CHAPTER – 2
HISTORICAL PERSPECTIVE

2 INTRODUCTION

The term ‘accused’ is the generic name for the defendant in a criminal case. A person becomes accused within the meaning of a guarantee of speedy trial only at the point at which either formal indictment or information has been returned against him or her, or when he or she becomes subject to actual restraints on liberty imposed by arrest, whichever occurs first.\(^{44}\) It is common ground that mere suspicion that an individual has committed offences is insufficient to place him in the category of ‘accused’ persons. It is also common ground that it is not enough that he is in the traditional phrase “wanted by the police to help them with their enquiries.”\(^{45}\) Something more is required. What more is needed to make a suspect an ‘accused’ person? There is no statutory definition. Given the divergent systems of law involved, and notably the differences between criminal procedures in the United Kingdom and in civil law jurisdictions, it is not surprising that the legislature has not attempted a definition. Accused may refer to a person charged with a criminal offence, or the state of being so charged.

In the common law legal system, an indictment is a formal charge of having committed a serious criminal offence. In those jurisdictions, which retain the concept of a felony, the serious crime offence would be a felony; those jurisdictions, which have abolished the concept of a felony often, substitute instead the concept of an indictable offence, i.e. an offence which requires an indictment. Traditionally an indictment was handed down by a grand jury, but most common law jurisdictions abolished grand juries. The role of the lawyer is considered central to protecting the rights

\(^{44}\) Webster's Revised Unabridged Dictionary (1913).
\(^{45}\) Available at http://www.hrothgar.co.uk/WebCases/hol/contents/0t/49.htm visited on 30th May 2006.
of a person accused of a crime, but the lawyer standing alone would be of little use were it not for the bundle of codified rights that are there for the accused person's protection. What evidence may be used in a criminal case, for example, is governed by the protections against unlawful search and seizure established in the Fourth Amendment. Here again the colonists’ experience under British rule in the 18th century shaped the concerns of the Founding generation.

Although British law required that warrants be issued for the police to search a person’s residence, the British Colonial government relied on general warrants, called writs of assistance, which gave officials a license to search almost everywhere for almost everything. The notion of a general warrant dated back to the Tudor reign under Henry VIII, and resistance to its broad reach began to grow in the early 18th century. Critics attacked the general warrants as “a badge of slavery upon the whole people, exposing every man's house to be entered into, and searched by persons unknown to him.” But the government still used them, and they became a major source of friction between His Majesty's Government and the American colonists. The problem with the general warrant was that it lacked specificity. In England in 1763, for example, a typical warrant issued by the Secretary of State commanded “diligent search” for the unidentified author, printer, and publisher of a satirical journal, The North Briton, and the seizure of their papers. At least five houses were subsequently searched, 49 (mostly innocent) people were arrested, and thousands of books and papers confiscated.46 Opposition to the warrants was widespread in England, and the opposition gradually forced the government to restrict their usage.

2.1 VEDIC PERIOD

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Natural law philosophy has been an integral part of indigenous legal, social and political system since Vedic time. Dharma like the sacred Ganges has the eternal spring of Indian ethic, morality, law, religion and philosophy. The concept of “Dharma” has been all pervading, governing, ordering, regulating and directing human being in their earthly and spiritual pursuits. It has been a liberating force helping man to attain freedom from bondage, indiscretion and exploitation.  

According to Manu :-

_The ten characteristics of Dharma are – fortitude, forgiveness, mind control, Non theft, purity of body and mind, sense control, wisdom, knowledge, truth and non anger._

The present rights of accused are a result of evolution through ages. Some minimal rights were available to the accused person in ancient times in India. _Vedas_ are the earliest sources which provided "three basic rights that of Tana (body), Skridhi (dwelling place) and Jibhasi (life)." Dharma was the code of conduct which provided rules for everyone and violations were punishable. There are different theories pertaining to origin of rights. Even the natural law or dharma commands humane treatment of those in prison. Long before Hobbes, Locke and Rousseau, the Indian Vedas and epics in ancient times had provided for rights and duties of individuals, classes and communities.

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

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47 Prof. Dhayani, S.N., Indian Legal Jurisprudence, ed. 4, 2006, p. 68.
50 See Kumar, N., Natural Justice (1997), p. 5.
The primary objective of criminal law was, "thus to punish offenders rather than paying compensation to the victims"\(^{51}\) as mere payment of compensation was not considered sufficient for ends of justice. In cases of "theft, assault, adultery, rape" there as provisions for monetary compensation in addition to corporal punishment.\(^{52}\) Brihaspati prescribed fine for those who mixes bad and good articles together with compensation of double the quantity or value of article to the buyers.\(^{53}\) Similarly, Gautama prescribed compensation in cases of theft.\(^{54}\) Kautilya's Arthasastra is a treatise on various kinds of rights and he envisaged a sort of welfare State where King was to look after all sections of the society.\(^{55}\) The King used to dispose of the urgent matters expeditiously\(^{56}\) and basic rights like right to sleep, sitting down, meals, answering calls of nature, movement etc., were available to the accused inside prison house, besides the sanitary facilities and places of worship of respective deities. Penalties were laid for even law enforcement officials like Superintendent of Jails for torture of détentes, depriving food and water and beating the prisoner to death.\(^{57}\) Kautilya even did not spare the King and punishment for him was also provided if some innocent accused was punished besides imposing fine on Magistrates and Judges. Two norms, viz. Dharma and Danda were the guiding factors of the administration and criminal justice system. The "Rule of Law" prevailed over" rule of man.

This secular law of nature which is of universal application envisaged observance of Yama and Niyama for the maintenance of order and harmony in society. The five yamas are ahimsa, truth, non theft, total abstinence and non possession and five Niyams are purity

\(^{52}\) See Kane, History of Dharmashastra (1972), p. 387.
\(^{53}\) See Brihaspati, Sacred Book of the East, 358 verse 9-10.
\(^{54}\) See Gautama X-46-7; see also Ling at Classical Law of Ancient India (1973), p. 70.
\(^{56}\) Kautilya, Book (i) Chapter 19 Section 30.
and contentment, penance, study of scriptures and surrender of God which were enunciated by Maharishi Patanjali to attain self discipline and to establish equilibrium in society. Hindu Vedic natural law ’s most remarkable feature has been that it was not affected by dogmas, myths and creeds as it called upon people to strive for right actions, righteous deeds and doing good to others.58

The Puranas, the Mahabharata and the Ramayana besides Vedas and the Upanishads also embody the principles of universal truth, morality and justice. The words between Rama and Ravana, Krishna and Arjuna, Kaurvas and Pandawas, Lord Buddha and Lord Mahavira with their respective disciples guides the noble ideals of eternal natural law of varying forms and contents which has been re-interpreted from ages to ages to mould, regenerate and protect Indian society from wickedness and adharma and to re-establish dharma to demonstrate the validity of Satyameva Jayate.

The roots of modern day law in India can be traced back to the Vedic period. The law, as we understand it in the present times has evolved in its journey through the Hindu period, Muslim Period, British Raj, and after independence, it has taken the present shape. The legal system of a country at a given time is not the creation of one man or of one day, it represents the cumulative fruit of the endeavour, experience, thoughtful planning and patient labour of people through generations.59

The corpus juris of ancient India evolved by its law givers Rishis, law researchers jurists like Bhrigu, Parasar, Shukracharya, Manu to name a few.60 Sutherland has rightly observed : “An understanding of the nature of law is necessary in order to secure an understanding of the nature of

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58 Prof. Dhayani, S.N., Indian Legal Jurisprudence, ed. 4, 2006, p. 69.
60 Dr. S.N.Dhyani, Fundamentals of Jurisprudence - The Indian Approach 3 (1997).
crime. A complete explanation of the origin and enforcement of laws would be also an explanation to the violation of laws.”

Hence, to understand the present day criminal justice system it is of vital importance to trace the roots of the system. Without a historical background, it may be difficult to appreciate as to why a particular feature of the system is as it is. The historical perspective also throws light on the anomalies that are there in the system. To reach out at the roots of the present legal system it is essential to analyse the system under three important periods:

2.2 Ancient Hindu Legal System
2.3 Muslim Legal System
2.4 Pre-independence era or British Legal System

2.2 ANCIENT HINDU LEGAL SYSTEM

Hindus had developed a very comprehensive legal system that may be dated back to sixth century B.C. Mayne does not at all exaggerate when he says that Hindu law has the oldest pedigree of any known system of jurisprudence and even now it shows no signs of decrepitude. The original conception of Hindu law was almost wholly religious and philosophical and was based on Dharma. Dharma is a classical Sanskrit term, which defies all attempts at an exact rendering in English. It may be used in different senses - it means law, it means justice and it means duty. In elucidating the relation between Dharma, law, justice and duty, Prof. B.K.Sirkar says, “It is clear that Dharma is like Danda, the most awe-inspiring fact in the state’s life ... Danda is the root of a tree which flowers in Dharma.” In the context of Dharmashastras, the word Dharma came to mean ‘the privileges, duties and obligations of a man, his standard of conduct’ as a member of the Aryancommunity as a person in a particular stage of life.”

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61 Edwin H. Sutherland, Criminology 11 (1924).
62 As quoted in Dr. U.C. Sarkar, Epochs in Hindu Legal History 19 (1958).
63 Romila Thapar, A History of India 50-68 (1966).
In order to fully appreciate the criminal law one must refer to the origin of kingship and the caste system. In the Rigveda there is reference to an order existing in nature. Varuna was the presiding deity of this order and any act of misdeameanor to this order was punished by Varuna. On the analogy of this moral sovereignty of Varuna was later conceived the earthly sovereignty of the King who was entrusted with the maintenance of law and order in the society. Danda was to be exercised by the King. But he was equally subjected to punishment in case of transgression. This was unlike the English concept of “The King can do no wrong” and thus in ancient India the doctrine of “rule of law” was recognized in its most perfect application. Hindu society was a caste-ridden society. Caste was a passport to special consideration. Caste divided the population into four distinct categories (1) Brahmins (2) Kshatriyas (3) Vaisyas and (4) Sudras. The Brahmins were considered the most superior caste and by virtue of their caste held privileges and prerogatives not held by other sections of the Hindu society. The nobles and warriors belonged to the Kshatriya class. Merchants and traders belonged to the Vaisya class and the Sudra were the downtrodden - the worker class. Caste determined the pattern of life amongst Hindu relating to their status, living, marriage, profession, and social obligations.

Ancient India was divided into states - each state had a Raja who ruled with the assistance of Purohita (the chief priest) and a Senani (Military commander). The State was further divided into provinces which were governed by Governors appointed by the Raja. The provinces were further divided into districts and units having different terminology at different times. Villages formed an integral part of the ancient Indian State. The village was based upon the bond between the family or the clan. Each village consisted of a village headman and a village panchayat. In

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64 See G.S.Gharye, “A casteless society or a plural society” in Caste and Race in India 444 (1979).
65 Epigraphic Indica, Calcutta and Delhi, Ch. XV, p. 130 ff.
ancient India, long before the courts of law were established, the decision of the village panchayat were accepted as binding on the parties. The panchayat was composed of the chief of community and some selected or elected residents of the village. The panchayats can be catalogued in their ascending order of importance as 1) Kula 2) Sreni and 3) Puga. The decision of the kula or kinsmen was subject to revision by the sreni, which in turn could be revised by the puga. From the decision of the puga, an appeal lay finally to the sovereign. Panchayats proceeded in an informal way untrammeled by the technicalities of procedure and the laws of evidence. Sanctions supporting the jurisdiction of the village Panchayat seems to be the custom and threat of ex-communication for non-conformists. Disputes among villagers were settled in the panchayat itself. The villagers felt normally bound by the verdict of the panchayat.

The King ruled according to Dharma-Dharma that which ensures and sustains progress and welfare of all in this world and eternal bliss in the other world. The Dharma is promulgated in the form of commands. Dharma is the path of righteous conduct and the scriptures say that the king who does not follow the path of Dharma may be removed. Like many thinkers of the modern time, some Indian writers like Manu held that the ultimate sanction behind the state is force. It is Danda (physical punishment) which rules over all the subjects, it is Danda which protects them; when all else are sleeping, Danda keeps awake. Law is nothing but Danda itself. It was the duty of the King to punish the lawbreakers and create conditions for the smooth running of the society. Every person had the right to receive justice and it was the state which delivered it to him. Though powerful, the King symbolizing the state had no right to legislate.

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68 Parasha Dharma Samhita - Sayana Madhavacharya Krita - Tikasahita (Sanskrit) - edited by Vamanasharma (1893), Bombay Sanskrit Series at 63.
The King was the upholder and promulgator of law and administrator of justice accordingly.\textsuperscript{70}

Brahmins occupied an envious position and if a man accused a Brahmin of committing a crime he will be deemed to have committed a similar crime himself, and in case of Brahmins' innocence his guilt will be declared as doubly sinful.\textsuperscript{71} Brahmins could not be subjected to corporal punishment imprisonment, fine, reviles or ex-communication.\textsuperscript{72} In disputed cases truth shall be ascertained with the help of witnesses who must be more than one in number and who may be even sudras. The punishment inflicted for crimes was different. Rank played an important part in determining the punishment. A man who had killed a Kshatriya shall give one thousand cows to Brahmins for the expiation of the sin, for killing a Vaisya or Sudra he must give one hundred or ten cows respectively along with a bull in each case.\textsuperscript{73} Kautilya is of the opinion that the punishment inflicted by the King must be just. Kautilya has laid down that in imposing the first, middle or highest amereaments the Pradeshta shall take into consideration the social position of the person, the nature of the offence, the cause, gravity or lightness the antecedent and subsequent circumstances, the time and place and shall ript fail to notice equitable distinction among offenders whether belonging to the loyal family or to the subject population. This shows that in mind of Kautilya there was a substantive conception of Danda and we may agree with Varma\textsuperscript{74} that Kautilya’s Dandaniti is concerned not only with penal sanctions but with the totality of social and political relationship, involving among other things, the King, his ministers and the army.\textsuperscript{75}

\textsuperscript{70} Dr. Birendra Nath, Judicial Administration in Ancient India 5-6 (1979).
\textsuperscript{71} U.C.Sarkar, Epochs in Hindu Legal History 62(1958).
\textsuperscript{72} Id. ,at 63.
\textsuperscript{73} Id. at 67.
\textsuperscript{74} V.P Varma, Studies in Hindu Political Thought and its Metaphysical Foundations 82(1975).
\textsuperscript{75} Dr. Birendra Nath, Judicial Administration in Ancient India 29 (1979)
According to Manu there are four methods of punishments (1) by gentle admonition (2) by severe reproof, (3) by fine and (4) by corporal punishment and declares that these punishments may be inflicted separately or together according to the nature of crime. A science of penology as such was not developed but ancient Smriti writers were quite aware of the several purposes served by punishments for crime.

By present day standards punishment was rather severe and the nature of crimes extended into most of the areas of human endeavour. Adultery was punishable by branding on the forehead, burning alive or public humiliations. Gautama suggests a public devouring by dogs. Banishment and cutting of the sex organ were also punishments. The fourteen places of punishment on the body indicated by Brhaspati are: both hands, both feet, the male organ, the eye, the tongue, both ears, the nose, the neck, one half of the feet, the thumb, and index fingers, the forehead, the lips, buttocks and hips. Torture was rather a statutory method for dealing with crimes.

Imprisonment does not figure in the earlier texts as a form of punishment but appears around 800 B.C. Manu mentions imprisonment as one of the three methods of restraining the wicked - the other two being the use of fetters and corporal punishments.

For committing murder, early Sutras prescribe that the murderer should pay fine according to the caste of the person murdered. Mostly the penalties were based upon caste-considerations as informed by Baudhayana. Other ancient law books lay down that punishment for murder was death with confiscation of the murder’s property. The Arthashastra prescribes death penalty for the murder, even if it occurred in a quarrel or duel. Capital punishment was given in varied forms, namely, roasting alive, drowning, trampling by elephants, devouring by dogs,

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76 “The Dandarireka o/Vardhamana” Published in Gaikwad Oriental Series, 1931, deals exclusively with the subject of punishment
78 Atov VIII, 310.
cutting into pieces, impalement etc. Mutilation, torture and imprisonment were common penalties for many other crimes.\(^\text{79}\)

As per Brihaspati, Vyavahara or the suit was divided into four states (1) Poorvapaksha (plaint,) (2) Uttar (reply) (3) Kriya (trial by the court) and Nirnaya (judgement). In criminal cases, sometimes-circumstantial evidence was sufficient to punish the criminal or to acquit him. The accused could produce any witness in his defence before the court to prove his innocence. Witnesses were required to take an oath before the court. Ordeal\(^\text{80}\) as a means of proof was not only permitted but also frequently used. In criminal cases, the courts were enjoined to convict according to the procedure established by law. False witnesses were severely fined by the courts. Narada says that they were condemned to go to a horrible hell and stay there for a kalpa.\(^\text{81}\)

Kane, has made an apt observation, “it will be seen from the early Sutras like that of Gautama and from the Manusmriti that the more ancient criminal law in India was very severe and drastic, but that from the times of Yagnavalkaya, Narada and Brihaspati the rigour of punishments was lessened and softened and fines came to be the ordinary punishments for many crimes.”\(^\text{82}\)

2.3 MUSLIM LEGAL SYSTEM

The long reign of Hindu states was broken at the end of the twelfth century by the foreign rule of Muslim Turks.\(^\text{83}\) Indians failed to adopt their time-honoured system of warfare to meet the requirements of the new situation. The real weakness in the Indian administration lay in the influence of the great feudatory families whose power and ambition constituted a perpetual threat to the stability of the Central Government.

\(^\text{79}\) See P.V.Kane, History of Dharmasastra 391-410 (1962).
\(^\text{80}\) E.g. ordeal by fire where Sita in order to prove her chastity had to walk through the fire as narrated in Ramayana and was known as Agni Pariksha.
\(^\text{81}\) Narada, Quotations, Vol. V, at 10.
\(^\text{82}\) P.V.Kane, History of Dharmasastra, 390 (1962).
Hindu kingdoms also suffered from the prevailing caste divisions. Hindu leadership was by then politically disunited and were unpatriotic as opposed to the Turks who were not only militarily superior but also religiously fanatic.

In the Muslim period justice were organized on traditional orthodox lines. The administration of justice was divided into three categories: Siyasat, Mazolim and Qada. The first dealt with military and political offences, the second with cases arising out of the dealings of public servants, with the public, and the third with ordinary civil and criminal suits. To understand the judicial system of the Muslims it would be necessary to have a brief account of the administrative units during that period. In medieval India the Sultan being the head of the State, was the supreme authority to administer justice in his kingdom. The administration of justice was one of the important functions of the Sultan, which was actually done, in his name in three capacities. Diwan-e-Qaza (arbitrator); Diwan-e-Mazalim (as head of bureaucracy) and Diwan-e-Siyasat (as comamnder in chief of forces). The courts were required to seek his prior approval before awarding capital punishment.

The Empire was divided into provinces called subahs. Each subah consisted of several sarkars further subdivided into mahals or parganahs. A convenient number of villages called maw da's or dihs were included in each mahal. In Muslim administrative jargon a village was not only the conglomeration of houses where peasants lived but also the land surrounding it. Hence the boundary of each mawda was clearly demarcated. Each one of these was an administrative unit. Smaller hamlets called naglahs were included in mawda’s.

Six courts were established at the capital of the Empire: The King’s Court, Diwan-e-Muzalim, Diwan-e-Risalat, Sadre Jehan’s Court, Chief Justice’s Court and Diwan-e-Siyasat. Sultan presided over the King’s court

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84 Dr. R.C.Mazumdar, Ancient India (1952).
which exercised both original and appellate jurisdiction on all kings of cases. The Sultan was assisted by two reputed Muftis. The court of Diwan-e-Muzalim was the highest court of criminal appeal and court of Diwan-e-Risalat was the court of civil appeal. The Chief Justice Qazi-ul-Quzat was the highest judicial officer next to the Sultan. The court of Diwan-e-Siyasat was constituted to deal with the case of rebels and those charged with high treason.

The village panchayats had criminal jurisdiction in petty cases. They were thus the lowest trial court for criminal cases and usually there were no appeals against their findings. The shiqdar of the pargana tried all cases of dacoity, murder, breach of peace etc. However, petty criminal cases relating to theft or rioting in the pargana were consigned to the local kotwal. Later, a whole time Qazi was appointed who tried most of the criminal cases within the pargana.

Appeals from the courts in the pargana lay with the qazi of the Sarkar who forced the highest criminal court in the region and possessed both original and appellate jurisdiction. Besides him, the local faujdar and kotwal also had some criminal jurisdiction. The court of the faujdar was particularly called the Faudari Adalat. His powers were analogous to those of modern magistrates.

Above the Sarkar courts were the two appellate courts in the province. Appeals against the decisions of the Faujdar were heard by the Governor’s court while appeal against the decisions of the Qazi-I-Sarkar were heard by the provincial qazi. Both these courts had original jurisdiction as well. From here the appeal lay the highest court i.e. Diwan-e-Muzalim which was located at the imperial headquarters. Once in a week, the Emperor also tried cases. He was assisted by the qazi of the

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86 Mufti was a lawyer of eminence attached to the court to expound law and was appointed by the Chief Justice in the name of the Sultan. Law as expounded by Mufti was accepted by the Judge as authoritative.

87 M.B. Ahmed. The Administration of Justice in Medieval India 104-125 (1941).
Capital, Qazi-ul-Quzat, the Mufti of the empire and a select group of theological specially chosen for the purpose. Ordinarily appeals from provincial courts were heard by the Qazi-ul-Quzat and no appeal in the usual course could be carried before the Emperor. But a citizen had a right to address petitions to him and the Emperor in his discretion could look into any such case and give necessary direction.  

A systematic judicial procedure was followed by the courts during the Muslim period. Justice was also done according to shariat. In criminal cases, a complaint was presented before the court either personally or through representative. To every criminal court was attached a public prosecutor known as Mohtasib. He constituted prosecutions against the accused before the court. The court was empowered to call the accused at once and to begin hearing of the case. Sometimes the court insisted on hearing the complaints evidence before calling the accused person. Ordinarily, the judgment was given in an open court. In exceptional cases, where either the public trial was against the interest of the state or the accused was dangerously influential, the judgment was not pronounced in an open court.

Evidence was classified by the Hanafi law into three categories: a) Tawatur i.e. full corroboration, b) Ehad i.e., testimony of a single individual, c.) Iqrar i.e. admission including the confession. The court always preferred Tawatur to other kinds of evidence. All those who believed in God could not be rejected as untruthful unless proved so. Oaths were administered to all witnesses. Women were also competent witnesses but at least two women witnesses were required to prove a fact for which the evidence of one man was sufficient. The testimony of one woman was recognized only in those cases where women alone were expected to have a special knowledge. The principle of estoppel and res judicata were also recognized by the Muslim law.

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89 Ibid
As opposed to present day situation the murder or homicide was essentially considered a private grievance (das-quas haqq ul abd ghallib ast). The state came into picture only when desired to do so by a complaint of the aggrieved party. The aggrieved party was given the option at the pronouncement of the judgment to chose between the execution of the condemned person or the blood price.⁹⁰

The qazi could also take independently cases involving theft and robbery. Aurangzeb’s farman of 1672 reiterates the power of the qazi to decide such criminal offences. It is stated that “when theft has been proved against any man by legal evidence below the qazi or the accused by confession satisfies the condition necessary for imposition of punishment, the qazi should indict the punishment in his own presence and keep the culprit in prison till he manifests signs of penitence for his crime”.⁹¹

The biggest defect in the administration of justice in the medieval period was that no regular record by the trial court was maintained; appeal generally meant retrial of a case de novo. Criminal cases were tried according to the Islamic law. There were no formal codes for the guidance of the courts. However, under Aurangzeb a comprehensive law book, called the Fatwa-i- Alamgir was compiled by the joint labours of a galaxy of eminent jurists. Lawyers could be employed by litigants. All important rulers of this period kept before themselves the ideal of making due provision for justice.⁹²

Punishments were very severe. However, all criminal offences including even murder could be settled by compounding. The Emperors of this period did not peril the judges to impose the penalty of death on any person without their concurrence. The recommendation of death penalty was carefully scrutinized and was accepted only when there was full justification for executing the offender. The qazis were directed to stipulate

⁹⁰ Fatawa-i-Alamgiri Bk VI at 503.
⁹² Supra note 28. See also, A.L. Srivastava, Medieval Indian Culture 27-32 (1964).
punishments commensurate with the crimes. Although the guidelines were provided for some offences not covered directly under the Shariat yet a peculiar feature of these punishments was that qazis were left with much discretionary power in the matter of imprisonment (qaid, mahbus or zindah) as the period of detention was not defined. The punishment was expressed in such a manner as: “the accused to be flogged and/or imprisoned till he repents”. Detention in jail usually lasted till the convict became weak and submissive or agreed to atone for his crime or to embrace Islam if he happened to be a non-Muslim. Torture to extort confessions were commonly resorted to and sometimes a person succumbed to these tortures. Apart from this whipping, blinding, mutilation of body and death by stoning or death by trampling under the feet of elephants or by being torn to pieces by wild animals (Jahangir had a special fancy for this variety of execution) were other popular punishments inflicted on the accused.

Nobody was given hundreds of stroke at one stretch. They were distributed over a shorter or longer period according to the estimated capacity of one’s endurance. If it appeared that a man might die of his sufferings, he was put into prison and allowed to recover from his wounds so that the rest of the sentence might be carried out after recovery. Sometimes a man was hacked to pieces bit by bit and special care was taken to begin with such limbs as would not lead to his death.

The Muslim law considered “Treason” (ghadrj as a crime against God and religion and therefore, against the state. Persons held responsible for treason by the court were mostly punished with death. No consideration was shown for their rank, religion and caste. Only the ruler was empowered to consider a mercy petition. Contempt of the court was considered a serious offence and was severely punished in the Muslim period. The royal prisons for housing under-trials and convicts were not quite satisfactory. There was little or no care taken of hygiene and
cleanliness and nor were there any satisfactory arrangement for messing and treatment in jails.  

2.4 PRE-INDEPENDENCE ERA OR BRITISH LEGAL SYSTEM

There is an organic connection between the Mughal period and the British period. British India was deeply indebted to Mughal India on the one hand, and Mughal India was a characteristic Indian entity on the other hand in a way not realized by any other regime during the previous thousand years. In many ways British India saw the development of trends already existing in Mughal India and it is certain that British India would have been a very different place had the Mughals never ruled before them.

The emergence of British Empire in India stands out as a unique event in the history of the World. Unlike many other empires, the huge edifice of this Empire was created by merely a Company which was organized in England for furthering the British commercial interests in overseas countries. A Charter of Queen Elizabeth which settled its Constitution, powers, and privileges incorporated the East India Company, with the official title as “The Governor and Company of Merchants of London trading into the Eas Indies” in England on 31st December 1600.

The Charter of 1661 is a landmark as far as evolution of judicial system in India concerned. This Charter conferred extensive powers on the Company to administer justice to its settlements. The major settlements of the British at that time were Surat, Bombay, Calcutta and Madras. The criminal jurisdiction in each Presidency town was vested in the Governor and five senior members of the Council. Each of them individually was to be a justice of-peace. A justice of peace could arrest persons accused of committing crimes, punish those who are guilty of minor crimes and commit the rest to be tried by the quarter session. Three justices of the peace collectively were to form a court of record and have powers of the

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93 Ibid. See also, supra note 28 at 24-28 &nd supra note 38 at 156-163.
court of oyer and terminer and goal delivery and thus hold quarter sessions four times a year to try and punish each and every criminal offence, except high treason, committed in the Presidency town and subordinate factories. Trials at quarter sessions were to be held by the help of a grand jury and petty jury. All technical forms and procedures of the English criminal justice were introduced in the Presidency towns.  

However, this judicial system was found wanting in many aspects. In the first place it was executive ridden and secondly the judges who were appointed had no training whatsoever, they were oblivious of the technicalities of law and many of them were junior members of the company: The company was growing territorially and politically earlier it governed only the Presidency towns but with passage of time it held and sway over the neighbouring territories as well known as “mofussif. Bengal, Bihar and Orissa were the first mofussil towns to be administered and in 1772 Adalat system was introduced here which later spread to other areas as well. The Adalat system of 1772 was a brainchild of Warren Hastings.

Warren Hastings characterized this as a law of “barbarous construction and contrary to the first principles of civil society, by which the state acquires an interest in every member which composes it and a right in his security. It is a law which if rigidly observed, would put the life of every parent in the hands of his son, and by its effect on weak and timid minds, would afford a kind of pre-assurance of impunity in those who were disposed to become obnoxious to it.  

In the Regulating Act of 1772 civil administration was taken up by the English while criminal administration was left to the nawabs. Though Muslim law was unjust and harsh on many courts but Warren Hastings decided not to interfere with it. Muslim law did not treat crime as a branch of public law. Some of the punishments prescribed were harsh like

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mutilation and moreover some of the procedures resulted in acquittal of the accused e.g. in a rape case four witnesses to the actual crime were required before pronouncement of guilt. Hence taking these precautions the vilest form of crimes were committed with impunity. Still Hastings left the administration of criminal justice to Muslim law officers, but to check arbitrary proceedings by them, he provided for supervision on them by the Collectors at the district level and by the Governor and Council at Calcutta.

The establishment of Supreme Court of Judicature at Calcutta under the Regulating Act of 1773 marks a watershed in the Indian legal history. The court was to consist of Chief Justice and there puisne judges to be appointed by the Crown and to hold office during its pleasure. Only a barrister of at least five years standing could be appointed as a judge.

The court was to be a court of record and was to enjoy civil, criminal admiralty and ecclesiastical jurisdiction. The jurisdiction of the court was not to extend to all persons in Bengal, Bihar and Orissa. It was restricted to only a few defined categories of persons viz. the British subjects and His Majesty’s subjects residing in Bengal, Bihar and Orissa; persons employed by, or directly or indirectly in the service of the company or any of His Majesty’s subjects.

A survey of the history of seven years from 1774 to 1780 show that the provisions of the Regulating Act, 1773 and charter of 1774 had caused a serious conflict between the judiciary and the executive. Hence the Act of 1781 was passed. However, because of the dichotomy which was maintained at that time between the Diwani and the Nizamat, the Council was diffident on the question whether it should intervene in any way in the law of crimes and seek to modify it. According to Rankin: “The cloudy title of the company to the nizamat made it slow to alter the criminal law.”

It was Cornwallis who first systematically initiated criminal reforms in 1790. What was needed was not only reform of the courts but certain

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features of Muslim criminal law were to be eliminated which was contrary to principles of natural justice. Cornwallis ignored the fact that the formal status of the company was still that of a Diwan and decided to modify several flagrant provisions of the Muslim criminal law. In the first place Cornwallis abolished the rule that the murderer was not liable for capital punishment if he committed the murder by drowning, strangling, poisoning or with a weapon such as a stick or club on which there was no iron, or by such an instrument as is not usually adapted to the drawing of blood. He sowed the seeds of modern criminal law by concentrating on the intention of the accused (mens rea in present day) in pronouncing him guilty of the offence.

The other major anomaly that was removed by Cornwallis was that till then crimes was considered part of private law and hence the next kin of the deceased could remit the death penalty. It was only on his insistence that a suit was instituted, no suo motu action could be taken much against the present day situation where accused is held to have committed a crime against the society. Cornwallis by Regulation of December 3, 1790 laid down that “the relations be in future debarred from pardoning the offender, and that the law be left to take its course upon all persons convicted, without any reference to the will of the kindred of the deceased.”

Severe punishments were prescribed for the criminals like mutilation of limbs which sends shivers down the spine. The punishment is to be reformative and not retributive. Therefore, the Governor General resolved on 10 October 1791 that the punishment of mutilation should not be inflicted on any criminal in future; thereafter all criminals should instead be imprisoned and made to do hard labour for 7 or 14 years. Imprisonment during pleasure was done away with and all such cases were reviewed. Furthermore, blood money that was given to the kin of the deceased was now imposed as a fine to be deposited in the state treasury and failure to do so entailed imprisonment for a particular period. Regulation VI of 1802 declared infanticide punishable as willful murder liable to a sentence of
death. Law of evidence was also modified and the Muslim law that did not permit a Hindu to testify against a Muslim accused was abrogated. The offence of perjury had very much increased and therefore, by Regulation XVII of 1977 severe punishments were prescribed with a view to discourage the offence.

Lord Hastings carried on the reform work and in 1818 the jurisdiction of the magistrates and the joint magistrates was enlarged and authorized to try persons who were charged with the offence of theft and burglary and attempt to commit such crimes. Efforts were also made to deal with the unnecessary delay in the administration of justice and to dispose of the arrears of work. Apart from this he took special interest in reorganizing the police force to deal with criminals and to maintain law and order in the country. In 1820 new penalties were laid down to prevent and punish began and dharna. It was also provided for arrest of persons on security grounds.98

The first major step in the direction of reducing the importance of the Muslim law officers was taken in 1810 when Regulation I made provisions for dispensing with attendance of fatwa of the law officers at the Circuits Court whenever that appeared to be advisable to the judges. In such cases, the court was not to pass any orders or sentence by itself but was to transmit the proceedings of the trial along with its opinion to the Sadar Nizamat Adalat which was finally to propose the sentence. Regulation VI of 1832 was very important insofar as it marked the end of the Muslim criminal law as a general and compulsory system of law applicable to all, Muslims and non-Muslims alike.

Very few changes were made during the period 1833-1860. After 1833, an All India Legislature was created. In the words of Rankin, the Charter Act of 1833 forms a watershed in the legal history of India. It envisaged a general system of justice and police and a code of laws

98 Ibid.
common, as far as possible, to the whole people of India, having its varieties classified and systematized. And for this the first Law Commission was appointed in 1835 under the chairmanship of Lord McCauley. Few changes in the criminal law during this period were that status of slavery was declared as non-recognizable in any court of the company, dacoits came to be punished with transportation for life, or with, imprisonment for any shorter term with hard labour and thugs came to be punished with imprisonment for life with hard labour. Finally in 1860, the Indian Penal Code was enacted which is followed till date.

On the way to establish the modern judicial system in India in the field of criminal justice the British had to face several difficulties. The character and habit of the people was such that they believed in destiny and did not want to trouble themselves by bringing criminals to justice. The second was that the ‘Indian Ministerial Officers were meanly paid and therefore corrupt’.\(^9\) The principle defect in the judicial system introduced by the British lay in the gross technicalities of the procedural law, born of a foreign legal system. The complex machinery of western civilization was introduced into the simple society of the East. The half-way stage that was arrived at in India resulted in technical difficulties, which often led to unnecessary delay and expense in the decision of criminal cases, and sometimes in miscarriage of justice. The elaborate and costly machinery of British courts and British legal processes and the immense advantage which they gave the literate minority against the illiterate cultivators and craftsmen had completely ‘elbowed out of Indian courts all real justice founded on equity and comoa sense’. The forms of procedure which in England were designed to protect the liberty of the subject, had in India sometimes the effect of protecting the rich and the criminals.

This state of things continued till India regained independence. But notwithstanding these defects British administration restored peace and law

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\(^9\) Romesh Dutt, The Economic History of India 313(1950).
and order and positively contributed in the field of administration even if it was only for its own sake and for serving its own purpose.\textsuperscript{100} M.R. Palande has rightly observed that: “It is hardly an exaggeration to say that a high standard of intelligence independence, and integrity in the dispensation of justice is one of the treasured legacies left by Britain to independent India.”\textsuperscript{101}

2.5 CONSTITUTION OF INDIA

The idea of a constituent assembly for India was put forward for the first time by M.N. Roy, a pioneer of communist movement in India and an advocate of radical democratic in 1934. It was in 1935 that the Indian National Congress (INC), for the first time, officially demanded a constituent assembly to frame the Constitution of India. It was declared by Jawaharlal Nehru, on behalf of INC in the year 1938 that the Constitution of free India must be framed, without outside interference by a constituent assembly elected on the basis of adult franchise. The constituent assembly was finally constituted in November, 1946 and 22 committees were formed to deal with different task of Constitution making. It was Dr. B.R. Ambedkar who introduced the final draft of Constitution in the assembly on November 4, 1948 and that draft Constitution was declared passed on November 26, 1946.\textsuperscript{102}

The Supreme Law of the land is the Constitution of India and making the same was not an easy task. The problems faced by the framers of the Constitution were well considered. Firstly, it was required to provide a Constitution which would unite a population which was not homogenous of over 300 millions. Many communities were living in this country and many languages were prevalent in different parts of it. There were many other differences. It was also

\textsuperscript{100} T.K. Banerjee, Background to Indian Criminal Law 370-372 (1963).
\textsuperscript{101} See, M.R. Palande, Introduction to Indian Administration 427(1937).
\textsuperscript{102} Laxmikant M., Indian Polity, ed. 2, 2008, p. 40.
required to make provisions for backward people and areas, like tribes and tribal areas and for the prisoners. The countries of Europe could not be able to join together or coalesce even in a confederacy, much less than one unitary government. But we succeeded in framing a Constitution which covered the whole of India inspite of the size and diversity of the country. \(^{103}\)

Now the Constitution of India is an elaborate document containing 395 Articles (divided into 22 parts) and 12 schedules and there is no Constitution in the world which is perhaps so comprehensive. \(^{104}\)

Protection has been given by the Constitution of India against arbitrary and excessive punishment to an accused person, whether citizen or foreigner or legal person like a company or a corporation, under different Articles. Various safeguards have been provided under the Indian Constitution to the person accused of crimes under different Articles\(^{105}\) like Protection for the right to equality before law under Article 14, Protection in respect of conviction for offences under Article 20, Protection of Rights of Prisoners under Article 21, Protection against arrest and detention in certain cases under Article 22, Appeals to Supreme Court under Article 134,136 and other protection available under some other Articles. \(^{106}\)

2.6  DEVELOPMENT OF THE LAW

An accused cannot have similar footing with the convicted person. In the Bill of Rights Ordinance, 1991 affirms that every accused has a right to be presumed innocent until his guilt is proved. Thus, the accused person has every right like other citizen of the country except his curtailment of person liberty in conformity with laws. The basic difference is that an accusation has been made against the accused person for violation of law


\(^{105}\) Ibid.

\(^{106}\) All the articles are explained in detail in the chapter-2.
or offence prevalent in the country. The rights of the accused person are of much concern today. Belatedly though, it has been observed the blatant and flagrant violation of their rights in different stages. The implication of Article 21 of the Constitution of India is that a person could be deprived of his life or personal liberty only in accordance with procedure established by law. As per Article 22 of Constitution of India, a person who is arrested for whatever reason gets three independent rights. The first is the right to be told or informed the reasons for the arrest as soon as an arrest is made, the second is the right to be produced before a Magistrate within 24 hours and the third is the right to be defended by an advocate of his choice.

The Third Report of the National Police Commission identifies the wrongful use of arrest powers as one of the chief sources of corruption in the police and that nearly 60% arrests made by police officers are unnecessary and unjustified. The said report strongly opposed the practice of carrying out indiscriminate arrests. The Hon’ble Supreme Court of India said that an arrest cannot be made simply because it is lawful for a police officer to do so. Arrest and detention in police lock up can cause incalculable harm to the reputation and self-esteem of a person. Therefore, arrest should not be made in a routine manner on mere allegation that a person has committed an offence.

Rights of accused, in law, the rights and privileges of a person accused of a crime, guaranteeing him a fair trial. These rights were initially (generally from the 18th century on) confined primarily to the actual trial itself, but in the second half of the 20th century many countries began to extend them to the periods before and after the trial. All legal systems provide, at least on paper, guarantees that insure certain basic rights of the accused. These include right to trial by jury (unless jury trial is waived), to representation by counsel (at least when he is accused of a serious crime), to present witnesses and evidence that will enable him to prove his innocence, and to confront (i.e., cross-examine) his accusers, as well as freedom from unreasonable searches and seizures and freedom from double
jeopardy. At the present stage of civilization it has been widely accepted
as human value that a person accused of any offence should not be
punished unless he has been given far trial and this guilt has been prove in
such trail. The notion of fair trial, like all other concept incorporating
fairness and reasonableness, cannot be explained in absolute terms.
Fairness is relative concept and therefore fairness in criminal trial could be
measure only in relation to the gravity of the accusation, time and resources
which society can reasonably afford to speed, the quality of the available
resource, and prevailing social value etc.

The major attributes of fair criminal trial are enshrined in Articles
10 of the Universal Declaration of Human Rights. These Articles provide:

1) Everyone in entitled in full equality to fir and public hearing by an
independent and impartial tribunal, in the determination of his
rights and obligations of any criminal charge against him. (Article
100)

2) Everyone charge with penal offence has the right to be presumed
innocent until proved guilty according to the law in public trial at
which he has had all the guarantees necessary for his defense.
(Article 11)

Our courts have recognized that the primary object of the criminal
procedure is to ensure a fair trial of accused persons, and the Law
Commission Report has accepted the view that requirements of a fair trial,
speaking broadly, relate to the character of the court, the venue, the mode
of conducting the trial (particularly trial in public), the rights of the accused
and other rights.

The Constitution being source of all laws of the land is a supreme
law. The Preamble of the Constitution aims to achieve the social justice,
liberty of thought, expression and equality of status, among others to all
citizens.\textsuperscript{107} Expect the legal restrictions, imposed on him, other

\textsuperscript{107} See Preamble of the Constitution of India, 1950
fundamental rights are available to accused and he can move the courts for enforcement of his rights.\(^\text{108}\) The basic Constitutional rights can't be halted at the prison gates and can be enforced within the prison campus.\(^\text{109}\) In *Sunil Batra (No. II) v. Delhi administration*\(^\text{110}\) the Supreme Court had clarified that "Prisons are built with stones of law and so it behoves the court to insist that, in the eye of law, prisoners are persons, not animals, and punish the deviant guardian of the prison system where they go berserk. Convicts are not by mere reason of conviction denuded of all the fundamental rights which they otherwise possess."\(^\text{111}\) The Constitution enshrines fundamental rights in Part-III endeavours that "human liberty may be preserved, human personality developed and effective social and democratic life promoted".\(^\text{112}\) These Fundamental Rights are available against the State, for they are limitations upon all the powers of the Government, legislative as well as executive.\(^\text{113}\)

The Constitution commands that "The state shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."\(^\text{114}\) Article 14 has been held to be the basic structure of the Constitution.\(^\text{115}\) The concept of, equality before law" is a negative concept which establishes the "Rule of Law."\(^\text{116}\) Article 14 guarantees equal protection as regards substantive laws but procedural laws also come within its ambit,\(^\text{117}\) so there cannot be separate procedure for the persons who have committed the same offence and are subject to same procedure for trial.\(^\text{118}\) Right to equality needs to be examined with reference to power

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\(^\text{110}\) AIR 1980 SC 1579.


\(^\text{113}\) Kumar, Narender, op. cit. p.53

\(^\text{114}\) Article 14 of the Indian Constitution.

\(^\text{115}\) See Indira Nehru Ganchi vs. Raj Narain AIR 1975 SC 2299.


\(^\text{117}\) Lachmandas vs. State of Bombay, (1952) SCR 710 at 726.

\(^\text{118}\) State of W.B. vs. Anwar Ali (1952) SCR 284.
of Public Prosecutor, Asstt. Public Prosecutor to withdraw cases under Section 321 Cr. P.C. against any accused.

The freedom of speech and expression\(^{119}\) is available to all citizens including the accused behind the bars and other freedoms available under Article 19 "cannot be enjoyed by prisoners because of the very nature of these freedoms and due to condition of incarceration."\(^{120}\) The freedom of expression thus includes the freedom of the propagation of ideas, their publication and circulation .... and includes the liberty of the press.\(^{121}\) The freedom of speech and expression is not absolute and reasonable restrictions can be imposed under Articles 19(2).\(^{122}\) Article 20 provides protection against ex-post-facto laws, immunity against double jeopardy and protection against testimonial compulsion.\(^{123}\) The team "person" in Article 20 includes a corporation which is accused, prosecuted, convicted or punished for an offence.\(^{124}\) Clause (1) provides for limitation in respect of conviction and punishment of a person for an offence which when committed was not an offence by the law of the land. The second is in regard to the imposition of a greater penalty than which ought to have been imposed under the existing law on the date of the commission of the offence. Clause (1) however "does not prohibit the trial of offences under the ex-post-facto laws... prescribing a new procedure different from the ordinary procedure for prosecution or trial, is not hit by Article 20(1)\(^{125}\) (emphasis added).

Clause (3) of Article 20\(^{126}\) protects a person accused of an offence against testimonial compulsions. This clause resembles fifth amendment of the American Constitution which reads "no person shall be compelled in

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\(^{119}\) Article 19(1) (a) of the Constitution.

\(^{120}\) Kumar, Nasresh., Constitutional Rights of Prisoners, Delhi (1986), p.65.

\(^{121}\) R.P. Ltd. vs. Proprietors, Indian Express Newspapers Pvt. Ltd., AIR 1989 SC 190.

\(^{122}\) Article 19(2) of the Indian Constitution.

\(^{123}\) See clause (1),(2) and (3) of Article 20.

\(^{124}\) M.P. Sharma vs. Satish Chandra, AIR 1954 SC 300.


\(^{126}\) Shiv Bahadur vs. State of Vindhya Pradesh, AIR 1953 SC 394.
any criminal case to be a witness against himself."\textsuperscript{127} The terms like "accused of an offence", "compelled to be a witness against himself", "offence", etc., have been researched threadbare with case law. In M P Sharma v. Satish Chandra\textsuperscript{128}, the Supreme Court gave a wide connotation to the term "to be a witness" so as to include documentary and testimonial evidence.\textsuperscript{129} The Constitutional bar is against compulsion and not against voluntary offer.\textsuperscript{130} Giving "specimen of handwriting, signature, thumb impression, finger prints or foot prints to be used for comparison ... will not amount to compelling the accused to be witness against himself."\textsuperscript{131} The protection against search and seizures is not available under clause (3) of Article 20.\textsuperscript{132}

Clause (2) of Article 20 provides that "No person shall be prosecuted and punished for the same offence more than once". The clause enacts well known principle of criminal jurisprudence that "no one should be put in jeopardy twice for the same offence".\textsuperscript{133} 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 subsequent proceeding.\textsuperscript{134} The worlds, "prosecuted" and "punished" are not to be read disjunctively so as to mean "prosecuted" or "punished" but to be read conjunctively. Both factors must co-exist in order to attract invocation of Article 20 (2) of the Constitution.\textsuperscript{135} The spirit of the article has also been incorporated in Section 300 of the Cr. P.C., which provides that a person once convicted or acquitted is not be tried for the same offence.\textsuperscript{136} A person acquitted or convicted of any offence may be after wards tried, with the consent of the State Government, for any distinct offence for which a

\textsuperscript{127} Clause (3) reads "No person accused of an offence shall be compelled to be a witness against himself."
\textsuperscript{128} See also. P. Rajangam vs. State of Madras, AIR 1959 Mad. 294.
\textsuperscript{129} AIR 1954 SC 300.
\textsuperscript{130} Ibid.
\textsuperscript{131} R.S. Bhagat vs. Union of India, AIR 1982 Del. 191.
\textsuperscript{132} State of Bombay vs. Kathi Kalu Oghad, AIR 1961 SC 1808.
\textsuperscript{133} See Sharma vs. Satish Chandra, (1954) SCR 1077.
\textsuperscript{134} See Maqbool Hussain vs. State of Bombay, AIR 1953 SC 352.
\textsuperscript{135} Venkataraman vs. Union of India, AIR 1954 SC 375.
\textsuperscript{136} Rajjab Ali vs State 1973 Cri. L.J. 139.
separate charge might have been made against him at the former trial under Sub-Section (1) of Section 220\textsuperscript{137} of Cr. P.C.

Right to life and personal liberty is the most precious, sacrosanct, inalienable and fundamental of all fundamental rights of citizens. It is the most essential basic human rights in a democratic state. It is the back-bone of human right movements both at national and international levels.\textsuperscript{138} In ordinary language personal liberty means liberty relating to or concerning the person or body of the individual and personal liberty in this sense is anti-thesis of physical restraint or coercion.\textsuperscript{139} 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,\textsuperscript{140} right to livelihood, better standard of life, hygiene conditions in work place and leisure facilities.\textsuperscript{141} A prisoner remains a human being not-withstanding his imprisonment and would be entitled to those minimum human rights which are inalienable from a human being.\textsuperscript{142}

\begin{footnotes}
\item[137] See also heading of Section 300, Cr.P.C., 1973.
\item[140] Francis Coralie v. UT of Delhi, AIR 1981 SC 746
\item[141] Consumer Education and Research Centre v. Union of India, (1985) 3 SCC 42.
\end{footnotes}