody. Even King was not absolved from punishment in case some innocent person was punished by him.

During medieval period justice was dispensed according to Islamic rules. The rule of tooth for tooth and eye for eye originated during this period.1 Punishments falling in four categories viz., Kisa, Hadd, Tazeer and Diya were prevalent2 and under Diya system the offender could escape punishment after paying monetary compensation on a fixed scale to the victim even in cases of homicide.3 There was no separation of criminal and civil courts and Kazis used to administer justice. King used to keep Muftis' in the palace itself to rule out biasness or corruption in administration of justice.4 Bail and surety had started in this period.

2. Ibid.
British rule in India has been a legislation period. The criminal laws were codified during this period and the western inquisitorial system was transplanted on Indian soil in the form of Indian Penal Code, 1860, the Code of Criminal Procedure, 1861, Indian Evidence Act, 1872 and so on. The procedural and laws of evidence were systematized and refined. Universal Declaration of Human Rights, 1948 made a great impact on enactment of laws recognizing fundamental human rights of person including accused person. It also finds reflection in Constitution of India and Part- III includes all human rights enshrined in the said declaration in the shape of fundamental rights. After independence the long cherished fundamental rights were enshrined in the Constitution of India and independence of judiciary for their enforcement was ensured.

Chapter- 2 dealt with rights of accused under Indian Constitution which is the thrust area as far as rights of accused are concerned. Article 14 provided that the State shall not deny to any person equality before the law and the equal protection of the laws within the territory of India. The concept of equality is based on the concept of Rule of Law of A.V. Dicey. The Phrase “equality before law” is somewhat negative concept which implies absence of special privileges in favour of particular individual. Expression “equal protection of the laws” is positive concept which ensures equal treatment in equal circumstances. The spirit of both the concepts is equality of status and opportunity. So there can’t be separate procedure for the persons who have committed same offence and are subject to same procedure for trial. This guarantee is available in substantive as well as procedural laws.

The freedom of speech and expression is available to the accused or convict person and subject to the reasonable restrictions provided in clause (2) of Article 19. The freedom of speech and expression means expression of opinion by words

5. The Criminal Laws in India were codified after 1861, which are still in force.
10. See Article 19(1)(a) of the Constitution.
11. See Clause (2) of Article 19 for grounds on which reasonable restrictions can be imposed.
of mouth, writing, pictures, visible representations and freedom of persons is also included in it. This right is available to all citizens. An accused or detenu in jail can publish book and no rule can prohibit it.

Recently, Arundati Roy has been convicted by the Supreme Court for its contempt for her observations against the judiciary in her book “God of Small Things”. She reacted that if judiciary removes itself from public scrutiny and accountability, it will mean that another pillar of the Indian democracy will eventually crumble.” This is a big jolt to the right of speech and expression and former Justice Rajinder Sachar reacted that “judges should allow greater freedom of speech, they should have a little more strength and confidence in their own position.”

Article 20 (1) of the Constitution provides protection to all persons against ex-post-facto laws. The right is available in respect of criminal offences. A penalty cannot be altered to the prejudice of the person from retrospective effect and legislature cannot declare an act to be an offence or provide penalty for an offence retrospectively so as to prejudicially affect the persons who have committed such act prior to enactment of that law. Clause (1) of Article 20 does not prohibit the trial of offences under the ex-post-facto laws. Therefore, a law, prescribing a new procedure different from the ordinary procedure for prosecution or trial, is not hit by Article 20 (1). Similarly, change of venue of trial of an offence from a criminal court to an administrative tribunal does not fall within the prohibition of Article 20 (1).

13. See Article 19(1) (a); see also Nirendra v. State of Punjab, AIR 1958 SC 986; Sakal Papers v. Union of India, AIR 1962 SC 305.
16. Ibid.
The Constitution provides protection against self-incrimination under Article 20 (3). The Article provided that “No person accused of an offence shall be compelled to be a witness against himself” which resembles fifth amendment of the American Constitution. The doctrine of immunity from self-incrimination is founded on the presumption of innocence. The protection is available to the person “accused of an offence” in a criminal proceedings and does not apply to civil proceedings.

There can be no accused without some formal accusation which the Supreme Court considers to be the first information report of the case. In State of Bombay v. Kathu Kalu Oghad, the court observed:

It is well established that clause (3) of Article 20 is directed against self-incrimination by the accused person. Self-incrimination must mean conveying information based upon the personal knowledge of the person giving the information and 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 accused based on his personal knowledge.

The accused can however be asked to give his specimen handwriting, signature, thumb impression, finger prints or foot prints to be used for the purpose of comparison and it will not amount to compelling the accused to be a witness against himself. The Supreme Court, in Oghad’s case set all doubts at rest and held that “Article 20 (3) never means that accused can never be compelled to be a witness. All that Article 20 (3) prohibits is that he cannot be compelled to be a witness against himself. In giving his specimen writing or thumb impression of finger impressions, the accused is certainly furnishing evidence but it cannot be said that in doing so he is furnishing evidence against himself.”

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22. Fifth amendment of the American Constitution reads “no person shall be compelled in any criminal case to be a witness against himself”.
29. Ibid.
While there is no express right to silence during interrogation and such person shall be bound to answer truly all questions relating to such case put to his by such officer, other than questions the answers to which would have a tendency to expose him in a criminal charge or to a penalty or forfeiture. Person giving false information in answer to such question is liable to be prosecuted under Section 202 and 203 of IPC, however, accused can always remain silent if he wishes.

As per Article 20 (2) of the Constitution "no person shall be prosecuted and punished for the same offence more than once." The Article incorporates prohibition against double jeopardy" The clause enacts the well known principle of criminal jurisprudence that" no one shall be put in jeopardy twice for the same offence", which is based on common law maxim "nemo debet bis vexari". Article 20 (2) bars a second prosecution only where the accused has been both prosecuted and punished for the same offence previously. The historical background of the principle of double jeopardy was traced by the Supreme Court in Maqbool Hussain v. State of Bombay and the Court point out:

The fundamental right which is 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 for the same offence.

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

30. See clause (1) & (2) of Section 161, Cr.P.C., 1973.
31. See Sankaralinga Kone, (1900) 23 Mad; see also Ghusa, (1941) All. 912.
32. See Section 93(1) & (3) of Cr.PC, 1973; see also V.S. Kuttan Pillai v. Ramakrishnan, AIR 1980 SC 185.
34. Maxim means that a person must not be put in peril twice for the same offence.
36. AIR 1953 SC 325.
37. Ibid., at 328.
the same offence; and unless all the three conditions are fulfilled the clause (2) of that Article could not be invoked. 38 In S.A. Venkataraman v. Union of India, 39 a government servant was charged with committing corruption. An enquiry was held against him and he was dismissed from service and subsequently he was prosecuted for having committed the offence under Section 161 and 165 of Indian Penal Code and Section 5 (2) of Prevention of Corruption Act, 1947. It was held that proceedings before enquiry commissioner did not amount to a prosecution for an offence. 40 Departmental enquiry is not a prosecution and the award of such proceeding is not a punishment, 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. 41 Section 300 Cr.P.C. also provides that a person once convicted or acquitted is not to be tried for same offence.

The Constitution of India ensures dignity and personal liberty of the person 42 and no person can be deprived of life or personal liberty except according to procedure established by law. Right to personal liberty has been held to be the most important of human rights. 44 The right to personal liberty under Article 21 of the Constitution is protected one but restricted since deprivation of it would be done only through procedure established by law. 45 The court has held that life does not mean mere animal existence, 46 or possession of his organs like arms, legs etc. 47 but to live with full human dignity. 48 Prisoners are persons and even the rights of accused are sacrosanct for though accused of an offence he does not become non-person. 49 Ba-

40. Ibid.
41. Ibid.
42. Preamble of Constitution aims to secure dignity of individual; see also Article 21.
43. Article 21.
47. Ibid.
sic freedoms including privacy of accused person are also protected. The personal liberty of a person can be bridged as per procedure established by law as provided in Article 21 but the procedure should be fair, just and reasonable and not fanciful, offensive or arbitrary (emphasis added). Handcuffs and fetters used to be put on under trials and prisoners by the police indiscriminately. The apex court declaring it violative of human dignity held that 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..." As handcuffing is prime facie inhuman, unreasonable, arbitrary and repugnant to Article 21 of the Constitution, Binding a man hand to foot and fettering his limbs with hoops of steel defiles his dignity, vulgarize society and foul the soul of our Constitutional culture and therefore, court have laid down detailed guidelines in the matter of President, Citizen for Democracy v. State of Assam. Now court have even awarded compensation for handcuffing a under trial prisoner which is a new step in human rights activism.

The domiciliary visits to check presence of history sheeter was held violative of personal liberty of individual in Kharak Singh's case but similar kind of surveillance on a person in accordance with police regulations was held to be lawful in Govind v. State of Madhya Pradesh but it is to be resorted to in clear cases of danger to society and not in a routine conviction.

Justice delayed is justice denied. Though Constitution does not specifically provide for right to speedy trial but this has been held to be implicit in Article 21. The

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50. See 122, 126 of Indian Evidence Act, 1872.  
51. See Maneka Gandhi v. UOI, AIR 1978 SC 597 at 613.  
52. President Citizen for Democracy v. State of Assam, AIR 1996 SC 2193, at p. 2195; see also Sunil Batra’s case.  
54. Supra note 52.  
55. Ibid.  
trial in the context of speedy trial includes the stage of investigation. Since right to speedy trial is a fundamental right enshrined in Article 21 of the Constitution to denial of justice. In Hussainara’s case, the Supreme Court had to give directions that in cases where police investigation is delayed for over 2 years the charge sheet must be forwarded in additional period of three months and in case of an offence punishable with imprisonment of not more than seven years period of three months for completing investigation and six months for filing charge sheet was fixed otherwise the prosecution against the accused would be liable to be quashed. Recently Justice R P. Sethi of Supreme Court have issued number of directions to High Courts to take measures for delivering judgements expeditiously because delay in disposal of cases may shake confidence of public in judicial system. Hence right to speedy trial is implicit in right to life and personal liberty and fairness and justness being its spirit.

Another dimension of right to life and personal liberty is freedom of movement. Article 19(1) (d) guarantees freedom of movement. There are catena of cases wherein the courts have given wider meaning of the word "personal liberty". In the absence of right to travel abroad in Article 21, the Indian judiciary made significant contribution by interpreting it to include right to travel abroad. The Supreme Court has recognized right to travel abroad as an essential ingredient of 'personal liberty' under Article 21 in the case of Satwant Singh Sawhney v. Assistant Passport Officer. The court also held that "if a person living in India has a right to travel abroad, the government by withholding the passport can deprive him of his right. In the Maneka Gandhi’s case the court further held that as long as a person holds the passport, he

60. See Sheela Barse v. Union of India, AIR 1986 SC 1773.
61. See Gokul Singh v. State of MP, 1999, Cr.LJ.
62. AIR 1979 SC 1365.
63. Ibid. at 1367.
64. Ibid; see also Sheela Barse v. Union of India, AIR 1986 SC 1773 at p. 1779
65. The Hindu, Delhi, August 7, 2001 p. 11
66. Ibid.
67. Article 19(1) (d) provides for right “to move freely throughout the territory of India” and this right is available to citizens.
69. AIR 1967 SC 1836; see also Deshta, Sunil and Deshta Kiran, op. cit., p. 117.
70. Ibid at p. 1841.
71. AIR 1978 SC 597.
can't be prevented from travelling abroad. The right to life and personal liberty can be taken away by 'procedure established by law' but such procedure 'must not be arbitrary, unfair or unreasonable.'

The Constitution of India provides for preventive detention under Article 22. Clause (4) to (7) of Article 22 provide for procedure if a person is detained under law of preventive detention. "The object of preventive detention is not to punish a man for having done something but to intercept him before he does it and to prevent him from doing it. No offence is proved, nor any charge is formulated. The sole justification of such detention is suspicion or reasonable probability of the detenue committing some act likely to cause harm to the society or endanger the security of the Government..." clause (4) to (7) provides for some safeguards against preventive detention but they are "pale shadow of safeguards." In countries like UK and USA except for purposes of extradition and deportation, there is no preventive detention in peace but in India preventive detention is sanctioned by the Constitution both during war and peace as an all time feature. The preventive detention is the legacy of British rule of India. The Govt. of India Act, 1935 empowered the central legislature to enact laws on preventive detention for British India. After independence, Article 22 was provided in the Constitution. The first Preventive Detention Act of 1950 was enacted which remained in force till 1969. The Maintenance of Internal Security Act, 1971 (MISA) revived the old provisions in refined manner, which continued till August, 1977. The National Security Act was enacted in 1980 which continues to be in force.

A person can be detained under the National Security Act, 1980, Article 22 of the Constitution and other laws enacted by the State Government for preventive detention if he is acting in any manner prejudicial to defence of India or relations of India with foreign powers or security of India or a foreigner with a view to regulate his

72. Ibid.
73. Article 21.
74. See Supra note 71 pp. 597, 624
77. Dhar, Panna Lal, Preventive Detention under Indian Constitution, Delhi (1986), p. 44.
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 State Government or public order or for acting in any manner prejudicial to the maintenance of supplies and services essential to the community. The grounds of detention are to be communicated to detenu and he has right to make representation to the appropriate Government. The grounds of detention along with representation of detenu (if any) and other material is to be placed before the Advisory Board within three weeks of detention and the govt. has to constitute the Advisory Board.

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." The particulars of each of the grounds are required to be communicated and explaining the grounds verbally or in language which he does not understand does not serve the purposes of Article 22 (5). Duty is cast on detaining authority to inform the detenu about his right to make representation and failure to do so will invalidate the detention. In Pushpa v. Union of India, the court ruled that appropriate authority was bound to give an opportunity to detenu to make representation and to consider the representation early. There should be no delay in consideration of representation. The appropriate authority should exercise its opinion on representation before referring it to Advisory Board. The consideration of representation of detenu should be independent of its consideration by Advisory Board. The Advisory Board has to submit its opinion to appropriate Government.

78. See Section 3 of NSA, 1980; see entry 9 of list I of Schedule VII; Entry 3 of list II Schedule VII of Constitution.
79. Section 10, NSA, 1980.
80. Ibid; If detention is made on orders of an officer mentioned in sub Section 3 of Section 3 of NSA, the report of such officer is also to be placed before Advisory Board; MISA contained Section 17-A which provided for detention in certain circumstances without reference to Advisory Board and it was struck down by Supreme Court; see also Sambhu Nath Sarkar v. State of West Bengal, AIR 1973 SC 1425.
within 7 weeks of detention of the person as per Section 11(1) of NSA, 1980. In case detention is confirmed the person can be detailed for maximum 12 months (24 months in disturbed or terrorist affected areas) and Govt. can revoke or modify detention order at any time. In case Advisory Board opines that there are no sufficient grounds, he is to be released by the government.

NSA provides that detained person is not entitled to appear by the legal representative before Advisory Board, however Supreme Court in the matter of A. K. Roy v. Union of India has held that detenu can consult lawyer only to prepare his representation or to file writ petition to court for release.

Part III of the Constitution enshrines various fundamental rights for citizens and persons. The dream of having fundamental rights came true when after attaining independence the Constitution was prepared. These fundamental rights are actually fundamental human rights corresponding to the rights provided by Universal Declaration of Human Rights, 1948. The talk of all human rights declaring them as fundamental rights in the Constitution would be meaningless unless the enforcement by an effective machinery is provided. 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 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. The right to move the Supreme Court by appropriate proceedings for enforcement of the rights conferred by Part- III is guaranteed. The stone walls of prison can't flout the

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86. Clause (1) of Sec. 11 NSA, 1980.
87. Section 13 ibid; see also Section 14-A.
88. Section 14 ibid.
89. Clause (2) of Sec. 12 ibid.
90. Section 11(4) of NSA.
91. AIR 1982 SC 710.
92. The Universal Declaration of Human Rights, 1948, issued by United Nations is contemporary to the Constitution as both were being drafted at the same time. All Rights declared as human rights find place in Part-III of Indian Constitution as Fundamental Rights.
93. Article 32 has been provided for enforcement of Fundamental Rights in the Constitution.
95. See clause (1) of Article 32.
protection available to the person behind the bars and writ of Supreme Court is available as a guaranteed right. Various writs and any other directions or order can be issued by the Supreme Court for enforcement of fundamental rights. If a person or class of persons are unable to approach the court for enforcement of their rights due to poverty, helplessness or disability or due to social economic disadvantaged position any member of public can move an application for appropriate direction. The duty of the welfare State is to protect the fundamental rights of its citizens. Any party aggrieved by the action of the State or its agencies may approach the High Court under Article 32 of the Constitution for enforcement of his fundamental rights and also for ancillary reliefs.

Articles 32 and 226 are the two unique weapons in the hands of Supreme Court and High Courts respectively to wipe out the tears from the crying nation. But unless voluntary organizations or activist people come forward, it may not be possible for every victim of an illegal arrest or undue detention to move the higher judiciary.

The Constitutional provisions relating to legal aid, schemes for legal aid services under the Legal Services Authorities Act, 1987 and various directions given by the apex court have been discussed in Chapter-3. Article 39-A of the Constitution cast a duty on the State to secure that the operation of the legal system promotes justice and to provide free legal aid through suitable legislation and schemes so that justice is not denied to any citizen because of economic or other disabilities.

The Preamble of the Constitution aims to achieve "justice-social, economic and political" and "dignity of individual." Article 22 (1) of the Constitution provides

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97. Supreme Court & High Courts are empowered to issue writs of habeas corpus, mandamus, prohibition, quo warranto and certiorari and it can also give any other direction or order; Similar power is available to High Courts under Article 226.
98. See SP Gupta v. President of India, AIR 1982 SC149.
101. See Preamble.
102. Ibid.
that any person arrested shall not be denied to consult and to be defended by, a legal practitioner of his choice." An accused person can consult or engage the lawyer of his choice if he has the means to afford his charges. Therefore economic capability of the accused affects his right to engage the counsel. In this poor country "all of us are not equal in earning as such High Income Group, Middle Income Group and Lower Income Group or poor or weaker sections" and if due to indigence a person gets convicted without legal assistance it cannot be called equality of justice.

The question came before the court as to when does this right to consult and to be defended by lawyer commences. The right commences from the time of arrest of person and services of lawyer can be availed during police interrogation or questioning by police though not throughout the interrogation. The International Covenant on Civil and Political Rights, 1966 cast a duty on the State that a person shall be entitled "to be informed, if he does not have legal assistance, of his right; and to have legal assistance assigned to him in any case where the interests of justice shall require, and without payment by him in any such case if he does not have sufficient means to pay for it. If ends of justice is justice and the spirit of justice fairness, therefore, each side should have equal opportunity to present its case before the court and such preparation and representation can be done by a skilled legal person as life or death hangs in balance, therefore it is of utmost importance. Therefore, the free legal aid services for the indigent is essential ingredient of "reasonable, fair and just" procedure and implicit in Article 21 of the Constitution. Since the right to

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103. Article 22 (1).
109. Article 14 (3) (d).
engage the counsel of own choice is entitled under Article 22(1) from the moment of arrest therefore, courts have also held that "legal aid to the indigent accused should be provided from the moment of arrest" by fairly competent lawyer at the cost of the State.  

Section 303 Cr. P.C. also explicitly provides that "any person accused of an offence before a criminal court or against whom proceedings are instituted under this code, may of right be defended by a pleader of his choice." It is pertinent to note that while Article 22(1) of the Constitution provides for right to counsel from the Stage of arrest Section 300 also provides a right for those persons may not be accused of an offence but facing proceedings under Cr.P.C. and there may not be a formal charge against the person.

Section 304 CrPc provides "where, in a trial before the Court of Session, the accused Sis not represented by the pleader, and where it appears to the court that accused has not sufficient means to engage a pleader, the court shall assign a pleader for his defence at the expense of the State." Two requirements are specified in the Section i.e. where trial is before the Court of Session and other that where accused does not have sufficient means to engage the counsel. The proceedings before sessions court is only for serious offences therefore this facility can not be availed by accused when offence committed is less serious and triable by other courts. Article 39-A cast a duty on the Government “to secure that the operation of legal system promotes justice... provide free legal aid, by suitable legislation of schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.”

The Government have enacted the Legal Services Authorities Act, 1987 provides for schemes to provide free legal aid to indigent facing trial in different courts.

114. Sec . 300 Cr.P.C.
115. Such proceedings may be under Chapter- VIII of CrPC; see also Section 151 and 145 Cr.P.C.
116. Sec. 304 Cr P.C.
The authorities at Central, State and District level have been established under the Act and facility of free legal aid can be availed of by SC, STs, women and other socially or economically weaker section' of the society.\textsuperscript{119} The aforesaid legislation has been the result of directions of the Hon'ble Supreme Court in cases like \textit{Sheela Barse v. State of Maharashra},\textsuperscript{120} \textit{Hussainara Khatoon v. Home Secy., State of Bihar},\textsuperscript{121} \textit{M.H. Hoskot v. State of Maharashra}\textsuperscript{122} and number of other cases, besides the efforts of "Committee For Implementing Legal Aid Scheme" (CILAS).\textsuperscript{123}

The accused and the bail are related with each other and there is a nexus between personal liberty and bail. The provisions relating to bail have been discussed in Chapter-4. Bail is related with the arrest of the person. The offences are classified into bailable and non-bailable categories as per Schedule of the Code of Criminal Procedure, 1973. The bail is a matter of right in bailable offences.\textsuperscript{124} The accused person is presumed to be innocent till his guilt is proved and he is entitled to freedom and have the opportunity to look after his case provided his security for attendance is ensured.\textsuperscript{125} An accused person cannot be refused bail in bailable cases so long as he is ready to furnish surety.\textsuperscript{126} Bail in non-bailable offences is a matter of discretion and discretion is to be used "judiciously and not arbitrarily while granting or refusing bail to the accused person".\textsuperscript{127} While Court can impose necessary conditions and restrictions on the bailee and if accused person misuses the liberty the bail may be cancelled by the Court.\textsuperscript{128}

In \textit{Hussainara's case},\textsuperscript{129} the Supreme Court laid down guidelines to be taken

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  \item \textsuperscript{119} See Section 12 of Legal Services Authoties Act, 1987.
  \item \textsuperscript{120} AIR 1983 SC 378.
  \item \textsuperscript{121} AIR 1979 SC 1369.
  \item \textsuperscript{122} AIR 1978 SC 1548.
  \item \textsuperscript{123} Govt. of India set up the committee by a Resolution dated 20th Sept., 1980 which was the first committee of its kind. Justice P.N. Bhagwati was Chairman of this Committee constituted in 1980.
  \item \textsuperscript{124} See Section 43 Cr. P.C.,1973.
  \item \textsuperscript{125} See AIR 1931 All. 356 at 358, 359
  \item \textsuperscript{126} See \textit{Dharmu Niak v. Rabindranatha Acharya}, 1978 Cr. LJ 864 at p. 867 (Orissa)
  \item \textsuperscript{127} Raj, Jai, Janak, Bail-Law and Procedure (1995), Delhi, p.13; It was held in \textit{Babu Singh v. State of UP}, AIR 1978 SSC 527 at p. 529 that discretion means sound discretion guided by law and not arbitrary, vague and fanciful.
  \item \textsuperscript{128} See \textit{Janbahadur v. State}, 52 Cr.LJ 108 (VP) (1951)
  \item \textsuperscript{129} \textit{Hussainara Khatoon v. State of Bihar}, AIR 1979 SC 1360.
\end{itemize}
into consideration for granting bail which includes length of residence in community, employment status, family ties, reputation, character, criminal record, surety of responsible members of community which the Court has to keep in view. These guidelines have given a new insight in the jurisprudence of pretrial release of accused. In another case the Court held that bail is the rule and rejection is exception, the bail should not be refused as a matter of punishment, nature of accusation extent of punishment and likelihood of jumping the bail and tampering the evidence are relevant factors in bail. The Court can refuse bail in non bailable cases but the public interest and liberty of individual are to be taken into consideration together. Though the Court has the power to cancel the bail but “cancellation of bail must be based on strong grounds” and not in a mechanical manner. In a recent judgment, the Apex Court has clearly laid down the criteria for grant of bail in the light of Section 437 Cr.P.C. which have redefined the law of bail. The Court laid down that if offence is punishable for imprisonment up to 3 years, the case is pending for one year and the accused has been in jail for six months or more he shall be released on personal bond with conditions (if any) as may be necessary. Similarly if offence is punishable up to 5 years and trial is pending for 2 years and accused has been in jail for 6 months or more shall be released on personal bond. In case offence is punishable up to seven years imprisonment and trial has been pending for two years or more and he has been in jail for one year or more the accused shall be released on bail/personal bond. The Parliament is yet to take action to incorporate provisions in Cr.P.C in

130. Ibid., p. 1363.
131. See Gian Zail Singh v. State of Punjab, 1978 Cr. LJ (NOC) 60; see also Praveen Malhotra v. State (Delhi Admn.) 1990 (2) CCC 321 (DHC)
133. Tilak Raj Kholi v. Devender Kumar, 1992 CR.LJ 4000; See also Ashok Kumar v. State, 142, Cr.LJ.3821.
135. 'Common Cause' a Registered Society through its Director, Petitioner v. Union of India, AIR 1996 SC 1619.
136. Ibid.
137. Ibid.
138. Ibid; The Court also issued other directions to dispose off the cases in a given time frame if trial has not commenced and accused has been in Jail for a long time.
accordance with the spirit of these directions of the apex Court.

Section 167 Cr.P.C provides for release of a person on bail when investigation is pending and it is not completed within 60 days (or 90 days in case of offences punishable with death or imprisonment for not less than 10 years) and accused is entitled to be released on bail on expiry of that period from date of arrest.\(^{139}\) This is a "legislative command" and not "Court’s discretion."\(^{140}\) The terms like "Bail", "Bond", Surety" and "Security" and "recognizance" have been used in different Sections of Cr. P.C. and none of these have been defined. In the Code and it all depends on discretion of Court and police to demand surety or security of an accused person.\(^{141}\) The amount of bail bond is decided by the Court,\(^{142}\) but it should not be excessive and unreasonable.\(^{143}\) Thus the entire law of bail was "humanized" by a judicial interpretation of Article 21 and the Supreme Court of India held that a new insight should inform the judicial approach in the matter of pretrial release.\(^{144}\)

The Code of Criminal Procedure of 1973 also provides for "anticipatory bail" or "bail in anticipation of arrest" in Section 438,\(^{145}\) and it can be availed of in case of reasonable apprehension or beliefs of arrest \(^{146}\) and it can be accepted by the High Court or the Court of Session.\(^{147}\) This provision has been made so "that the liberty of the subject is not in jeopardy on frivolous grounds at the instance of unscrupulous or irresponsible person or officers.\(^{148}\) The High Court and Court of Session have concurrent jurisdiction to grant anticipatory bail\(^{149}\) and Court have wide powers to cancel the

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140. See Devender Kumar NCB, 1990 Cr. LJ 62; AIR 1990 SC 91; Natabar Pardia v. State of Orissa, 1975 Cr. LJ 1212; See also Sec. 167(2) Cr. PC.
141. See Sections 57,167,436 to 439; see also Section 59, 106 to 110, 118, 330, 339, 349, 389, 390, 395.
142. See Asstt. Collector of Customs, Bombay v. Madam Ayabo Attenda, 192 Cr. LJ 2349; Swankhar Gulshan v. Asstt. Collector Customs 1993 Cr.LJ 3569 (Bom.)
145. This is new provision introduced in the Code of 1973.
147. See Section 438 (1) Cr.P.C.
148. See Bai Chand v. State of MP, 1977 Cr. LJ 225 (SC)
149. See Sec. 438 Cr.P.C.
bail in case of new or supervening circumstances.\textsuperscript{150}

When a person is convicted and files an appeal before appellate Court the Court can pass orders for release of person on bail or bond under Section 389 Cr.P.C where person is sentenced to a term not exceeding 3 years or where offence of which person is convicted is a bailable one and he is on bail.\textsuperscript{151} It is evident that the law of bail has been liberalised by the judiciary and now bail is the rule not jail.

There is no wrong without a remedy (\textit{ubi jus ibi remedium}).\textsuperscript{152} The rights are meaningless unless it provides for their enforcement and remedy. The Constitutional rights are available to a accused (or prisoners) person irrespective whether he is under trial or convicted and fundamental right of the accused is violated, he can approach High Court or Supreme Court under Article 32 or 226 of the Constitution for enforcement in case of infringement of fundamental right. The provisions relating to compensatory justice have been discussed threadbare in Chapter-5 of the study.

Section 250 Cr.P.C enables the accused person to claim compensation for accusation without reasonable cause\textsuperscript{153} in summons as well as warrants case.\textsuperscript{154} The object of Section is not to punish the complainant, but to award compensation.\textsuperscript{155} Section 237 provides for payment of compensation to the victims of crime by Sessions Court in cases involving defamation of a person.\textsuperscript{156} Victims of crime can be paid compensation under Section 357 Cr.P.C from the accused person who has been sentenced by the Court and this compensation forms part of fine imposed by the Court.\textsuperscript{157} It is for the Court to decide whether compensation is to be awarded and capacity of the accused to pay the amount\textsuperscript{158} as imposing sentence for default of

\begin{footnotes}
\item[150] See A. K. Murmu v Prasanjit Chowdhary, 1999 CrLJ 3460; see also Maiku v. State, 1977 CrLJ 1461 at pp. 1462, 1463 (All.)
\item[151] See sub section 3 of Sec. 389 CrPC; See also Vaskaran v. State of Kerala, 1987 Cr.LJ 1588; Verma R.S., \textit{op.cit.}, pp.83-84.
\item[154] Ibid. Clause (3).
\item[155] \textit{Beni Madhub Kurmi v. Kumud Kumar Biswas}, (1902) 30 Cal 123, 128, FB; The person against whom accusation has been made without reasonable cause has the option to prefer civil suit or resort to criminal prosecution also.
\item[156] Section 237 Cr.P.C.; see also section 199 Cr.P.C.
\item[157] See 357 Cr.P.C.
\end{footnotes}
payment would not achieve the objective. This Section enables those accused persons whose fundamental rights are violated by police or jail authorities during their detention or incarceration and in such cases those authorities or instrumentalities of the State become the accused. The Supreme Court have clarified with reference to Section 357 that "it is an important provision but Courts have seldom used it perhaps due to ignorance of object of it.... In addition to conviction Court may order the accused to pay some amount by way of compensation to victim who has suffered by the action of the accused. It may be noted that this power of Courts to award compensation is not ancillary to other sentences but it is in addition thereto. The Courts have awarded compensation under Section 357 in number of cases. Section 357 Criminal Procedure Code as it stands does not provide speedy or sure relief to the needy. It is commonly seen that the accused normally does not deny the injury or loss sustained by the complaint, though he denies his own responsibility for the crime. Any compensation awarded under the cover of Section 357 Criminal Procedure Code at the end of normally protracted trial spanning over an average of 8 to 10 years is not immediately available to the victim as he must await the appellate round to conclude.

Section 358 provides for compensation for groundless arrest and compensation not exceeding one hundred can be awarded, payable by the person causing the arrest of the person, for his loss of time and expenses in the matter. The compensation is recoverable as fine. This is definitely a progressive legislation aimed at protecting the Constitutionally guaranteed personal liberty and to check arbitrary arrest.

159. Ibid.
162. Mundrathi, Sammaiah, op.cit., p.182
163. See clause (1) of 358 Cr.P.C.
164. Ibid. Clause 3.
165. See Mundrathi, Sommaiah, op.cit., p.75
But it has been observed that there has been rare use of these provisions for award of compensation and the powers under the Section have not been exercised as liberally as could be desired.

The Constitution of India enshrined fundamental rights like right to equality, right to life and personal liberty, freedom of speech and expression, freedom of movement throughout the territory of India, right to be produced before the Magistrate within 24 hours of arrest, right to be informed of grounds of arrest, right to engage counsel, protection against double jeopardy, protection against ex-post-facto criminal legislation and protection against self-incrimination.

These rights are available to the person accused of an offence. Article 32 guarantees right to move the Supreme court by appropriate proceedings for enforcement of fundamental rights. High Courts can also be approached for enforcement of these rights under Article 226 of the Constitution. Award of Compensation in proceeding under Article 32 or by the High Court under Article 226 of the Constitution is a remedy available in public law based on strict liability for contravention of fundamental rights to which the principle of sovereign immunity does not apply.

168. Article 14; see also Article 16.
169. Article 21.
170. Article 19 (1)(a).
171. Article 19 (1)(d).
172. Article 22(2).
173. Article 22(1).
174. Article 20(2).
175. Ibid. Clause (1).
176. Ibid Clause (3).
177. Clause (3) Ibid.
178. Clause (1) of Article 32.
179. Article 226.
The concept of sovereign immunity\textsuperscript{181} has been diluted to great extent by the active judiciary. It was held that “the immunity of the State on the ground of sovereign functions, the court held that the traditional concept of sovereign immunity has undergone a considerable change in the modern times and the line of distinction between sovereign and non-sovereign powers no longer survives.”\textsuperscript{182} Though there is no specific right to claim compensation under the Indian Constitution but the Supreme Court had clarified in \textit{K.K. Kochunni},\textsuperscript{183} that it can pass any order including a declaratory order or give any direction as may appear to it to be essential for providing adequate relief to the aggrieved persons.\textsuperscript{184}

The Protection of Human Rights Act was enacted in 1994.\textsuperscript{185} As per Act “Human Rights” means the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by Courts in India.\textsuperscript{186} Section 12 of the Act assigns multifarious functions to the National Human Rights Commission which includes that for promotion of human rights it will make appropriate recommendations.\textsuperscript{187} The Act also empowers National Human Rights Commission to “recommend to concerned Government or authority for grant of such immediate interim relief to the victim or members of his family as the Commission may consider necessary,”\textsuperscript{188} though it does not specifically provide for monetary compensation under this Section. From the perusal of NHRC Reports from 1995-96, it reveals that Commission has been investigating the cases of human rights violation and recommending compensation \textit{suo motu} or on complaints.\textsuperscript{189} In addition to awarding compensation Commission has also been recom-

\begin{itemize}
\item \textsuperscript{182} Mundrathi, Sammaiah, \textit{op.cit.}, p.139.
\item \textsuperscript{183} \textit{AIR 1959 SC 725}.
\item \textsuperscript{184} \textit{ibid}.
\item \textsuperscript{185} Act on 10 of 1994.
\item \textsuperscript{186} Sec 2(1)(d) the PHR Act, 1993.
\item \textsuperscript{187} \textit{Ibid}. See sec 12.
\item \textsuperscript{188} \textit{Ibid}. See section 18(3).
\item \textsuperscript{189} For details of cases in which Commission have recommended Compensation. see Chapter-5 of the study.
\end{itemize}
mending prosecution or disciplinary action against the erring Govt. Servants. These compensations have been awarded for custodial death, torture in custody, sexual harassment and rape etc.  

The Supreme Court and High Courts in India have been awarding compensation for violation of fundamental rights (which are human rights also) under Article 32 and 226 of the Constitution. In *Khatri v. State of Bihar*, the Court had realised the need to forge new tools and devise new remedies for vindicating fundamental right to life and personal liberty but did not award compensation. However right from *Rudal Shah v. State of Bihar*, the Courts have been awarding compensation in appropriate cases.

Later on court awarded compensation of Rs. one lakh to two each of next of kin of missing persons in *Sebastian M. Hongray v. Union of India*, Rupees 20,000/- in cases of death and Rs.5000/- to injured persons in case of death/injuries due to police firing in Arwal(Bihar). A prisoner was killed inside the jail in Andhra Pradesh due to malfeasance and misfeasance of the jail officials. The court awarded Rupees 1,44,000/- as compensation in the case. In *Saheli v. Commissioner of Police, Delhi*, police in connivance with the landlord beat up a 9 years old boy and misbehaved with his mother (tenant) to get some house vacated in Delhi. The said boy succumbed to the injuries in hospital. The court awarded compensation of Rs.75000/- to the next of the deceased. The court also gave the option to the Govt. to recover the amount of compensation from police officers who will be found responsible. In *Kewal Pati v. State of UP*, a convict was killed by a colleague in the jail and court awarded compensation to the tune of Rs. one lakh to the widow of the

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190. See NHRC, Annual reports for the year 1995-96, 1996-97 and 1997-98; see also Chapter 5 of the study.
192. *Ibid., p 930.*
197. *AIR 1990 SC 513.*
198. *Ibid., at p. 516*
deceased. In another case, High Court of A.P. awarded a compensation of Rs. 10,000/- for death of a person who died in the custody of the Excise Authorities. Where a person sustained injuries in a riot which broke out in the jail and later on succumbed to the injuries was awarded compensation of Rs. 50000/-. Narendra Sinha, a AIO, CID died in police custody in suspicious circumstances in Gujarat. The next of kin was awarded Rs. 2 lakh as compensation. Similarly, compensation have been awarded in number of cases for custodial death, torture, custodial violence, illegal detention etc., by the Supreme Court and High Courts.

Courts in India, however, it appears have adopted “compensation” more as a strategy to impose economic sanction against the ‘State’ for its inability to contain or for its silent acquiescence to the human rights abuses perpetrated by its agents. Apparently, there seems to be nothing wrong with this approach and it generally gives one the impression that by penalising the State the victim and the society gets adequately compensated whether individual officials perpetrating the atrocities get penalised or not. But it is not realised that imposing sanction against the State but itself neither deters the offending official of the State not in anyway helps mitigating the causes which led to such distortions in a democratic State system. It reveals that majority of the cases of illegal detention or custodial torture / death are from the State of Bihar and apparently there appears to be no yardstick adopted in awarding compensation by the court. Moreover, unless the violator of Human Rights are taken to task, it would not pinch them as the compensation till now have been paid by the State in all cases decided by Hon’ble Supreme Court and High Courts. It also includes the cases of compensation recommended by the National Human Right Commission.

(II) SUGGESTIONS

1. The "equality before law" and "equal protection of the laws" is available to all accused persons under Article 14 of the Constitution. The public prosecutor or Assistant Public Prosecutor, in charge of a case may, with the consent of the court, at any time before the judgment is pronounced can withdraw from the prosecution of any person either generally or in respect of anyone or more of the offences for which he is tried under Section 321 of Cr.P.C., 1973. 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; but the essential consideration which is implicit on the grant of the power is that it should be in the interest of administration of justice. The Section is not based on any intelligible differentia and shakes the right of equality before law. This Section can be used as a political tool and cases can be withdrawn by the Public Prosecutor at the direction of Govt. against a particular accused or group of accused. In this way this may become discriminatory against other accused persons who are situated on the same footing and still facing prosecution. Section 321 of the Code of Criminal Procedure, 1973 is incompatible with Article 14 of the Constitution and concept of Rule of Law established in the term "equality before law". Section 321 Cr.P.C., 1973 needs to be scrapped.

2. Article 20 (3) of the Constitution provides protection against self-incrimination and accused can't be forced to be a witness against himself. Police have powers under Cr. PC to interrogate a person and put questions to him. Though accused person is not bound to give reply to incriminate himself but every person does not understand the implications of his answers, therefore, this provision is exploited. Moreover, with the present level of literacy, a person may not be able to apprehend the complications and implications of his answers.

205. See Article 14.
206. Section 321 Cr.P.C., 1973; see Sankartinga Kone, (1900) 23 Mad.; see Sections 202 & 203 of IPC.
208. Article 20 (3).
209. See Section 161 Cr.P.C.
answers. The common man does not understand the legal procedure and rights. The only way to protect the accused against any incriminating reply is to allow him the counsel during his interrogation.

3. Right to silence is not specifically provided under the Constitution. If he (accused) does not reply to the questions he is subjected to physical torture. Hence right to silence needs to be inserted in the Constitution.

4. Article 22 of the Constitution provides for preventive detention of a person on certain grounds by the Central Govt. or State Govt. or officers of State Govt. on their subjective satisfaction. The detention is to be examined by Advisory Board within three weeks and it has to submit its report to appropriate Govt. within seven weeks. It means even if there are no sufficient grounds for detention the liberty of individual can be played with for seven weeks. Even if there are no sufficient grounds for detention of a person he can be detained for seven weeks. The concept of preventive detention is incompatible with the Preamble of the Constitution and rightly called as “pale shadow of safeguards.” It is suggested that there should be provision that prima facie sufficiency of grounds against the person detained should be examined by any Judicial Magistrate within 24 hours or at the most seven days so that if grounds are insufficient person may not be detained unnecessarily for seven weeks.

5. Clause (3) to (7) of Article 22 of the Constitution provides for broad procedure for preventive detention and detailed provisions are to be enacted by Parliament. These provisions of preventive detention are exception to Clause (1)

210. Grounds of detention are laid down in Section 3 of National Security Act, 1980; The Central Govt. or State Govt. may detain a person if a person is acting in any manner prejudicial to defence of India, relations of India with foreign powers; security of India, or in respect of foreigner with a view to regulate his continued presence in India or expulsion from India; see also entry 9 list I and entry of 3 of list III of Schedule VII of Constitution.

211. Under clause (2) of Section 3 of NSA, power of detention may be delegated to Commissioner of Police or Distt. Magistrate for detention of any person acting in any manner prejudicial to security of the State Govt. or public order or if his activities are prejudicial to maintenance of supplies and services essential to the community.

212. See clause 4 (a) and (5) of Article 22 and Section 10 of NSA, 1980.

213. Section 11 NSA, 1980.


215. See clause (7) of Article 22.
and (2) of Article 22. Clause (4) of Section 11 of NSA disentitle a detenue to appear by a legal practitioner before Advisory Board. However, the Apex Court conceded to representation through counsel in Francis Coralie v. Union of India\textsuperscript{216} and Hemlata v. State of Maharashtra\textsuperscript{217} but this was overruled in A. K. Roy v. Union of India\textsuperscript{218} and the court observed that detenue can only consult the lawyer for preparation of representation but is not permitted to appear before Advisory Board.\textsuperscript{219} The layman even if intelligent and educated may not be possessing knowledge and skills of law and aware of rules of evidence, therefore, he can't establish his innocence in the absence of a counsel.\textsuperscript{220} As per Article 21 of the Constitution life or personal liberty of a person can't be deprived except according to procedure established by law. In Maneka Gandhi,\textsuperscript{221} it was held that 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 would be no procedure at all.\textsuperscript{222} This is the minimum requirement which must be guaranteed to enable a citizen to live with human dignity.\textsuperscript{223} After enactment of the Protection of Human Rights Act, 1993,\textsuperscript{224} new rights relating to life, liberty, equality and dignity of individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by courts in India are defined as “Human Rights.”\textsuperscript{225} The procedure laid down in National Security Act\textsuperscript{226} and Constitution\textsuperscript{227} appears to be incompatible with concept of “human rights” and not a fair just and reasonable procedure as envisaged in Menaka Gandhi Case.\textsuperscript{228} In all fairness a detenue

\textsuperscript{216.} AIR 1981 SC 746.  
\textsuperscript{217.} AIR 1982 SC 8 (Para 6).  
\textsuperscript{218.} AIR 1982 SC 710.  
\textsuperscript{219.} Ibid. at 748.  
\textsuperscript{221.} Maneka Gandhi v. Union of India, AIR 1978 SC 597.  
\textsuperscript{222.} Ibid.  
\textsuperscript{224.} Act No. 10 of 1994.  
\textsuperscript{225.} See 2(1) (d) of PHR Act, 1993.  
\textsuperscript{226.} See 11(4) of NSA, 1980.  
\textsuperscript{227.} Clause (3) to (7) of Article 22.  
\textsuperscript{228.} Supra note 17.
should be allowed to consult and be defended by a legal practitioner, otherwise the preventive detention would not be less than the provisions of the Rowlatt Act which provided for "no vakil, no daleel, no appeal." 229

6. The Constitution of India under Article 32 provided for guaranteed right to move the Supreme Court for enforcement of fundamental rights enshrined in Part-III of the Constitution 230 and similar powers have been conferred on High Courts under Article 226. The power conferred on Supreme Court under clause (1) & (2) of Article 32 can be conferred by Parliament on any other court to exercise in local jurisdiction. 231 The Supreme Court is situated in Delhi and High Courts are also at far off places and a person can't approach the court without incurring high expenditure besides inconvenience. In the North Eastern States 232 people have to travel for days and not hours to reach the High Court. It would be appropriate if these powers to enforce fundamental rights (which are human rights also) are conferred on Session Judges to bring justice to the door steps of poor, socially and economically disadvantaged people.

7. The State is duty bound to secure "equal justice and free legal aid" 233 by providing "free legal aid, by suitable legislation or schemes." 234 An accused person charged of an offence punishable with imprisonment is entitled to be offered legal aid, if he is too poor to afford counsel. 235 Legal aid may be treated as part of the right created under Article 21. 236 Under Section 304(1) Cr. P.C. where it appears to the court(where the trial is before the Court of Sessions) that accused does not have sufficient means to engage a pleader,

229. See observation of Pandit Thakur Das Bhargava member of the Constituent Assembly with reference to draft Article 15-A (Now Art. .22) during debates ; see C.A.D., Vol. 9 p; 1505.
230. See Clause (1) of Article 32.
231. See Clause (3) of Article 32. These powers have not been conferred on the other courts by the Parliament after enactment of the Constitution.
232. Assam, Nagaland, Arunachal Pradesh, Meghalaya, Mizoram, Manipur and Tripura.
233. Article 39-A.
234. Ibid.
the court shall assign a pleader for his defence at the expense of State. As per Section 28(2) and (3) Cr.P.C. the Court of Sessions is authorized to try the offences punishable with imprisonment exceeding ten years. Hence, it is clear that the right of counsel under Section 304(1) Cr.P.C. is not available to accused who is facing trial of an offence punishable for imprisonment upto 10 years. Supreme Court have observed in number of cases that where accused is unable to engage counsel due to poverty the counsel is to be provided at State's expense. This right needs to be incorporated in rights of accused under procedural law.

8. Under the existing provisions of bail under the Code of Criminal Procedure, bail of a person is to be given by another person possessing property and reputation. In practice, the bailor may dispose off his property and the accused while on bail may frustrate the bail in a pre-planned manner in collusion with bailor and no legal action can be taken against the bailor except his imprisonment. The law of bail needs to be amended suitably to plug the misuse of the procedure.

9. As per Schedule First under Cr.PC, offences have been classified in two categories i.e. bailable and non-bailable. The amount of bail is not specified for the offences and the fixation of amount depends on the discretion of the Court. The Supreme Court has held that “the bail amounts ought not to be excessive and the demand for verification of surety not unreasonable.” The amount can be changed with change in circumstances. The police and courts in the absence of any laid down yardsticks fix amount of bail as per their own discretion which may be unreasonable and excessive, hence amount of bail/surety should be laid down for each offence.

10. The classification of offences into bailable and non-bailable is based on

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239. See Schedule first of Cr.P.C.; See also Section 2(a) CrPC.

240. Moti Ram v. State of MP. AIR 1978 Sc 1595; see also Section 440 of Cr.P.C.

quantum of imprisonment which needs to be reviewed. If a person remains in jail and he happens to be only bread earner of family then it may affect the whole family. Hence bail procedure needs to be more liberalized. Bail should be the rule and jail an exception.

11. The term "bail", "bond", "personal bond", "surety", "security" and "recognizance" have been used in the Code of Criminal Procedure but none of these terms have been defined. Hence, there is a need to explain meaning of these terms.

12. The bail is a matter of right in bailable offences and in non-bailable offences grant of bail depends on discretion of Court. In addition to circumstances of the case the age and health conditions should be taken into consideration for release of person in non-bailable offences. In addition, there should be separate provisions for women and child offenders with some relaxation, which does not find place in the existing provisions relating to bail.

13. The role of community in the bail process has not been thought over to ensure presence of accused in the court. This concept has not been tried by law makers/jurists and Law Commission of India so far, this needs to be translated into procedural laws.

14. The existing procedural laws have lot of scope for professional bailors to give bail and make money. There should be some check as to number of occasions and number of cases in which a person can give bail and law should lay down detailed instructions on the subject.

15. Section 250 CrPC makes a provision for award of compensation for accusation without reasonable cause to the accused person not exceeding amount of fine which a Magistrate is empowered to impose. First class and second class Magistrates can impose fine upto Rs. 5000/- and one thousand respectively, it means they can award compensation to that extent only. The amount of compensation is meagre in the present context and it needs to be increased.

16. Section 358 CrPC provides for compensation for groundless arrest of a person and this compensation is upto Rs. one hundred only. The amount of

243. See Sub-Section (2) & (3) of Section 29 Cr.P.C., 1973.
compensation is meagre and needs revision.

17. When fundamental right of a person is infringed he can approach directly, the Supreme Court or High Court for enforcement of his right by appropriate proceedings under Article 32 and 226 respectively of the Constitution. The Constitution of India, however, does not provide for separate right to compensation for violation of fundamental right. However, the Supreme Court have observed in number of cases that the Court’s power is not limited to issuing writs only and it can pass any declaratory order or give any direction for providing adequate relief to aggrieved persons. It may be noted that Article 142 empowers the Supreme Court to make such orders as is necessary for doing complete justice in any cause or matter pending before it. In some cases this compensation is called as “exemplary compensation,” “palliative” or “suitable monetary compensation” but there is no statutory right to claim compensation for violation of fundamental or human rights. India is though signatory to the Covenant on Civil and Political Rights, 1966 but it has not accepted Article 9 (5) of the Covenant pertaining to enforceable right of victim for unlawful arrest and detention. Govt. should take appropriate measures to enact law for declaring right to compensation for violation of fundamental or human rights enshrined in Constitution and the Protection of Human Rights Act, 1993.

18. The Radul Shah’s case decided by Supreme Court has become a pioneering case in the annals of the compensatory jurisprudence. The Supreme Court of India has laid down that compensation is an inherent right as part of the right to life under Articles 21 and 226. It has been observed that compensation is a necessity to ensure justice for the aggrieved person. The Supreme Court has also observed that compensation is a parallel right to the fundamental right of life.

250. Fundamental Rights are enshrined in Part-III of the Constitution. “Human Rights” are defined in Section 2 (1)(d) of the PHR Act, 1993. There is no enforceable right to compensation against unlawful arrest or detention in India, see Declaration on the Covenant signed by President of India dated 10.4.1979.
Court and High Courts have been awarding compensation for violation of human rights and fundamental rights depending upon discretion of the court and no standard formula or yardstick has been adopted by the court. For example in a case of illegal detention in mental asylum for over thirteen years, court awarded compensation of Rs. 15000/- \(^{252}\) and in another case of illegal detention for more than 14 years court awarded Rs. 35000/- as compensation. \(^{253}\) In *Bhim Singh*’s case, \(^{254}\) the petitioner illegally detained by police for 4 days was awarded compensation of Rs. 50,000/- \(^{255}\) whereas in another case where one Masi was detained illegally by police for 19 days was awarded compensation of Rs. 5000/- only. \(^{256}\) Similarly, in a case of disappearance of two persons from custody in the matter of *Sebastian M. Hongray v. Union of India*, \(^{257}\) the Supreme Court awarded compensation of Rs. One lakh to each of next of kin, but in another identical case of *Inder Singh v. State of Punjab*, \(^{258}\) where seven persons were found missing from police custody the court awarded compensation of Rs. 1.5 lakhs to each of the legal representatives. In Saheli’s case, \(^{259}\) 9 year old boy succumbed to the injuries caused by police officials, the petitioner was awarded compensation of Rs. 75000/-. Whereas in *Smt. Nilabati Behera v. State of Orissa*, \(^{260}\) one Suman Behra was picked up by police and next day his body was found with multiple injuries near railway track. The petitioner was awarded compensation of Rs. 1,55,000/- in the case. It is evident from the foregoing instances that there are no standard yardstick or criteria for awarding compensation. Though the compensation have been awarded by the court considering facts and circumstances of each yet, the system of awarding compensation needs to be streamlined.

\(^{252}\) *Oraon v. State of Bihar*, See Times of India dated 13\(^{th}\) August, 1983. The case is not reported in AIR.


\(^{255}\) *Ibid*.


\(^{257}\) AIR 1984 SC 1026.

\(^{258}\) AIR 1995 SC 1949.

\(^{259}\) *Saheli v. Commissioner of Police*, Delhi, AIR 1990 SC 513.

19. The Supreme Court and High Courts have been awarding compensation for violation of fundamental or human rights to the accused persons or next of kin of deceased who have suffered at the hands of police and other governmental agencies and in majority of cases this compensation have been paid by "the State" for the faults (or defaults) of its Govt. servants being vicariously liable for acts of its servants. In some of the cases Court has given option to the Govt. to prosecute or take disciplinary action against erring official or to recover the amount of compensation from them. The very objective of awarding compensation to the victim is for the loss suffered and to deter the offenders. In case compensation is paid by State it will have no deterrence on the public servants. Hence, the amount of compensation for violation of fundamental or human rights should be recovered from guilty police official or public servant and revenue collected from honest tax payers should not be wasted for individual faults. As in case of environmental pollution, the honourable Supreme Court have devised "polluter pays principle," on the similar lines in case of violation of fundamental rights or human rights "violator pays principle " needs to be adopted so that erring Govt. official is made liable to pay compensation and not "the State". Till such time the Govt. enact laws, the researcher would request the Hon'ble Supreme Court to lay down standard guidelines for awarding compensation in cases of violation of fundamental or human rights.

20. The protection against prosecution and arrest is available to public servants where act committed has a nexus with the performance of duty and thus if


264. See Sec. 45,132 and 197 Cr.P.C.
some criminal act is committed by the public servant he is liable to be pros­ecuted for the criminal act. In the cases of violation of fundamental rights (or human rights) where the courts have awarded compensation for illegal detention or custodial deaths the court have given option to the Govt. to have recourse against those officers (for either recovery of amount or launching pros­ecution). Similar action have been taken by the NHRC for awarding compen­sation by the Govt. The objective of criminal justice system would be met unless culprits are punished otherwise it will have no deterrent effect on prospective offenders. Police officers needs to be made aware that in case some offence is committed by them they are not entitled to claim any immunity against prosecution and punishment.

21. The rights of accused needs to be given wide publicity so that every member of public is educated and made aware of his rights to enable him to approach appropriate court in case of violation of their rights by police or other government agencies.

22. The Protection of Human Rights Act, 1993 provides for interim relief for the victims of human rights violations which can be recommended by the National Human Rights Commission, though Act does not expressly provide for award of compensation by the Commission. The NHRC have been recommending compensation under Section 18 of the Protection of Human Rights Act. NHRC is only a recommendatory body and no action can be taken if the Govt. (Central or State) decides not to pay the compensation. Hence, Protection of Human Rights Act needs to be suitably amended for empowering the Commission to award the compensation in cases of human rights violations.

23. In India, there is no statutory body to assess and award compensation for the loss suffered by the victim. As in case of death or injury in motor vehicle accident cases compensation is mandatory under the provision of the Motor


266 Section 18 PHR Act, 1993.
Vehicles Act, 1988,  

On the similar lines compensation should be paid to victim of crime, especially death and grievous injuries. Hence, "Immediate legislation for awarding compensation to the victim of crimes by constituting a Criminal Injuries Compensation Board, is required to fulfill the obligation of India to the International Covenant on Human Rights." There is a urgent need to establish a “Compensation Board”. In case of delay of investigation interim compensation should be paid to the needy victim(s) till find compensation is decided. The compensation to the victim or his dependents should be granted without delay taking into account the victim’s age, occupation, status in life and dependence of family members on the victim etc.

24. The Supreme Court have classified that “the defence of sovereign immunity being inapplicable and alien to the concept of guarantee of fundamental rights, there can be no question of such a defence being available in the Constitutional remedy. The Immunity of the Crown in the United Kingdom was based on the old feudalistic notions of justice, namely that the King was incapable of doing a wrong, and therefore, of authorising or instigating one, and that he could not be sued in his own courts. In India, ever since the time of the East India Company, the sovereign has been held liable to be sued in tort or in contract and the common law immunity never operated in India. Hence, there is a need to abrogate Article 300 of the Constitution as India is no more a feudal State, it is a biggest democracy of the world and the concept of sovereign immunity is not compatible with the aspirations of the people i.e. justice and equality laid down in the Preamble of the Constitution.

267. See Section 140 of the Motor Vehicles Act, 1988; In case of death Rs. 50,000/- and in case of permanent disablement Rs. 25,000/- is entitled as compensation to the victim of Motor Vehicle Accident.

268. Bag, R.K., op.cit., p. 94; see also Article 9 (5) of the International Covenant on Civil and Political Rights, 1966 (adopted by U.N. on 16 Dec, 1966); The President of India has ratified this Covenant on 10.4.1979 but it has not accepted enforceable right to compensation for persons claiming to be victims of unlawful arrest or detention against the State.

269. See Mundrathi, Sammaliah., op.cit., p. 189.

270. Ibid.


Andhra Pradesh Govt. have devised a new innovative law to utilise services of petty offenders for the benefit of community instead of sending them to jails. The new legislation named Andhra Pradesh Community Services of offenders Bill, modelled on the lines of legislations in USA, Canada, Germany and Zimbabwe, will cover offenders above 18 years and sentenced to maximum of two years for minor offences. The offender will have the option of either putting in a specific number of hours for community service fixed by the court or go to the prison. Such laws need to be enacted at national level so that offenders of petty offences can be utilised for community services. This will not only save expenditure of the Government on prisoners but also the services of prisoners will be for the benefit of the community.

(III) PROBABLE FUTURE TRENDS

1. An accused person is a person and all fundamental rights and Constitutional freedom and protections are available to him. Being in prison or police lock up he does not cease to be a person or citizen. The Supreme Court have clarified that constitutional rights does not halt at the prison gates and writ of the court will run even when a person is in jail or behind the bars. Writ can be filed in Supreme Court or High Court for enforcement of fundamental rights under Article 32 of the Constitution which itself is a fundamental right. The awareness of fundamental rights is increasing and it is evident from the work load of the cases pending in the High Courts. In future, litigation about enforcement of human rights and fundamental rights is likely to increase tremendously and the Supreme Court and High Courts should be ready to face the future challenges and prepare action plan therefor.

2. Legal jurisprudence provides that a case should be filed by the aggrieved party and not by other person. But in the recent years rules of locus standi have been relaxed to a great extent. Where the persons whose fundamental rights

273. See the Sunday Hindustan Times, Lucknow, (City Edition) 9th Feb, 2003, p. 5 (Col. 2-5), This step is suggested to reduce the financial burden and rush in jails. The Govt. is spending about Rs. 57,000/- on each prisoner every year and jails are overcrowded.

274. See Charles Shobraj v. Supdt. Central Jail, AIR 1978 SC 1514. The Supreme Court has held that "Supreme Court's writ will run, breaking through stone walls and iron bars to right the wrong and restore rule of law."
have been infringed are unable to approach the courts due to social, economic
disabilities being poor and illiterate, any public spirited person may file a writ
or even inform the court through a postcard, the court takes cognizance as it
sees the contents not the form. This judicial approach and activism of judiciary
is a step in right direction and public interest litigation or social action litigation
in all probabilities is bound to increase in future.

3. The speedy trial has been held to be implicit in Article 21 of the Constitution.\(^\text{275}\)
If trial is delayed it would amount to the denial of justice.\(^\text{276}\) Sometimes the
under trial prisoners remains in judicial custody awaiting trial for more than the
period of imprisonment provided for the offences awaiting trial.\(^\text{277}\) Despite of
directions of Apex Court the pendency of criminal cases in lower courts is on
the increase and it is likely to increase in future. Hence besides permanent
Lok Adalats the drastic changes are warranted in the criminal justice system
to translate the dream of speedy trial into reality.

4. The right to free legal aid at the expense of the State to the indigent accused
has been held to be implicit in reasonable, fair and just procedure envisaged
under Article 21 of the Constitution.\(^\text{278}\) The Legal Services Authorities Act,
1987 has been put into action and free legal aid to poor and weaker sections
of society are available at Taluka District, State and National level. At present
counsel is provided to indigent persons at the trial stage. Since right to en­
gage and be defended by a legal practitioner commences from the time of
arrest of the person. A person can avail of free legal aid as per directions of
the Apex Court in \textit{D.K. Basu v. State of W.B.}\(^\text{279}\) and other cases but Govt. has
to make efforts to educate public about their rights.

\begin{itemize}
\item \textit{Hussainara Khatoon v. State of Bihar, AIR 1979 SC 1365; see also Sheela Barse v. UOI, AIR}
\textit{1986 SC 1773.}\(^\text{275}\)
\item \textit{Gokul Singh v. State of MP, 1999 Cr.LJ, 3455 (MP).}\(^\text{276}\)
\item In \textit{Hussainara Khatoon's Case} (AIR 1979 SC 1360) large number of women, men and children
were found behind the bars awaiting trials for years for trivial offences. Justice P.N. Bhagwati
ordered their release.\(^\text{277}\)
\item \textit{See Hussainara Khatoon v. State of Bihar, AIR 1979 SC 1369; In re Llewelyn Evans, AIR 1926}
Bombay, 551.\(^\text{278}\)
\item 1997, \textit{Cr. LJ, 743.}\(^\text{279}\)
\end{itemize}
5. The Supreme Court and High Courts have been awarding compensation in cases of violation of fundamental rights (or human rights) ever since *Radul Shah's Case*\(^{280}\) to *Saheli's case*\(^{281}\) under its writ jurisdiction under Article 32 and 226 of the Constitution respectively which is welcome development in the jurisprudence of compensatory justice. But courts could not lay down any standard yardstick for deciding amount of compensation. This is also surprising that this has neither been projected in the Apex Court nor the Law Commission of India or National Human Rights Commission have taken cognizance in this direction. However, in future it is hoped Supreme Court would fix up some intelligible criteria to decide amount of compensation in cases of violation of Fundamental Rights / Human Rights.

6. The National Human Rights Commission have been recommending award of compensation in cases of human rights violation under the provisions of Section 18 of the Protection of Human Right Act, 1993 by way of interim relief however NHRC in expected to recommended to the Govt. to arm the Commission to award compensation instead of keeping it only recommendatory body. The Commission may also recommend to the Govt. to make right to compensation a statutory right by enacting law on the pattern of laws available in England and USA as envisaged under Article 9 of the Covenant of Civil and Political Rights, 1966.\(^{282}\)

7. "Human Rights" is no more a vague concept, and now the definition have been provided under Section 2 (1) (d) of the Protection of Human Rights Act.\(^{283}\) The right to life liberty, equality and dignity enforceable by courts in India are human rights. These are all Fundamental Rights provided in Part-III of the Constitution. The NHRC have been taking cognizance of cases of custodial deaths, torture, rapes, sexual harassments, illegal detentions and not touched the areas of "equality". Even the rights of people pertaining to service matters or

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282. See clause (5) of Article 9.
discrimination without any intelligible differentia are also expected to be taken up by the Commission in future.

8. The protection of concept of "sovereign immunity" claimed under Article 300 of the Constitution by the State for Sovereign functions is withering away. Though NHRC as well as Supreme Court (and High Courts) have awarded compensation to the victims of human rights violations, yet the payment of compensation by State out of the tax payers money is not justified. Though in number of cases the courts and NHRC have gave option to the State to prosecute and recover amount from the erring officials but any case of recovery is yet to be seen.

9. The Code of Criminal Procedure, 1973 provides for compensation to the victim and accused but these provisions have been rarely used by the courts. The amount of compensation is to be paid out of the fine. These powers of the court to impose fine under Section 357 and 358 Cr.P.C. are meagre. A Magistrate can award Rs. 100/- as compensation for accusation without unreasonable cause. This is likely to be revised in future.

10. The law of bail have already undergone a change in view of directions the Apex Court in the matter of 'Common Cause' a Registered Society Through its Director v. Union of India and bail not jail is already a rule being adopted by the courts. The concept of bail is likely to become more liberal in future.

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284. See Article 300 of Constitution.
286. See Sections 237, 250, 357 and 358 of Cr.P.C.
287. AIR 1996 SC 1619.