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Constitutional Rights Relating to Criminal Justice Administration in South-Asia : A Comparison with the European Convention on Human Rights

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...in the name of my father

...to my mother

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UNIVERSITY OF SOUTHAMPTON

Abstract

FACULTY OF LAW

DOCTOR OF PHILOSOPHY

CONSTITUTIONAL RIGHTS RELATING TO CRIMINAL JUSTICE ADMINISTRATION IN SOUTH-ASIA : A COMAPRISON WITH THE EUROPEAN CONVENTION ON HUMAN RIGHTS

by Kelaniyage Buddhappriya Asoka Silva

This research examines the nature and scope of the Constitutional guarantees relating to criminal justice administration in five South Asian neighbouring States, namely, India, Sri Lanka, Pakistan, Bangladesh and Nepal, and compares those guarantees with the corresponding guarantees of the European Convention on Human Rights in order to, (i) determine whether the Constitutional guarantees relating to criminal justice administration in the five South-Asian neighbouring States are, in comparison with the corresponding rights of the European Convention of Human Rights, of acceptable international standard, (ii) suggest measures, if any, the South-Asian States should adopt in order to raise the present level of Constitutional protection afforded to the persons accused or suspected of committing offences, and (iii) to ascertain whether there exists a common Constitutional practice in the South-Asian region among the neighbouring States with regard to the rights relating to criminal justice administration.

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Abbreviations

A.C.	- Appeal Court
A.I.R.	- All India Reporter
AJIL	- American Journal of International Law
CD	- Collection of Decisions of the European Commission of Human Rights
Cr.L.J.	- Criminal Law Journal
Cr.P.C.	- Criminal Procedure Code
D.L.R.	- Dacca Law Reports
FRD	- Fundamental Rights, Decisions of the Supreme Court of Sri Lanka
D & R	- Decisions and Reports of the European Commission of Human Rights
EHRR	- European Human Rights Reports
EJIL	- European Journal of International Law
ELR	- European Law Review
HRLJ	- Human Rights Law Journal
ICLQ	- International and Comparative Law Quarterly
N.L.R.	- New Law Reports
N.L.R.	- Nepal Law Reports
P.Cr.L.J.	- Pakistan Criminal Law Journal
P.L.D.	- All Pakistani Legal Decisions
S.C.	- Supreme Court
S.C.C.	- Supreme Court Cases
S.C.M.R.	- Supreme Court Monthly Review
S.C.R.	- Supreme Court Reporter
SAARC	- South Asian Association for Regional Co-operation
Sri L.R.	- Sri Lanka Law Reports
YBECHR	- Year Book of The European Convention on Human Rights

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Chapter 1 - Introduction.

Peace and good order are necessary preconditions for the flourishing of any society. Crimes are incidents of human behaviour[1] which not only cause harm to individuals but also pose threats to the peace and good order of the society. Whatever the nature of the harm caused or the degree of the threat posed, the interests of the victim, as well as the society, demand that people who commit crimes be found, prosecuted, judged and punished if found guilty.

The process of finding, prosecuting, judging suspected criminals and punishing them if found guilty is generally called the administration of criminal justice. Since this process requires collective, and often coercive, measures, as well as specialised skills, in particular for making judgements, the task of administering criminal justice has been assigned by the civilised societies upon the State. Along with this assignment the State has also been conferred with a whole range of wide and coercive powers which are necessary for the proper administration of criminal justice.

On the other hand, like any other power conferred upon the State, unless properly checked and balanced, the wide and coercive powers of criminal justice administration, which include, *inter alia*, powers to arrest, detain, prosecute, convict and punish, too could potentially be either misused or abused to the detriment of the personal liberty of individuals by the agents of the State. In particular, overzealous or over-ambitious State officials may, with a view to creating an exemplary society free

[1] See, Leslie T.Wilkins, "The Relative Nature of Deviance", in *Crime and Justice*, Vol. I, *The Criminal in Society*, edited by Leon Radzinowicz and Marvin E.Wolfgang (London: Basic Books Inc. Publishers 1971), p.43.

of crimes, subject many innocent individuals to unjust prosecutions and unjustified punishments. Thus, while assigning the task of administering criminal justice upon the State, the civilised societies also developed various safeguards to prevent the arbitrary and capricious use of the wide and coercive powers meant to facilitate the proper administration of criminal justice, by the agents of the State.

Initially these safeguards started developing as an integral part of the law of criminal procedure.[2] Although even today the criminal procedural laws of almost all, if not all, the legal systems lay down limits and conditions with regard to the use of powers relating to criminal justice administration, those laws are of little or no avail for the safeguard of the personal liberty of individuals. For, procedural laws are often looked upon by judges as well as law enforcing officials in many countries as mere technicalities which can simply be brushed aside. However, it must be noted that steadfast adherence to procedural safeguards during criminal proceedings, which have the potential of converting free citizens into incarcerated convicts, is not a frivolous technicality, but a distinguished hallmark of civilised governance and sound administration of justice.

The collective international action taken since the end of the Second World War, at promoting and protecting human rights, also resulted in the transforming of a number of procedural safeguards pertinent to the criminal process into legally enforceable entitlements of persons who are suspected or accused of committing crimes. All the major international human rights declarations and treaties concluded during this period regarded many of these safeguards as basic rights of anyone who is the subject of a criminal investigation or a proceeding. Moreover, by giving them novel and salutary interpretations, the protective potential of those safeguards was expanded by the supra-national bodies established by some of the international human rights treaties to supervise the implementation of their provisions. In particular, the inspiring and unprecedented jurisprudence generated by the supervisory organs, namely, the European Court of Human Rights and the European Commission on Human Rights, of the Convention for the Protection of Human Rights and Fundamental Freedoms in Europe, which has been the most successful international human rights mechanism so far, set new international standards for the conduct of criminal investigations and trials, and thereby opened up new chapters in the protection of rights and liberties of the suspected offenders.

[2] The law of criminal procedure provides the machinery for the enforcement of criminal law which is the substantive law that defines criminal behaviour and prescribes punishments.

Prompted by the trends in the international scene, many States incorporated Bills of rights in their national Constitutions to safeguard, *inter alia*, the liberties and freedoms of suspects and accused persons. In the South-Asian region, the Constitutions of the neighbouring States of India, Sri Lanka, Pakistan, Bangladesh and Nepal, have all guaranteed various rights to suspects and accused persons that can be availed of during the penal process. However, it must be noted that, albeit the providing of guarantees in a fundamental document like the Constitution of a State is important and commendable, it does not necessarily imply that the subjects enjoy a high quality of protection against infringement of their liberties and freedoms. Even the most explicitly phrased Constitutional guarantees can in reality be mere illusions, if the national authorities who interpret and apply those guarantees are not giving them a real and meaningful effect.

The present research has three objectives. First and foremost, to determine whether the Constitutional rights relating to criminal justice administration in the five South-Asian neighbouring States mentioned above are, in comparison with the corresponding rights of the European Convention of Human Rights, of acceptable international standard. Secondly, to suggest measures, if any, the South-Asian States should adopt in order to raise the present level of Constitutional protection afforded to the persons accused or suspected of committing offences. Thirdly, the research is also trying to ascertain whether there exists a common Constitutional practice in the South-Asian region among the neighbouring States with regard to the rights relating to criminal justice administration. Before delving into detailed investigations, however, it is thought appropriate to discuss briefly about, (i) Constitutional, or fundamental rights, (ii) the South-Asian region, the five South-Asian States and the evolution of their Constitutions, and (iii) the European Convention on Human Rights.

1.1 - Constitutional, or fundamental Rights.

According to Encyclopaedia Britannica, the word "Constitutions" connotes the body of doctrines and practices that form the fundamental organising principle of a political State.[3] As Thomas Paine notes,

> "(a) constitution is a thing antecedent to a Government, and a Government is only the creature of a constitution. The constitution of a country is not the act of its government, but of the people constituting a government. It is the body of elements, to which you can refer...and which contains the principles on which the government shall be established, the manner in which it shall be organized, the power it shall have, the mode of elections, the duration of parliaments, or by what other name such

[3]See, *The New Encyclopaedia Britannica*, Vol.3, 15th Edition (Encyclopaedia Britannica Inc. 1995), p.567.

> bodies may be called; the power which the executive part of the government shall have; and, in fine, everything that relates to the complete organization of a civil government, and the principles on which it shall act, and by which it shall be bound."[4]

In the opinion of Wheare[5], the word "Constitution" is used to describe the whole system of government of a country. For the purpose of the present research it would be sufficient to say that the Constitution is the system of laws, customs and conventions which define the composition and powers of organs of the State, and regulate the relations of the various State organs to one another and to the private citizen.[6]

It would also be sufficient for the purpose of the present research to say that a right is an entitlement that can be enforced through courts of law. According to Jayampathy Wickrameratne, rights become "fundamental" when they are enshrined in a Constitution. When incorporated into a Constitution they can be altered only in the special manner applicable to Constitutional amendments.[7] As Gajendragadkar observes, a fundamental right is a legally enforceable right governing the relations between the State and the individual.[8]

1.2 - South-Asian Region.

One of the significant features of the South-Asian States considered in this research is that they all have multi-racial, multi-religious and multi-lingual societies, albeit, as a result of the same ancient history inherited by them, the social and cultural environments among the regional neighbours demonstrate a profound similarity. In fact, until the late 1940s, the people of the three largest States in the region, namely, India, Pakistan and Bangladesh, in terms of their area and population, were one and the same. Moreover, at present all five countries belong to the category of developing States and have predominantly agriculture based economies. Over-population, poverty, illiteracy and lack of resources are major problems common to the region.

The influence of the religious doctrines of Hinduism, Buddhism and Islam upon law and politics in the region has been uninterrupted for centuries until the arrival of the western colonials. In one way or the other, all five countries were under the rule or supremacy of

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[4] See, *Thomas Paine : Rights of Man*, Edited by Henry Collins (Penguin Books 1969), p.93.
[5] See, K.C.Wheare, *Modern Constitutions* (London: Oxford University Press 1956), p.1.
[6] See, O.Hood Phillips and Paul Jackson, *O.Hood Phillips' Constitutional and Administrative Law*", Seventh edition (London: Sweet & Maxwell 1987), p.5.
[7] See, Jayampathy Wickramaratne, *Fundamental Rights in Sri Lanka* (New Delhi: Navrang Booksellers and Publishers 1996), p.2.
[8] See, P.B.Gajendragadkar, *The Constitution of India : Its Philosophy and Basic Postulates* (Oxford University Press 1970), p.24.

the British colonials till the end of the Second World War. While India, which included Pakistan and Bangladesh during this period, and Sri Lanka were under the complete political subjugation to the British, Nepal was guided by the British on foreign policy and was providing soldiers for the British Indian Army.

The influence of British colonialism is still highly evident in the legal systems of India, Sri Lanka, Pakistan and Bangladesh, all of whom to a considerable extent, inherited the British Constitutional traditions. The evolution of the present day Constitutions of these countries is inseparable from the British decolonisation process in the South-Asian region, which resulted in India being partitioned into two independent States, viz., India and Pakistan in 1947. While Sri Lanka was granted independence by the British in 1948, Bangladesh which remained a part of Pakistan and was known as East Pakistan since the partition from India, became an independent State in 1971.[9]

1.2.1 - India.

Of the five countries in the South Asian region considered in this research, India is by far the largest and the strongest one in terms of its area, population, political stability, economic viability and military capabilities.[10] It is also the only country in the region which shares territorial or maritime boundaries with each of the other four countries. India has a long-standing parliamentary democracy, based on the Westminster model, with a bicameral parliament. It practices a federal form of Government with 25 state governments who have the primary responsibility of maintaining law and order.

The recent Constitutional history of India[11] begins with the British Crown's assumption of sovereignty over the Indian sub-continent, which included modern day India as well as Pakistan and Bangladesh, from the East India Company by the Government of India Act, 1858 (21^0 & 22^0 Vic., c.106).[12] This Act, which was intended for the better

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[9] For comprehensive details about the South-Asian region see, Bhabani Sen Gupta (editor), *Regional Cooperation and Development in South Asia* (New Delhi: South Asia Publishers 1986); Sridar K.Khatri (editor), *Regional Security in South Asia* (Kathmandu: Centre for Nepal and Asian Studies, Tribhuvan University 1987); Ramkant and B.C.Upreti (editors), *Nation Building in South-Asia* (New Delhi: South-Asian Publishers 1991); Ramakant and P.L.Bhola (editors) *Post Cold War Developments in South Asia* (Jaipur: RBSA Publishers1995): Kant Kishore Bhargava *et al* (editors), *Shaping South Asia Future : Regional Cooperation* (New Delhi: Vikas Publishing House Pvt. Ltd. 1995); Pramod Kumar Mishra, *South Asia : Conflicts and Cooperation* (Delhi: Kalinga Publications 1997).

[10] See, E.Sudhakar, *SAARC : Origin, Growth & Future* (New Delhi: Gyan Publishing House 1994), p.86.

[11] For the Constitutional History of Ancient India see, M.Rama Jois, *Legal and Constitutional History of India* (Bombay: N.M.Tripathi Pvt. Ltd. 1990).

[12] See, *A Collection of the Public General Statutes* (1858), printed by George Edward Eyre & Williams Spottiswoode, printers to the Queen's most Excellent Majesty, p.386.

government of India, was followed by, *inter alia*, the Indian Councils Act 1909[13], based on Morley-Minto reform[14], and the Government of India Act 1919[15], based on Montagu-Chelmsford Report.[16] Although all three Acts introduced substantial changes in the manner in which India was to be governed none of them contained any fundamental rights. However, in the light of the persistent demands made by the local political leaders, the colonial rulers incorporated a few rights in the Government of India Act, 1935[17], which remained in force until India gained independence in 1947. But none of the rights contained in the above Act related to criminal justice administration.

While all the Acts relating to the Government of India enacted prior to the Indian independence sought to lay down a Constitution for the governance of India by the legislative will of the British Parliament, the 1947 Indian Independence Act did not lay down any such Constitution. Instead, it provided that as from the 15th August 1947, in place of 'India' as defined in the Government of India Act, 1935, there would be set up two independent Dominions, to be known as India and Pakistan, and the Constituent Assembly of each Dominion was to have unlimited power to frame and adopt any Constitution and to repeal any Act of British Parliament, including the Indian Independence Act.[18] The Constituent Assembly elected in pursuance of the Independence Act to draft a new Constitution for the Dominion of India comprised of a number of Committees which included, *inter alia*, a Committee on Fundamental Rights and Minorities.

The new Constitution, which in its Preamble declared India to be a Sovereign, Socialist, Secular, Democratic Republic, drafted by the Constituent Assembly[19] was adopted on 26th November, 1949. It came into full effect on 26th January 1950 and, albeit subjected to more than 77 amendments, still remains in force. It is the most lengthy and detailed constitutional document the world has so far produced.[20] It incorporates not only a Bill

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[13] See, *The Law Reports, The Public General Statutes* (1909), printed by Eyre & Spottiswoode Ltd,, London, p.11.

[14] See, D.D.Basu, *Constitutional Documents*, Vol. I, 5th edition (Calcutta: S.C.Sarkar & Sons Pvt. Ltd. 1968), p. iv.

[15] See, *The Law Reports, The Public General Statutes* (1919), printed by Eyre & Spottiswoode Ltd,, London, p.519.

[16] See, See, D.D.Basu, *Constitutional Documents*, Vol. I, 5th edition (Calcutta: S.C.Sarkar & Sons Pvt. Ltd. 1968), pp. v-vi.

[17] See, Art.298 and 299 of the Government of India Act, 1935, *The Law Reports, 1935, The Public General Acts*, Printed by Eyre & Spottiswoode Ltd., Chapter 42 p.569.

[18] See, D.D.Basu, *Introduction to the Constitution of India*, 7th edition (New Delhi: Prentice-Hall of India Pvt. Ltd. 1995), p.17.

[19] For details of the proceedings of the Constituent Assembly, visit world wide web at http://alfa.nic.in/debates/ca.htm

[20] The original Constitutions contained as many as 395 Articles and 8 Schedules [see, Basu, *Introduction to the Constitution of India*, 7th edition (New Delhi: Prentice-Hall of India Pvt. Ltd. 1995),

of rights[21] containing justiciable fundamental rights of the individual on the model of the Amendments to the American Constitution but also a Part containing Directive Principles[22], which confer no justiciable rights upon the individual but are nevertheless to be regarded as 'fundamental in the governance of the country', - being in the nature of 'principles of social policy' as contained in the Constitution of the Republic of Ireland.[23] The fundamental rights, which include a number of guarantees relating to criminal justice administration, are enforced jointly by the Supreme Court and the State High Courts.[24]

1.2.2 - Sri Lanka.

Like its giant neighbour India, Sri Lanka too is a long-standing democratic Republic. Under the present Constitutional framework, the Sovereignty of the people is shared mainly between an elected President and the Parliament. While the executive powers of the Republic is held by the President, the legislative power is exercised by the Parliament and by people at Referendums.[25]

Until the late 1940s Sri Lanka too was, like the sub-continent of India, under the British colonial rule. Although on 4th February 1948 Sri Lanka or Ceylon, the name by which the country was known prior to 1972, gained independence from the British, the Ceylon Independence Act 1947 provided for the setting up of neither a Constituent Assembly nor a Constitution Commission to draw up a free Constitution for the country.[26] As a result, the 1947 Constitution, called the Soulbury Constitution[27], adopted by the British Parliament, remained in force until 1972. Even though the local political leaders were keen on having a comprehensive Bill of Rights in the Constitution, the Soulbury

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p.31; J.N.Pandey, *Constitutional Law of India*, third edition (Allahabad: Central Law Agency 1997), p.22]

[21] See, Part III of the Constitution of India.

[22] See, Part IV of the Constitution of India.

[23] See, See, D.D.Basu, *Introduction to the Constitution of India*, 7th edition (New Delhi: Prentice-Hall of India Pvt. Ltd. 1995), p.33.

[24] See, Art.32 and Art.226 of the Indian Constitution. [Note, Art.32, which in its first paragraph provides that "(t)he right to move the Supreme Court by appropriate proceedings for the enforcement of the right conferred by this part is guaranteed", has itself been declared a fundamental right - see, Prem Chand Garg v. Excise Commissioner, Uttar Pradesh, A.I.R. 1953 S.C. 996]

[25] See, Art.4 of The Constitution of the Democratic Socialist Republics of Sri Lanka, 1978.

[26] However, the Ceylon Independence Act 1947 severed the links which bound Ceylon to the British Parliament and Government. As from 4th February 1948 all authority of the United Kingdom Parliament to legislate for Ceylon ceased except at the request and with the consent of Ceylon. [see, J.A.L.Cooray, *Constitutional Government and Human Rights in a Developing Society* (1969), pp.17].

[27] This Constitution was contained in the Ceylon (Constitution) Order in Council, 1946, the three Ceylon (Constitution)(Amendment) Orders in Council, all of 1947, and the Ceylon (Independence) Order in Council, 1947. [see, Jayampathy Wickramaratne, *Fundamental Rights in Sri Lanka* (New Delhi: Navrang Booksellers and Publishers 1996), p.11].

Constitution did not contain one.[28] Instead it had a provision based on Sec.5 of the Government of Ireland Act 1920 to protect the interests of racial and religious minorities.

In 1972, through a Constituent Assembly, Sri Lanka adopted an autochthonous or home-grown Republican Constitution which completely severed the existing legal ties with the British parliament.[29] This Constitution contained a Chapter entitled "Fundamental Rights and Freedoms", which included certain rights and freedoms, inclusive of some rights relating to criminal justice administration, drawn up from the Universal Declaration of Human Rights. These rights were enforceable through the ordinary legal remedies. However, the Constitution did not set out a specific procedural machinery for the judicial enforcement of the fundamental rights in case of their infringement. Also, the exercise of the fundamental rights were subject to very wide restrictions.[30]

As J.A.L.Cooray notes,

> "Almost since the 1943 Declaration of the British Government which invited the Board of Ministers to submit proposals for a new Constitution, and particularly having regard to the working of the 1946-47 and 1972 Constitutions, an important question had arisen. : namely, whether the Westminster Parliamentary model on which these Constitutions were based was suitable, without adaptation to our requirements, for a mixed developing society such as ours...It had in fact been suggested that a justiciable Bill of Fundamental Rights of all persons and groups in this country and a form of Executive suitable to our society combining the merits of both the Parliamentary and Presidential system of government should be incorporated in the Constitution."

In line with these aspirations, in 1978 Sri Lanka adopted its second Republican Constitution which is still in force, and introduced a Presidential system of Government based on the French model. The Constitution contains a comprehensive Bill of Rights. However, the exercise of these rights has once again been subjected to severe restrictions.[31] According to Art.126 of the Constitution the Supreme Court has the sole and exclusive jurisdiction to hear and determine any question relating to the

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[28] The British attitude towards Bills of Rights is recapitulated by Sir Ivor Jennings, who was the architect of the Soulbury Constitution, in his book *The Approach to Self-Government* [(Cambridge University Press 1956), at p.20] As he notes, "(i)n spite of the American Bill of Rights, that liberty is even better protected in Britain than in the United States, and what the Indian lawyers tried to do was to formulate that part of English constitutional law which dealt with personal and political liberty. Pakistan is no so ambitious. It has left more to the common law and to the normal working of political institutions : but that is even more British, for in Britain we have no Bill of Rights; we merely have liberty according to law; and we think - truly, I believe - we do the job better than any country which has a Bill of Rights or a Declaration of the Rights of Man."

[29] For the events that gave rise to the adoption of the 1972 Republican Constitution see, M.L.Marasinghe, "Ceylon - A Conflict of Constitutions", 20 *ICLQ* (1971) 645.

[30] See, J.A.L.Cooray, *Constitutional and Administrative Law of Sri Lanka* (Colombo: Sumathi Publishers 1995), p.71.

[31] See, Art.15 of the 1978 Constitution of the Democratic Socialist Republic of Sri Lanka.

infringement or imminent infringement by executive or administrative action of any fundamental right.

1.2.3 - Pakistan.

Of the five countries considered in this research, Pakistan is the second largest and the strongest one in the region in terms of its area and military capabilities. It is an Islamic Republic. As a State Pakistan has a relatively short history. It came in to existence as an independent sovereign State on the midnight of 14th August 1947 as a result of the partition of British India under the 1947 Indian Independence Act adopted by the British Parliament.

In pursuance of the provisions of the 1947 Indian Independence Act, a Constituent Assembly was set up to draw a new Constitution for the Dominion of Pakistan. The Assembly which held its inaugural session on 10th August 1947, four days before the birth of Pakistan, comprised of various committees, including a committee on "Fundamental Rights and on matters relating to minorities". Although the Indian Independence Act 1947 authorised the Constituent Assembly to make provisions for the Constitution of the new Dominion, it did not fix any time period for this purpose. As a result the Assembly functioned for seven years as the Dominion's legislature without producing a Constitution. During all this period, the Government of India Act 1935, as adapted by the Pakistan (Provisional Constitution) Order, 1947, the Indian Independence Act, other Orders promulgated by the Governor General under Section 9 of the Indian Independence Act, and Acts passed by the Dominion's legislature remained as the Constitutional sources of the country.

In the light of its failure to draw up a Constitution for Pakistan the original Constituent Assembly was dissolved on 24th October 1954. On 15th April 1955 the Governor General by a proclamation summoned a new Constituent Assembly, which was known as the Constituent Convention, for the purpose of, *inter alia*, making provisions as to the Constitution of Pakistan. In less than one year the Constituent Convention adopted the first Constitution of the Islamic Republic of Pakistan which came into force on 23rd March 1956. In Part II the 1956 Constitution contained elaborate provisions regarding fundamental rights. These rights mainly followed the principles enunciated in the Universal Declaration of Human Rights and the Indian Constitution.[32] High Courts and

[32] See, A.B.M.Mafizul Islam Patwari, *State of Fundamental Right to Personal Liberty* (Thesis submitted for the Degree of Doctor of Philosophy in the University of Dhaka 1985) p.4.

the Supreme Court were given jurisdiction to issue appropriate writs for the enforcement of the fundamental rights conferred by Part II of the Constitution.

The 1956 Constitution, however, did not last very long. By a Proclamation on 7th October 1958 the President annulled the Constitution and declared Martial law throughout the country. In March 1962 a new Constitution was promulgated which came into force on 8th June the same year. Part II of the Constitution embodied fifteen principles as 'principles of law-making' which sought to maintain and guarantee fundamental rights. Nonetheless, those fundamental rights, which included a few rights relating to criminal justice, were not justiciable.[33] In December 1963 an amendment was passed by the National Assembly to restore the fundamental rights of the 1956 Constitution.

Again, on 25th March 1969 by a proclamation the then President relinquished his office and handed over all powers to the Commander-in-Chief of the Pakistan Army, who forthwith assumed the office of President, and abrogated the Constitution. But on 31st March the same year he made a proclamation to the affect that notwithstanding the abrogation of the Constitution, the State would be governed, subject to certain conditions, in accordance with the 1962 Constitution. However, in December 1971, after the defeat of the Pakistan Army in East Pakistan and the declaration of independence by East Pakistan as Bangladesh, the Presidency was handed over to the civilian leader of the majority party in West Pakistan who promulgated an interim Constitution. The interim Constitution was replaced by a permanent Constitution on 14th August 1973 which still remains in force albeit with some momentous and eventful changes made from time to time.[34]

The 1973 Constitution has more or less followed the pattern of the 1956 Constitution.[35] It sets up a federal form of government with a parliamentary system. It also has incorporated in Part II a comprehensive Bill of Rights which includes a number of rights pertinent to criminal justice administration. The rights conferred by Part II of the Constitution are enforced jointly by the Supreme Court and the High Courts.[36]

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[33] See, S.Sharifuddin Pirzada, *Fundamental Rights and Constitutional Remedies in Pakistan* (Lahore: P.L.D. Publishers), pp.68-69.
[34] See, Justice Muhammad Munir, *Constitution of the Islamic Republic of Pakistan*, Vol. I (Lahore: P.L.D. Publishers 1996), p.53.
[35] Ibid., p.51.
[36] See, Art.184(3) and Art.199(2) of the Constitution of the Islamic Republic of Pakistan, 1973.

1.2.4 - Bangladesh.

Although this is the second largest country in the region in terms of its population, Bangladesh is the youngest out of the five South-Asian countries considered in this research. It became an independent State on 16th December 1971 after a bloody war with Pakistan. Until then, since partition from India, Bangladesh remained a part of Pakistan known as East Pakistan.

On 11th January 1972 Bangladesh promulgated a Provisional Constitution which provided for a parliamentary system of government. Later in March the same year a Constituent Assembly was constituted to draft a new democratic Constitution for the country. Exactly one year after the independence of Bangladesh, on 16th December 1972, the Constitution currently in force, adopted by the Constituent Assembly came into operation. It made Bangladesh a sovereign unitary Republic and introduced a parliamentary form of government with the President of the Republic as the Constitutional head elected by the members of Parliament. The Constitution in Part III contains a comprehensive Bill of Rights which includes, *inter alia*, a number of rights relating to criminal justice administration. These rights are enforced by the High Court Division of the Supreme Court.[37] Art.44 of the Constitution has made the right to move the High Court Division of the Supreme Court to enforce fundamental rights guaranteed by Part III of the Constitution itself a fundamental right.

1.2.5 - Nepal.

The landlocked Nepal, situated along the mountain range of Himalayas, is the poorest of the five South-Asian countries considered here. According to Art.4 of the present Constitution "Nepal is a multiethnic, multilingual, democratic, independent, indivisible, sovereign, Hindu and Constitutional Monarchical Kingdom". Until the middle of the twentieth century it was under a authoritarian system of government. As Thapa notes,

> "(d)espite historical chivalrous achievements of the mountain people during wars with the Tibetian and Chinese rulers of the north and British colonial rulers of the south, these people were less politically conscious of their rights to fight against their own rulers...in 1930s, a small section of urbanites, who were educated and politically indoctrinated were influenced by the political uprisings against colonial rule of the south. These persons started to raise voices for socio-economic and political change in the country and people's participation in the government. The independence of Indian and Pakistan from British colonial rule in 1947 hastened the process of political articulation in Nepal. A growing number of Napalese people joined the forces with the agitators for demands of democratic setup of the country. The external

[37] See, Art.102 of the Constitution of the People's Republic of Bangladesh, 1972.

> pressures against the autocratic rule...contributed sufficiently towards initiating measures of democratisation which led to formulation of a constitution."[38]

The first written Constitution of Nepal, known as the Government of Nepal Act, 2004, came into effect on 13th April 1948. Although never implemented properly, the Act contained several rights pertinent to criminal justice administration. Soon afterwards, two other Acts relating to human rights, namely, Fundamental Rights Act, 1948 and Personal Liberty Act, 1949, were also enacted.

The second written Constitution of Nepal, known as the Government of Nepal Act, 2007 (1951), was promulgated after the country was liberated from the then autocratic regime. This Act was intended to remain as an interim Constitution until a formal Constitution was adopted by a Constituent Assembly elected by the Nepalese people. Although the 1951 Act contained a number of fundamental rights they were non-justiciable and were in the form of Directive Principles of State Policy. However, in 1955 an Act called Civil Rights Act was enacted with a view to ensuring certain rights, including some rights relating to criminal justice administration, to the people of Nepal.

Despite all the positive aspects of the 1951 interim Constitution, the government in power at the time, owing to the deteriorating political situation in the country, could not constitute the Constituent Assembly within the expected time. As a result a Royal Order was issued amending the interim Constitution so as to dispense with the forming of the Constituent Assembly. Later, instead of a Constituent Assembly, a Constitution Drafting Commission was formed to submit a draft Constitution.

The Constitution drafted by the Commission, which for the first time in Nepal introduced multiparty system and adult franchise for parliamentary elections, was promulgated by a Royal Proclamation on 14th February 1959. Although this was the first formal Constitution Nepal had with many democratic features, it did not last very long. By a Royal Proclamation issued in exercise of the emergency powers, the Constitution was suspended on 15th December 1960.

A new Constitution, known as the Panchayat Constitution, introducing a partyless system of government, was promulgated on 16th December 1962. The unicameral legislature designed under this Constitution consisted both of elected representatives as well as persons nominated by the King. Unlike the previous Constitutions, the Panchayat Constitution, which contained a comprehensive list of fundamental rights

[38] See, Dhruba Bar Singh Thapa, "Crisis in Constitutionalism", in *Essays on Constitutional Law*", Vol.22 (1996), Nepal Law Society, Kathmandu, p.1 at p.2.

relating to criminal justice administration, lasted for almost three decades until the popular uprisings in 1990 which culminated in the restoration of multiparty democratic system.[39]

In 1990, the King constituted a Constitution Recommendation Commission to draft a new Constitution accommodating a multiparty political system. The Constitution drafted by the Commission and promulgated on 9th November 1990 has remained in force to date. In Part III, the 1990 Constitution contains a comprehensive Bill of Rights, which includes a number of rights pertinent to criminal justice administration. These rights are enforced by the Supreme Court.[40] As guaranteed by Art.23 of the Constitution, the right to move the Supreme Court to enforce fundamental rights guaranteed by Part III is itself a fundamental right.

1.3 - The European Convention for the Protection of Human Rights and Fundamental Freedoms.

The Convention for the protection of human rights in Europe is a collective effort between "countries which are like-minded and have a common heritage of political traditions, ideals, freedom and rule of law"[41] to enforce some of the noble standards enumerated in the Universal Declaration of Human Rights. Although the initial enthusiasm for the international protection of human rights at universal level in the immediate post Second World War years faded quickly, the European Convention on Human Rights, since its coming in to force in 1953, has made steady and smooth progress creating inspiring and unprecedented mechanisms of international adjudication of human rights grievances. Revolutionising the international law, which thereto did not recognise to any significant extent the *locus standi* of individuals before international tribunals, the European Convention for the first time allowed individuals, irrespective of their nationalities, recourse to international organs against governments of Member States with regard to violation of human rights. While the Convention itself has now evolved more or less to be regarded as a Bill of Rights in Europe, the organs it has created to supervise the effective implementation of its provisions and to adjudicate human rights grievances have, through their dynamic work, developed into institutions somewhat similar to that of constitutional courts in federal states.

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[39] Ibid., p.12.
[40] See, Art.88 of the Constitution of the Kingdom of Nepal 2047 (1990).
[41] See the Preamble to the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950).

1.3.1 - Rights and Freedoms Guaranteed Under the Convention.

Section I from Art.2 to Art.12 lays down the substantive rights and freedoms which the Convention envisage to protect through its implementation mechanisms. These rights and freedoms include the right to life, freedom from inhuman punishment and slavery, the right to liberty and security of persons and to a fair trial, freedom from conviction under *ex post facto laws*, the right to respect for private life and freedom of thought, conscience and religion, freedom of expression and of peaceful assembly and to marry and found a family.[42] Other rights and freedoms which were not included in the original Convention were later added through Protocols. To date eleven protocols[43] had been drafted and out of those Nine have come in to force.

1.3.2 - An outline of the Review System Under the Convention.

The original Convention created two organs, namely the European Commission on Human Rights and the European Court of Human Rights[44], to supervise the effective implementation of the obligations undertaken by the Member States and to adjudicate violations of rights and freedoms set forth in the Convention.[45] Under Art.24 any Contracting State may refer to the Commission any alleged breach of the provisions of the Convention by another Contracting State. The Commission can, in addition, receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the Contracting States, provided that the delinquent State Party has made a declaration under Art.25 recognising the jurisdiction of the Commission to receive such applications. When an application is received, the Commission which meets *in camera*, first determines whether the application is admissible, based on the criteria laid down in Art.26 and Art.27. Admissible applications are referred to a sub-commission to attempt to bring about conciliation.[46] If a friendly settlement is reached, a brief report containing the

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[42] For comprehensive details about the right guaranteed under the Convention see, *inter alia*, Ralph Beddard, *Human Rights and Europe*, third edition (Cambridge: Grotius Publications Ltd.); D.J.Harris, M.O'Boyle, and C.Warbrick, *Law of the European Convention on Human Rights*, (London: Butterworths, 1995); P.Van dijk and G.J.H.van Hoof, *The Theory and Practice of the European Convention on Human Rights*, second edition (Deventer: Kluwer Law and Taxation Publishers 1990).

[43] Out of these eleven only Protocol No.1, 4, 6 and 7 add new rights to the original Convention.

[44] Herein after sometimes referred to as the Strasbourg Organs.

[45] It must be noted that the control machinery under the original Convention consists of three bodies, namely, the Commission , the Court and the Committee of Ministers, not only two as one might deduce from Art.19 of the Convention which deals only with the Commission and the Court. Art.19 does not mention the Committee of Ministers which already existed when the Convention was drafted. See, H.Golsong, "The Control Machinery of The European Convention on Human Rights" in *The European Convention on Human Rights* (London: Stevens & Sons Ltd. 1965), p.38.

[46] Note, some of the procedural rules were changed by later Protocols or by rules of the Commission and the Court.

facts and the solution reached is published. Any settlement reached must to be on the basis of respect of human rights as defined in the Convention.[47]

In the event of failure to reach a friendly settlement, the Commission will draw up a report on the facts and state its opinion as to whether the facts found disclose a breach by the State Party concerned of its obligations assumed under the Convention. This report will be transmitted to the Committee of Ministers and to the State(s) concerned. The report must remain unpublished.[48] If, however, the Commission or the State(s) concerned, as provided by the Convention, decided to bring the matter before the European Court of Human Rights, the opinion of the Commission may become public. Although it is desirable that the opinion of the Commission remain a secret in order to prevent it from being used by political opponents and subversive elements for propaganda purposes and to embarrass governments, if the matter is brought before the Court, it is equally desirable to discuss this opinion in public hearings.

The Commission or the State(s) concerned, within a period of three months from the date of transmission of the report, can refer the question to the European Court of Human Rights for a decision. If not the Committee of Ministers, by a majority of two thirds, will decide whether there has been a violation of the Convention. In the affirmative case the Committee will prescribe a period during which the State concerned must take measures required by the decision of the Ministers. If the delinquent State has failed to take satisfactory steps within the prescribed period, the Ministers, by the same majority, will decide what effect should be given to its original decision and publish the report.[49]

The jurisdiction of the European Court of Human Rights is optional. A State party may at any time declare that it recognises as compulsory *ipso facto* and without special agreement the jurisdiction of the Court in all matters concerning the interpretation and the application of the Convention.[50] Such declarations may be made unconditionally or on condition of reciprocity on the part of several or certain other State Parties or for a specifies period of time.

The original Convention has not provided individuals with any right of access to the Court. Only the Commission, a State party whose national is alleged to be a victim, a State party which referred the case to the Commission and a State party against which

[47] Art.28-Art.30.
[48] See Art.31.
[49] Art.31 & 32.
[50] See, Art.46.

the complaint has been lodged have the right to bring a case before the Court.[51] Further, for the Court to be seized of the matter, the delinquent State must have recognised the compulsory jurisdiction of the Court. Also, the Court can only deal with a case after the Commission has acknowledged the failure of efforts for a friendly settlement. As mentioned earlier, the application to the Court must be made within three months from the date of the transmission of the Commission's report.

Any decision reached by the Court is final and binding upon the parties. The decision will be transmitted to the Committee of Ministers who will supervise its execution. Although the Member States have undertaken to abide by the decisions of the Court it does not necessarily follow that those decisions have the force of law in domestic legal systems of Member States. Nor does it mean that those decisions have any formal precedence over the final decisions of domestic courts or other tribunals. As provided by Art.50 of the Convention,

> "(i)f the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the present Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

It must be noted that neither the Court nor the Commission is intended to function as a supra-national appeal tribunal.[52] As Professor Buergenthal has said "...the Court lacks the power either to reverse or to annul the determination of national courts which, vis-à-vis the Human Rights Court, are independent rather than hierarchically inferior tribunals."[53]

Except in exceptional circumstances, the Strasbourg organs are not expected to give autonomous interpretations to domestic laws.[54] Nor are they supposed to review the correctness of the interpretation of national laws followed by the domestic courts. The Strasbourg organs only determine whether the interpretation given by the domestic courts are in line with the principles enunciated in the Convention.[55]

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[51] Art.48.

[52] See the speech of Mr.Teitgen, Rapporteur of the Committee on Legal and Administrative Questions, addressed to the Consultative Assembly on 07th September 1949, Collected Edition of the *Travaux Preparatoires of the European Convention on Human Rights*, Vol. I (Hague: Martinus Nijhoff 1975), p.266 at p.288.

[53] See, Thomas Buergenthal, "The Effect of the European Convention on Human Rights on the Internal Law of Member States" in *The European Convention on Human Rights* (London: Stevens & Sons Ltd. 1965), p.79 at p.95.

[54] For example, the Strasbourg organs may be required to ascertain the proper interpretation of municipal law in matters where the Convention expressly refers to municipal law, as it does in Art.7. See, below Chapter 4.2

[55] Apart from the supervision by the Court and the Commission, under Art.57 the Member States have undertaken to furnish, on the receipt of a request from the Secretary General of the Council of Europe,

In order to address the problem of delay, a single court as a full time body in place of the existing Commission and Court has been created by the 11th Protocol to the Convention. [56] This Protocol is now in force having been ratified by all State parties. The 11th Protocol has made the right of individual petition to the new Court automatic. As provided by Art.34 of the Protocol, the new Court

> "...may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right."

The inter-state jurisdiction continues to be mandatory even under the 11th Protocol. Albeit the supervisory role of the Committee of Ministers in executing the judgements of the Court has been retained under the Protocol, it has abolished the decision making role of the Ministers enunciated by Art.32 of the original Convention.[57]

1.4 - Delimitation of the Research.

The present research is concerned with the rights relating exclusively to criminal justice administration. Thus, rights and issues concerning 'preventive detention', which is not a part of the criminal process, are not within the scope of the research.[58] Detention is effected during criminal proceedings either to help the investigation of, or to ensure the detainee's presence to face a charge in connection with, a crime already committed. On the other hand, an offence need not have occurred to effect preventive detention. As Lord Finley observed in the case of *Rex* v. Halliday[59], preventive detention is only a precautionary measure. It can be effected whenever there is suspicion or reasonable probability of the impending commission of a prejudicial act. According to Dilwar Mahmood[60] the object of preventive detention is not to punish a person for having done something wrong but to intercept him/her before he/she does it and prevent him/her from doing it.

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an explanation of the manner in which its internal law ensures the effective implementation of any of the provisions of the Convention.

[56] For details about the 11th Protocol see, Henry G. Schermers, "The Eleventh Protocol to the European Convention on Human Rights", 19 *ELR* (1994) 367; Andrew Drzemczewski, "Principal Characteristics of the New ECHR Control Mechanism, As Established by Protocol No.11, Signed on 11 May 1994", 15 *HRLJ* (1994) 81; Rudolf Bernhardt, "Reforms of the Control Machinery Under the European Convention on Human Rights : Protocol No.11", 89 *AJIL* (1995) 145.

[57] See, Art.46(2) of the Protocol No.11 to the European Convention on Human Rights.

[58] Note, all the South-Asian States, except Sri Lanka, has Constitutionally sanctioned preventive detention.

[59] 1917 A.C. 260.

[60] See, M.Dilwar Mahmood, *The Law of Preventive Detention*, second edition (Lahore: Ifran Law Book House 1992), p.8.

Also excluded from the scope of the present research are the rights against arbitrary search and seizure and the rights against cruel, inhuman and degrading punishments. Although these rights are of colossal importance for the suspects and accused, their study, i.e., the study of rights against arbitrary search and seizure and the rights against cruel, inhuman and degrading punishments, would inevitably bring in broader issues relating to, for example, right to privacy, right to respect for family life, right to dignity, rights against torture etc., which are not strictly connected with the penal process and which require separate investigation. Further, because of space restrictions the research will also not deal with the impact of emergencies on the rights relating to criminal justice administration.

1.5 - Plan of the Research.

For reasons of convenience the present research has been divided in to six parts. While the first part deals with the rights relating to arrest and detention, which includes examination of the right to freedom from unlawful arrest, the right to know the grounds of arrest, as well as the right to judicial control of arrest, the second part investigates the right to a fair trial and its concomitant guarantees. Part three and four are concerned respectively with the rights against retroactive penal laws and rights against double jeopardy. Part five looks into certain rights, viz., right to appeal and right to compensation in the case of miscarriage of justice, guaranteed by Protocol No. 7 to the European Convention on Human Rights. All these parts begin with an examination of the South-Asian Constitutional provisions in the order of India, Sri Lanka, Pakistan, Bangladesh and Nepal. They next move on to examine the corresponding provisions of the European Convention. Each part ends with a comparison between the South-Asian Constitutional provisions and the corresponding provisions of the European Convention. Finally Part six will contain the observations and conclusion. This part will recapitulate the situation in the South-Asian States as regards the rights relating to criminal justice administration with a view to, (i) suggesting measures, if any, the South-Asian States should adopt in order to raise the present level of Constitutional protection afforded to the persons accused or suspected of committing offences, and (ii) ascertaining whether there exists a common Constitutional practice in the South-Asian region among the neighbouring States with regard to the rights relating to criminal justice administration.

Part I

Chapter 2 - Rights Relating to Arrest and Detention.

2.1 - Rights Against Unlawful Arrest and Detention.

In most, if not all, legal systems the criminal process begins with the arrest of the suspected offenders. Whether guilty or not, which in democratic societies is determined by courts of law after a fair trial, arrest can have a severe and devastating impact on the arrestee. It is extremely important for the safeguard of personal liberty to ensure that the individuals will not be arrested or detained without probable reasons prescribed by law. Even the Magna-Charta of 1215, the foetus of the modern concept of human rights, provided that "no free man shall be taken or imprisoned...but... by the law of the land." Although arrest is a means necessary for maintaining law and good order in modern societies, any arbitrary power to arrest and detain would obviously be vexatious and detrimental to the liberty and freedom of individuals. The rule of law demands that the laws governing arrest and detention be precise, unambiguous and non-arbitrary.

2.1.1 - South Asia.

2.1.1.1 - India.

There is no safeguard in the Indian Constitution dealing exclusively with unlawful arrests. The guarantees against such arrests are deduced from Art.21 of the Constitution which provides that "(n)o person shall be deprived of his life or personal liberty except according to procedure established by law". The word "liberty" mentioned here has been given a wider interpretation by the Indian courts to encompass a whole range of personal freedoms.[61] Among others, it includes the

[61] See, *inter alia*, Satwant Singh v. Assistant Passport Officer, New Delhi, (1967) 3 SCR 525; A.G.Kazi v. C.V.Jeethwani, (1967) Bombay 235 p.240; A.D.M.Jabalpur v. S.S.Shukla, (1976) Supp. SCR 172; Maneka Gandhi v. Union of India, (1978) 2 SCR 621.

freedom of movement and freedom from bodily restraint.[62] Obviously arrests encroach upon these freedoms. Hence, in order not to offend Art.21, all arrests must strictly follow the conditions laid down by law.

According to Fazl Ali J., the juristic conception of 'personal liberty', when these words are used in the sense of immunity from arrest, is that it consists in freedom of movement and locomotion.[63] Further, as per Kania CJ[64], 'deprivation' for the purpose of Art.21 means 'total loss', and thus, a restriction or a partial control of movement would not come within the purview of that Article. However, it must be noted that a deprivation or a total loss of personal liberty contrary to Art.21 could take place not only as a result of physical restraints unleashed upon a person's body, but also through various methods of coercion.[65] As Subba Rao and Shah JJ. said in the case of Kharak Singh v. State of U.P.,

> "(t)he expression 'coercion' in the modern age cannot be construed in a narrow sense. In an uncivilized society where there are no inhibitions, only physical restraints may detract from personal liberty, but as civilization advances the psychological restraints are more effective than physical ones. The scientific methods used to condition a man's mind are in a real sense physical restraints, for they engender physical fear channelling one's action through anticipated and expected grooves. So also creation of conditions which necessarily engender inhibitions and fear complexes can be described as physical restraints...We would, therefore, define the right of personal liberty in Art.21 as a right of an individual to be free from restrictions or encroachments on his person, whether those restrictions or encroachments are directly imposed or indirectly brought about by calculated measures."[66]

Within the context of Art.21 "law" means not only the laws made by the legislature.[67] It also includes Ordinances issued by the President and the Governors and the laws made by the President or his/her delegates under the powers conferred by the Constitution.[68] However, any law, whether made by the legislature or any other authorised person or body, if it seeks to abridge or take away a person's personal liberty would offend Art.21, unless it concurs with the principles of natural justice.[69]

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[62] See, *inter alia*, A.K.Gopalan v. State of Madras, 1950 (51) Cr.L.J. 1383; Kharak Singh v. State of U.P., 1963 (2) Cr.L.J. 329.

[63] See, the judgement of Fazl Ali J. in A.K.Gopalan v. State of Madras, ibid., p.1403 at p.1408 para.59.

[64] See, the judgement of Kania C.J, in A.K.Gopalan v. State of Madras, ibid., p.1388 at p.1393 para.12.

[65] See the judgement of Mukherjea J. in A.K.Gopalan v. State of Madras (ibid., p.1446 at p.1452 para.177). According to this learned judge the phrase "personal liberty" within the context of Art.21 implies the anti-thesis of physical restraint or coercion imposed upon the body of an individual.

[66] 1963 (2) Cr.L.J. 329 at pp.339-340 para.31.

[67] The phrase "procedure established by law" in Art.21 has been borrowed from Art.31 of the Japanese Constitution - see, A.K.Gopalan v. State of Madras, 1950 (51) Cr.L.J. 1383 p.1395 para.19.

[68] See, A.K.Roy v. Union of India and Others, (1982) 1 S.C.C. 271.

[69] Also see Art.13 para.(2) & (3). According to para.(2) "The State shall not make any law which takes away or abridges the rights conferred by this part and any law made in contravention of this clause shall to the extent of the contravention, be void." According to para.(3) "In this Art., unless the context otherwise requires, - (a) 'law' includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India, the force of law."

In other words a law that permits the deprivation of freedoms guaranteed by Art.21 must prescribe a procedure for such deprivation which must not be arbitrary, unfair or unreasonable.[70] This, nonetheless, does not mean that to meet the requirements of Art.21 every detailed step of the procedure must be mentioned in the law.[71]

According to Mukherjea J. in Gopalan v. State of Madras[72], the expression "procedure" in Art.21 means the manner and form of enforcing the law. Further, as was observed by Chandrachud CJ in A.K.Roy v. Union of India and Others[73], the word "established" in the same Article is used to denote that the procedure, or the manner and form of enforcement, prescribed by law must be defined with certainty so as to enable the persons deprived of their fundamental rights to life and to liberty to know the precise extent of such deprivation. Thus, in order to conform with the requirements of Art.21, a law authorising arrest has to pass two tests. Firstly, the law must prescribe a procedure which "...must be 'right and just and fair' and not arbitrary, fanciful or oppressive".[74] Secondly, to be regarded as established by law, the procedure so prescribed must be 'definite and reasonably ascertainable'.[75]

In the Indian Criminal justice system an arrest can be made either under a warrant or without a warrant in certain circumstances. The following Sections of the Indian Criminal Procedure Code, Act II of 1974, have sanctioned arrest without a warrant;

> Sec. 41(1) Any police officer may without an order from a Magistrate and without a warrant, arrest any person -
>
> (a) who has been concerned in any cognizable offence, or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists, of his having been so concerned; or
>
> (b) who has in his possession without lawful excuse, the burden of proving which excuse shall lie on such person, any implement of house-breaking; or
>
> (c) who has been proclaimed as an offender either under this code or by order of the State Government; or
>
> (d) in whose possession anything is found which may reasonably be suspected to be stolen property and who may reasonably be suspected of having committed an offence with reference to such things; or
>
> (e) who obstruct a police officer while in the execution of his duty, or who has escaped, or attempts to escape, from lawful custody; or
>
> (f) who is reasonably suspected of being a deserter from any of the armed forces of the union; or

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[70] See, Maneka Gandhi v. Union of India, (1978) 2 SCR 621.

[71] See, H.M.Seervai, *Constitutional law of India : A Critical Commentary*, Second edition, Vol. I (Bombay: N.M.Tripathi Pvt. Ltd. 1975), p.560.

[72] 1950 (51) Cr.L.J. 1383 p.1446 at p.1458 para.180.

[73] (1982) 1 S.C.C. 271 p.285 at pp.293-294 para.19.

[74] See, *inter alia*, the judgement of Bhagwati J. in Maneka Gandhi v. Union of India, (1978) 2 SCR 621 p.663 at p.674; Sunil Batra v. Delhi Administration, A.I.R. 1978 S.C 1675 pp.1727-1732; Anand Rao v. Inspector General of Prisons, Bhopal, 1982 Cr.L.J. 925 p.926 para.5.

[75] See the judgement of Chandrachud CJ in A.K.Roy v. Union of India and Others, (1982) 1 S.C.C. 271 p.285 at pp.293-294 para.19.

(g) who has been concerned in, or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists, of his having been concerned in, any act committed at any place out of India which, if committed in India, would have been punishable as an offence, and for which he is, under any law relating to extradition, or otherwise, liable to be apprehended or detained in custody in India; or

(h) who, being a released convict, commits a breach of any rule made under sub-section (5) of section 356; or

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

(2) Any officer in-charge of a police station may, in like manner, arrest or cause to be arrested any person, belonging to one or more of the categories of persons specified in section 109 or section 110.

Sec.42(1) When any person who, in the presence of a police officer, has committed or has been accused of committing a non-cognizable offence refuses, on demand of such officer, to give his name and residence or gives a name or residence which such officer has reason to believe to be false, he may be arrested by such officer in order that his name or residence may be ascertained.

(2) When the true name and residence of such person have been ascertained, he shall be released on his executing a bond, with or without sureties, to appear before a Magistrate if so required...

Sec.43(1) Any private person may arrest or caused to be arrested any person who in his presence commits a non-bailable and cognizable offence, or any proclaimed offender[76], and, without unnecessary delay, shall make over or cause to be made over any person so arrested to a police officer, or, in the absence of a police officer, take such person or cause him to be taken in custody to the nearest police station.

(2) If there is reason to believe that such person comes under the provisions of section 41, a police officer shall re-arrest him.

(3) If there is reason to believe that he has committed a non-cognizable offence, and he refuses on the demand of a police officer to give his name and residence, or gives a name or residence which such officer has reason to believe to be false, he shall be dealt with under the provisions of section 42; but if there is no sufficient reason to believe that he has committed any offence, he shall be at once released.

Sec.44(1) When any offence is committed in the presence of a Magistrate...within his jurisdiction, he may himself arrest or order any person to arrest the offender, and may thereupon, subject to the provisions herein contained as to bail, commit the offender to custody.

(2) Any Magistrate...may at any time arrest or direct the arrest, in his presence, within his local jurisdiction, of any person for whose arrest he is competent at the time and in the circumstances to issue a warrant.

Sec.60(1) if a person in lawful custody escapes or is rescued, the person from whose custody he escaped or was rescued may immediately pursue and arrest him in any place in India.

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[76] Note, if a person's fundamental rights guaranteed under Art.21 are violated by the agents of the State, that person may approach either the Supreme Court or the High Court for redress. On the other hand, if they are violated by the actions of a private individual the victim can approach only the High Court for redress - see, *Chaudhari & Chaturvedi's Law of Fundamental Rights*, 4th edition [Allahabad: Law Publishers (India) Pvt. Ltd. 1995], p.899.

> Sec.151(1) A police officer knowing of a design to commit any cognizable offence may arrest, without orders from the Magistrate and without a warrant, the person so designing, if it appears to such officer that the commission of the offence cannot be otherwise prevented.
>
> Sec.157(1) If, from information received or otherwise, an officer in charge of a police station has reason to suspect the commission of an offence which he is empowered under section 156 to investigate, he shall forthwith send a report of the same to a Magistrate empowered to take cognizance of such offence upon a police report and shall proceed in person, or shall depute one of his subordinate officers not being below such rank as the State Government may, by general or special order, prescribe in this behalf, to proceed, to the spot, to investigate the facts and circumstances of the case, and, if necessary, to take measures for the discovery and arrest of the offender...
>
> Sec.432(3) If any condition on which a sentence has been suspended or remitted is, in the opinion of the appropriate Government, not fulfilled, the appropriate Government may cancel the suspension or remission, and thereupon the person on whose favour the sentence has been suspended or remitted may, if at large, be arrested by any police officer, without warrant...

In addition, there are also various other Acts which too confer powers of arrest without warrant on police officers.[77]

Irrespective of the mode of arrest, i.e., whether under a warrant or without a warrant, a person is not regarded as arrested unless and until the authority making the arrest actually touches or confines the body of that person.[78] A mere oral declaration or a bodily gesture by the arresting authority, without any actual contact with a view to arresting or, without submission to custody by word or by action by the person to be arrested, does not amount to arrest.[79] On the other hand, if the person is already in jail or under legal detention it is not necessary to do any other act to effect the arrest.[80] Further, in Kultej Singh v. Circle Inspector[81], a person was kept at the police station since the morning of the day before the actual arrest was made. It was held that the person was under arrest from the moment his movements were restricted to the precincts of the police station, albeit the actual arrest took place a day after. Also, if a person not in custody approaches a police officer investigating an offence and offers to give information leading to discovery of facts having a bearing on the charge which may be made against him/her, he/she may appropriately be deemed to have submitted to the custody.[82] However, according to the decision of Munsamy Shunmugam v.

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[77] See, for example, Arms Act or Explosives Act.
[78] See, Sec.46(1) of the Code of Criminal Procedure, Act II of 1974.
[79] See, Roshan Beedi v. Joint Secretary to Government of Tamil Nadu, 1984 Cr.L.J. 134 Mad (FB); Kultej Singh v. Circle Inspector of Police, 1992 Cr.L.J. 1173 (Karn). Also see, R.V.Kelkar, *Lectures on Criminal Procedure*, 2nd Edition, revised by Dr.K.N.Chandrasekharan Pillai, (Lucknow: Eastern Book Company, 1990), p.27.
[80] See, Birendra Kumar Rai v. Union of India, 1992 Cr.L.J. 3866 (All).
[81] 1992 Cr.L.J. 1173 (Karn).
[82] See, Deoman Upadhya, A.I.R. 1960 S.C. 1125.

Collector of Customs[83], keeping a person in custody for enquiry or interrogation does not amount to arrest.

The powers of arrest without warrant as conferred upon police officers by the Criminal Procedure Code, Act II of 1974, are only confined against such persons who are accused or concerned with the offences or are suspects thereof. The fact that a person was once upon a time in possession of an illicit fire arm does not make him/her either an accused or a suspect susceptible to arrest without warrant at present.[84] Moreover, the 'credible information' or 'a reasonable suspicion' upon which an arrest can be made without a warrant by a police officer must be based on definite facts and materials placed before him/her.[85] Prior to taking any action, he/she must also consider those facts or materials for him/herself. The likelihood of a cognizable offence being committed in the future is not sufficient for the arrest of a person without a warrant.[86] Any police officer making an arrest without a warrant must, if the offence involved is a bailable one, inform the person arrested that he is entitled to be released on bail and that he may arrange for sureties on his behalf.[87]

On the other hand, if the offence concerned is a non-cognizable one[88], i.e., an offence for which no police officer has authority to arrest without a warrant[89], a Magistrate may, after taking cognizance of the offence[90], issue a warrant of arrest.[91] The existence of a warrant is equivalent to credible information.[92] Accordingly, the fact that the warrant is not entrusted upon the particular police officer making the arrest does not effect the lawfulness of the arrest.[93] Any court issuing a warrant for the arrest

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[83] 1995 Cr.L.J. 1740 (Bombay).
[84] See, Sham Lal v. Ajit Singh, 1981 Cr.L.J. NOC 150 (P & H).
[85] In the case of arrest under Sec.41(1)(b) the police officer must have definite knowledge or at least definite information that the person about be arrested is in possession of an implement of house breaking before effecting the arrest. An arrest of a person without such definite knowledge is illegal and therefore the person concerned has a right of private defence against it, albeit an implement of house breaking may actually be found on searching the person after the arrest. [See, Abdul Hakim, 1942 All 35. Also see, Ratanlal Ranchhoddas and Dhirajlal Keshavlal Thakore, *Ratanlal & Dhirajlal's The Code of Criminal Procedure*, 15th edition (New Delhi: Wadhwa and Co. 1997), p.54]
[86] See, Easih Mia, (1962) 1 Cr.L.J. 673.
[87] See, Sec.50(2) of the Code of Criminal Procedure, Act II of 1974.
[88] See, Sec.2(l), ibid..
[89] However, see Sec.42(1) & 43(3), ibid..
[90] According to Sec.190 of the Code of Criminal Procedure, Act II of 1974, a Magistrate may take cognizance of any offence, (I) upon receiving a complaint of facts which constitute such offence, or (ii) upon a police report of such facts, or (iii) upon information received from any person other than a police officer, or upon his/her own knowledge, that such offence has been committed.
[91] Note, a Magistrate may issue a warrant of arrest after taking cognizance of any offence, whether it is cognizable or non-cognizable (see, Sec.204 and 87 of the Code of Criminal Procedure, Act II of 1974).
[92] See, Gopal Singh, (1913) 36 All 6.
[93] See, Ratna Mudali, (1917) 40 (Mad) 1028. In any case, arrest even if illegal does not effect the trial of the case (See, Madho Dhobi, (1903) 31 Cal 557).

of any person may in its discretion direct by endorsement on the warrant that, if such person executes a bond with sufficient sureties for his/her attendance before the court at a specified time and thereafter until otherwise directed by the court, the officer to whom the warrant is directed shall take such security and shall release such person from custody.[94]

If the person to be arrested forcibly resists the endeavour to arrest, or attempts to evade the arrest, the authority making the arrest has the power to use all means necessary to effect the arrest.[95] This, however, does not give any power to subject the person concerned to more restraint than is necessary to prevent his/her escape.[96] Especially, in the process of arrest death must not be caused of a person who is not accused of an offence punishable with death or with imprisonment for life.[97] Also, with a view to maintaining a balance between the needs of crime control on the one hand and the protection of human rights of citizens from oppression and injustice at the hands of the law enforcing agencies on the other, the Supreme Court has laid down following guide lines to be observed in case of arrest during investigation:

> (i) An arrested person being held in custody is entitled, if he/she so requests to have one friend, relative or other person who is known to him/her or likely to have an interest in his/her welfare told as far as practicable that he/she has been arrested and where is being detained;
> (ii) Police officer shall inform the arrested person when he/she is brought to the police station of his/her rights;
> (iii) An entry shall be required to be made in the Diary as to who was informed of the arrest.[98]

Whatever the nature of the offence or the mode of arrest, it is up to the arresting authority to show that the arrest, including its manner and form of execution, is sanctioned by a law which satisfies the requirements of Art.21.[99] Also, as the Supreme Court has observed, all restraints on personal liberty have to be commensurate with the object[100] which furnishes their justification. They must be minimal and cannot

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[94] See, Sec.71(1) of the Code of Criminal Procedure, Act II of 1974.
[95] See, Sec.46(2), ibid..
[96] See, Sec.49, ibid. .
[97] See, Sec.46(3), ibid..
[98] See, *inter alia*, Jogindar Kumar v. State of U.P., 1994 (2) SCALF Vol.II No.7 p.662; A.K.Roy v. Union of India and Others, (1982) 1 S.C.C. 271 pp.323-324 para.74; Union of India v. Vasanbharthi, A.I.R. 1990 S.C. 1216.
[99] See, *inter alia*, Mohammad Ali v. Ram Swarup, 1965 (1) Cr.L.J. 413; Sundaram v. Inspector General of Police, Madras, 1971 Madras Law Journal, Vol. I p.196; Narendrakumar Pranlal Gandhi v. State of Gujrat, 1982 Cr.L.J. 1682 p.1686 para.7.
[100] According to the Criminal Procedure Code, Act II of 1974, an arrest could be effected for one or more of the following objectives, (i) for securing attendance of an accused at trial (ii) as a preventive or precautionary measure (iii) for obtaining correct name and address (iv) for removing obstruction to police (v) for retaking a person escaped form custody [see, R.V.Kelkar, *Lectures on Criminal Procedure*, 2nd Edition, revised by Dr.K.N.Chandrasekharan Pillai, (Lucknow: Eastern Book Company, 1990), pp.21-22].

exceed the constraints of the particular situation, either in nature or in duration. Above all, they cannot be used as engines of oppression, persecution, harassment or the like. The sanctity of person has to be maintained at all costs and that cannot ever be violated under the guise of maintenance of law and order.[101] 'Those who feel called upon to deprive other persons of liberty in the discharge of what they conceive to be their duty must, strictly and scrupulously, observe the forms and rules of law'.[102]

2.1.1.2 - Sri Lanka.

As provided by para. 1 of Art.13 of the Constitution of Sri Lanka "(n)o person shall be arrested except according to procedure laid down by law...". Although the word "arrest" is expressly mentioned here, the guarantee of this provision is not confined to apprehensions by authorities in connection with alleged or suspected commission of offences. Since the substantive fundamental right Art.13, taken as a whole, envisages to safeguard relates to personal liberty[103], the Supreme Court of Sri Lanka has given the word "arrest" in para.1 a some what wider interpretation to include 'an arrest in connection with an alleged or suspected commission of an offences, as well as any other deprivation of personal liberty'.[104] Accordingly, in order to conform with the requirements of para.1 of Art.13, before a person is deprived of his/her personal liberty, there must 'preliminarily exist a substantive law conferring authority for such deprivation and the law should further provide the mode of procedure for such deprivation'.[105]

Whether an act amounts to arrest subject to Art.13(1) depends on the circumstances of each case.[106] In this connection the important question is not the lawfulness of the alleged act but whether or not the person concerned has been deprived of liberty to go

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[101] See, *inter alia*, Rupinder Singh v. Union of India, A.I.R. 1983 S.C. 65.
[102] See, *In re* Madhu Limaye, A.I.R. 1969 S.C. 1014 p.1019 para.12 (in the context of Art.22). *c.f.* Ram Narayan Singh v. State of Delhi, A.I.R. 1953 S.C. 277.
[103] See, S.Sharvananda, *Fundamental Rights in Sri Lanka - A Commentary* (1993), pp.147-148.
[104] See, Wickremabandu v. Herath and Others, (1990) Sri.L.R.348, p.356.
[105] See, S.Sharvananda, *Fundamental Rights in Sri Lanka - A Commentary* (1993), pp.147-148. Also see, Vivienne Goonewardena v. Hector Perera and Others, FRD (2) 426; Selvakumar v. Devananda, S.C. App.No.150/93, S.C. Minutes 13/7/94. However, in Joseph Perera v. Attorney General [(1992) 1 Sri L.R. 199] the majority of the Supreme Court upheld the lawfulness of an arrest made in pursuance of a regulation which the full bench of the same court in the same case agreed to be *ultra vires* of the Constitution (Also see, S.C. App.No.96/87, Gunaratna v. Cyril Herath, and App.No.99/87, Wijesooriya v. Abeyratna, S.C. Minutes 3/3/89). On the other hand if the authorities had the legal power to act in the way they did, the mere fact that they did so in reference to a wrong provision of the law would not make their act unlawful [see, Samrakoon CJ. in Fernando v. Attorney General, (1983) 1 Sri.L.R. 374].
[106] See, Mahinda Rajapakse v. Kudahetti and Others, (1992) 2 Sri.L.R. 223 p.243.

where he/she pleases.[107] As the Supreme Court of Sri Lanka has observed "(c)ustody does not...necessarily import the meaning of confinement but has been extended to mean lack of freedom of movement brought about not only by detention but also by threatened coercion, the existence of which can be inferred from the surrounding circumstances."[108] However, not every detention or, delay or prevention of going on, constitutes an arrest. A person would be regarded as arrested for the purpose of Art.13(1) only if there was an apprehension of his/her person by word or by deed. In other word no claim under Art.13(1) can be maintained unless it is established that there was an imprisonment, confinement, durance or constraint by placing the person concerned in the custody, keeping, control, or under the coercive directions of an officer of justice or other authority.[109]

As per Sec.23(1) of the Sri Lankan Code of Criminal Procedure Act, No.15 of 1979, 'in making an arrest the person making the same shall actually touch or confine the body of the person to be arrested unless there be a submission to the custody by word or action'. However, according to the explanatory note, "keeping a person in confinement or restraint without formally arresting him or under the colourable pretension that an arrest has not been made when to all intents and purposes such person is in custody shall be deemed to be an arrest of such person". Thus, an arrest may be completed by words spoken or by other conduct, without the authority making the arrest actually touching the body of the person to be arrested, if under the circumstances such words or conduct are/is "...calculated to bring, and do bring, to a person's notice that he is under a compulsion and he thereafter submits to that compulsion."[110]

Every arrest has to conform with the requirements of Art.13(1). It is not relevant whether the purpose of the arrest was to enable the person concerned 'to be available and ready to be produced to answer an alleged or suspected crime or to assist in the detection of a crime or in the arrest or prosecution of an offender or some such or other purpose of the officer making, or authority ordering, the arrest'.[111] In Namasivayam v. Gunawardena[112], a policeman investigating a case of robbery of a gun "required" a person travelling in a bus to accompany him to the police station

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[107] See, A.R.B.Amerasinghe, *Our Fundamental Rights of Personal Security And Physical Liberty*, (Ratmalana: Sarvodaya Book Publishing Services1995), p.80.
[108] See, Piyasiri & Others v. Nimal Fernando, A.S.P. & Others, (1988) 1 Sri.L.R. 173 p.183.
[109] See, Mahinda Rajapakse v. Kudahetti and Others, (1992) 2 Sri.L.R. 223 p.243.
[110] See, A.R.B.Amerasinghe, *Our Fundamental Rights of Personal Security And Physical Liberty*, (Ratmalana: Sarvodaya Book Publishing Services1995), p.81.
[111] See, Mahinda Rajapakse v. Kudahetti and Others, (1992) 2 Sri.L.R. 223 p.243.
[112] (1989) 1 Sri.L.R. 394.

since he (the policeman) believed that that person was acquainted with the facts and circumstances relating to the robbery. Although the policeman denied arrest, the Supreme Court said,

> "...when the 3rd Respondent required the Petitioner to accompany him to the Police Station and took him to the Police Station, the Petitioner was in law arrested by the 3rd Respondent. The petitioner was prevented by the action of the 3rd Respondent from proceeding with his journey in the bus. The petitioner was deprived of his liberty to go where he pleased. It was not necessary that there should have been any actual use of force; threat of force used to procure the Petitioner's submission was sufficient. The Petitioner did not go to the Police Station voluntarily. He was taken to the Police by the 3rd Respondent...The liberty of an individual is a matter of great constitutional importance. This liberty should not be interfered with, whatever the status of that individual, arbitrarily or without legal justification".[113]

In Piyasiri v. Nimal Fernando, A.S.P. & Others[114], a group of customs officers returning after work were stopped on the way and were questioned about a bribery allegation made against them. Thereafter they were asked to go in their own cars to a nearby Police Station where they were searched. Then they were ordered to proceed to the Bribery Commissioner's Department, again in their own cars. At the Bribery Commissioner's Department their statements were recorded and they were permitted to leave but only after they gave a written undertaking to appear in the Magistrate's Court the following morning. As in the Namasivayam case the policeman concerned denied arrest, formal or otherwise. According to him the Petitioners were at no time confined or incarcerated and their movements were restricted only for the limited purpose of searching and recording statements. However this contention was rejected by the Supreme Court. In the Court's opinion the group of customs officers concerned were under arrest during the whole period in question, for, after they were signalled to stop until they appeared before the Magistrate's Court the following morning they were under the coercive directions of the 1st Respondent.

As stipulated by Art.13(1) an arrest is legal only if it is effected in accordance with the procedure laid down by law.[115] The word "law" here has not been used in an abstract sense. It denotes only the statutory law, i.e., law enacted by the legislature.[116] As a corollary of this the phrase "procedure established by law" means the procedure laid down in the law passed by the legislature.

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[113] Ibid., pp.401-402.

[114] (1988) 1 Sri.L.R. 173.

[115] See, *inter alia*, Jayakody v. Karunanayake, S.C. App.No.91/91, S.C. Minutes 18/11/92; Kumarasena v. Sriyantha and Others, S.C. App.No.257/93, S.C. Minutes 31/5/94; Moramudalige Podiappuhamy v. Dayananda Liyanage and Others, S.C. App.No.446/93, S.C. Minutes 31/5/94; Faurdeen v. Jayatilleke and Others, S.C. App.No.366/93, S.C. Minutes 8/9/94; Rajitha Senaratne v. Punya de Silva and Others, S.C. App.No.18/95, S.C. Minutes 3/11/95.

[116] See, Art.170 of the Constitution of Sri Lanka.

The main statutory provisions pertinent to arrest in criminal proceedings are laid down in the Code of Criminal Procedure Act, No.15 of 1979. As has been provided therein an arrest can be effected either under a warrant or without a warrant in certain circumstances. In the following instances the Criminal Procedure Code has sanctioned arrest without warrant.[117]

> Sec.32(1) Any peace officer[118] may without an order from a Magistrate and without a warrant arrest any person -
> (a) who in his presence commits any breach of the peace;
> (b) who has been concerned in any cognizable offence or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having been so concerned;
> (c) having in his possession without lawful excuse (the burden of proving which excuse shall lie on such person) any implement of house-breaking;
> (d) who has been proclaimed as an offender;
> (e) in whose possession anything is found which may reasonably be suspected to be property stolen or fraudulently obtained and who may reasonably be suspected of having committed an offence with reference to such thing;
> (f) who obstructs a peace officer while in the execution of his duty or who has escaped or attempts to escape from lawful custody;
> (g) reasonably suspected of being a deserter from the Sri Lanka Army, Navy or Air Force;
> (h) found taking precautions to conceal his presence under circumstances which afford reasons to believe that he is taking such precautions with a view to committing a cognizable offence;
> (i) who has been concerned in or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having been concerned in any act committed at any place out of Sri Lanka, which if committed in Sri Lanka would have been punishable as an offence and for which he is under any law for the time being in force relating to extradition or to fugitive persons or otherwise liable to be apprehended or detained in custody in Sri Lanka.
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> Sec.33(1) When any person in the presence of a peace officer is accused of committing a non-cognizable offence and refuses on the demand of such peace officer to give his name and residence or gives a name or residence which such officer has reason to believe to be false, he may be arrested by such peace officer in order that his name or residence may be ascertained, and he shall within twenty-four hours from the arrest exclusive of the time necessary for the journey be taken before the nearest Magistrate's Court unless before that time his true name and residence are ascertained, in which case such person shall be forthwith released on his executing a bond for his appearance before a Magistrate's Court if so required.
> (2) When any person is accused of committing a non-cognizable offence and a peace officer has reason to believe that such person has no permanent residence in Sri Lanka and that he is about to leave Sri Lanka, he may be arrested by such peace officer...

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[117] Note, this is not an exhaustive list of instances in which a person can be arrested without a warrant. In addition to the Code of Criminal Procedure Act, No.15 of 1979, there are various other Statutes which also confers powers of arrest without warrant (see, for example, Sec.63, 69 & 85(2) of the Police Ordinance).

[118] "Peace officer" includes police officers and Grama Seva Niladharis appointed by a Government Agent in writing to perform police duties. (see, Sec.2 of the Code of Criminal Procedure Act, No.15 of 1979).

Sec.35 Any private person may arrest any person who in his presence commits a cognizable offence or who has been proclaimed as an offender, or who is running away and whom is reasonably suspect of having committed a cognizable offence, and shall without unnecessary make over the person so arrested to the nearest peace officer or in the absence of a peace officer take such person to the nearest police station[119]. If there is reason to believe that such person comes under the provision section 32 a peace officer shall re-arrest him. If there is reason to believe he has committed a non-cognizable offence and he refuses on the demand of a police officer to give his name and residence or gives a name or residence which such officer has reason to believe to be false or is a person whom such officer has reason to believe is about to leave Sri Lanka, he shall be dealt with under provisions of section 33. If there is no reason to believe that he has committed any offence he shall be at once discharged.

Sec.40 When any offence is committed in the presence of a Magistrate within the local limits of his jurisdiction he may himself arrest or order any person to arrest the offender...

Sec.41 Any Magistrate may at any time arrest or direct the arrest in his presence within the local limits of his jurisdiction of any person for whose arrest he is competent at the time and in the circumstances to issue a warrant.

Sec.42 If a person in lawful custody escapes or is rescued the person from whose custody he escaped or was rescued may immediately pursue and arrest him in any place...

Sec.107(3) A peace officer knowing of an attempt to commit any cognizable offence may arrest without orders from a Magistrate and without a warrant the person so attempting if it appears to such officer that the commission of the offence cannot be otherwise prevented.

Sec.109(5) If from information received or otherwise an officer in charge of a police station or inquirer has reason to suspect the commission of a cognizable offence or to apprehend a breach of the peace he shall forthwith send a report of the same to the Magistrate's Court having jurisdiction in respect of such offence, or, in the case of an officer in charge of police station, to his own immediate superior, and shall proceed in person to the spot to investigate the facts and circumstances of the case and to take measures as may be necessary for the discovery and arrest of the offender...

Sec.311(3) If the person in whose favour a sentence has been suspended or remitted fails to fulfil the conditions prescribed by the President, the President may cancel such suspension or remission; whereupon such person may, if at large be arrested by any police officer without warrant...

For the purpose of Sec.32 of the Code of Criminal Procedure Act, No.15 of 1979, a reasonable suspicion may be based either upon matters within the arresting officer's own knowledge or upon credible statements made to him/her by other persons, or

[119] However, see A.R.B.Amerasinghe, *Our Fundamental Rights of Personal Security And Physical Liberty*, (Ratmalana: Sarvodaya Book Publishing Services1995), pp.85-86 - "(t)he arrest by a private person transgressing the provisions of section 35 would not be justiciable as an infringement of Article 13(1), since it would not, in terms of Article 126, be 'executive or administrative action', although it may give rise to a cause of action for damages for wrongful arrest".

upon a combination of both these sources.[120] However, an arrest without a warrant would be declared illegal if the suspicion is not of a positive and definite character but of an uncertain and vague nature. A mere conjecture or a vague surmise of a suspicion is not sufficient. In other words, the arresting officer's knowledge or the information he/she has received must give rise to a *reasonable* suspicion that the suspect was concerned in the commission of an offence for which he/she could have arrested a person without a warrant.[121] The test here is an objective one.[122] The subjective satisfaction of the officer making the arrest, however much bona fide it may be, is not relevant for the determination of the lawfulness of an arrest without a warrant.[123]

Thus, the police officers must be satisfied that the complaint or the suspicion, upon which they act as the case may be, is reasonable, or the information received is credible, before making an arrest without a warrant.[124] It would be contrary to the provisions of Sec.32 to make an arrest without a warrant in the course of a voyage of discovery.[125] In other words, according to G.L.Peiris[126], before making arrests without warrant, the officers making such arrests must be persuaded of the guilt of the suspects. "They cannot bolster up their assurance or the strength of the case by seeking further evidence and detaining the man meanwhile, or taking him to some spot where they can or may find further evidence".[127] This, however, does not mean that before an arrest without a warrant is made under Sec.32 there must exist a prima facie case for conviction. A reasonable suspicion or a reasonable complaint is sufficient. Not even proof of the commission of the offence is required.[128] Also, the

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[120] See, The "Wadduwa" Case, *Supreme Court Fundamental Rights Decision*, (Colombo 3: Nadesan Centre), pp.35-36. Also see, Muttusamy v. Kannangara, 52 N.L.R. 324 p.327; Premalal De Silva v. Inspector Rodrigo and Others, (1991) 2 Sri.L.R. 307 p.318.

[121] See, Selvakumar v. Devananda, S.C. App.No.150/93, S.C. Minutes 13/7/94. Also see, the "Wadduwa" Case, ibid.. According to Amerasinghe J. "A suspicion does not become 'reasonable' merely because the source of the information is creditworthy."(at p.35) Compare this statement with the decision of Dhammika Yapa v. Bandaranayake and Others, (1988) 1 Sri.L.R. 63.

[122] See, *inter alia*, Withanachchi v. Herath, (1988) II C.A.L.R. 170; Kumara v. Rohan Fernando and others, SC App.22/90, SC Minutes of 21 July 1994.

[123] See, *inter alia*, Chandradasa v. Lal Fernando, S.C. App.No.174-5/87, S.C. Minutes 30/9/88; Moramudalige Podiappuhamy v. Dayananda Liyanage and Others, S.C. App.No.446/93, S.C. Minutes 31/5/94; SC Application Nos. 146/92-155/92, The "Wadduwa" Case, *Supreme Court Fundamental Rights Decision*, (Colombo 3: Nadesan Centre), p.39.

[124] See, *inter alia*, Muttusamy v. Kannangara, 52 N.L.R. 324; Mohamed Faiz v. Attorney General and others, S.C. App.No.89/91, S.C Minutes 19/11/93.

[125] See, Jayampathy Wickramaratne, *Fundamental Rights in Sri Lanka*, (New Delhi: Navrang Booksellers and Publishers 1996), p.252. Also see, Piyasiri & Others v. Nimal Fernando, A.S.P. & Others, (1988) 1 Sri.L.R. 173; Premalal De Silva v. Inspector Rodrigo and Others, (1991) 2 Sri.L.R. 307 p.321; Kumara v. Rohan Fernando and Others, S.C. App.No.22/90, S.C. Minutes 21/7/94.

[126] See, G.L.Peiris, "Criminal Procedure in Sri Lanka", second edition (Pannipitiya: Stamford Lanka Pvt. Ltd.1998), pp.97-98.

[127] See, Corea v. The Queen, 55 N.L.R. 457.

[128] See, Premalal De Silva v. Inspector Rodrigo and Others, (1991) 2 Sri.L.R. 307 p.318; Joseph Perera v. Attorney General (1992) 1 Sri L.R. 199 p.236.

fact that the person arrested was later released or the investigations subsequent to the arrest revealed that the available evidence is insufficient or deficient in some characteristic to prosecute does not mean that the initial arrest was unlawful, or, the person who made the arrest acted with no reasonable grounds.[129]

On the other hand, if the offence involved is a non-cognizable one[130], a legally valid warrant of arrest[131], obtained form the proper judicial authority[132], is required to arrest the person concerned.[133] Once issued, such a warrant remains valid until it is cancelled by the authority which issued it or until it is executed.[134] Although a warrant of arrest is ordinarily directed to the fiscal of the court issuing it, it may be executed by all fiscal officers, and peace officers within the limits of their several and respective jurisdictions or in any part of the country by any police officer.[135] Also, as provided in Sec.59 of the Code of Criminal Procedure Act, No.15 of 1979 "(w)here a police officer has reasonable grounds to believe that a person is one for whose arrest a warrant of arrest has been issued, he may notwithstanding anything to the contrary in this Chapter arrest that person in execution of the warrant although the warrant is not in his possession for the time being.". A Magistrate's Court issuing a warrant for the arrest of any person may in the case of any non-bailable offence and shall in the case of a bailable offence direct by endorsement on the warrant that, if such person executes a bond with sufficient sureties for his/her attendance before the court at a specified time and thereafter until otherwise directed by the court, the officer to whom the warrant is directed shall take such security and shall release such person from custody.[136]

According to Sec.23(2) of the Code of Criminal Procedure Act if the person to be arrested forcibly resists the endeavour to arrest or attempts to evade the arrest, "...the person making the arrest may use such means as are reasonably necessary to effect the arrest." This, however, does not give a right to cause the death of a person who is not accused of an offence punishable with death. Under no circumstances must a person

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[129] See, Kulatunga J. in Veeradas v. Controller of Immigration and Emigration, (1989) 2 Sri.L.R. 205; Bandaranyaka J. in Mahinda Rajapakse and Vasudeva Nanayakkara, S.C. App.Nos. 2/93 & 4/93, S.C. Minutes 31/3/94.
[130] See, Sec.2 of the Code of Criminal Procedure Act, No.15 of 1979.
[131] See, Part B of Chapter V of the Code of Criminal Procedure Act, No.15 of 1979.
[132] See, Sec.139 & 140 of the Code of Criminal Procedure Act, No.15 of 1979.
[133] However see Sec.33 of the Code of Criminal Procedure Act, No.15 of 1979.
[134] See, Sec.50(2), ibid..
[135] See, Sec.52(1), ibid..
[136] See, Sec.51(1), ibid..

to be arrested be subjected to more restraint than is necessary to prevent his/her escape.[137]

Art.13(1) is designed to invalidate the exercise of despotic power by law enforcing authorities. As it decrees the authorities must, before they deprive any person of his/her personal liberty, strictly and scrupulously follow the letter and form of law. According to the Supreme Court, "...however anxious police officers may be to avoid the evils of the law's delays and commendably assist the administration of justice, they must comply with the salutary provisions established by law designed to protect the liberty of the subject."[138] Under no circumstances must the procedure established by law be departed from to the disadvantage of the persons to be arrested. The good intention of the arresting authority cannot justify a constitutional infirmity. As S.Sharvananda has noted, the liberty of the subject and the convenience of the police must not be weighed in the scale against each other.[139]

2.1.1.3 - Pakistan.

Similar to its Indian counterpart, the Constitution of the Islamic Republic of Pakistan too does not contain any safeguard dealing exclusively with unlawful arrests. The rights against such arrests are deduced from Art.9, which provides that "(n)o person shall be deprived of life or liberty save in accordance with law". According to Sharifuddin Pirzada[140], the word "liberty" here is used in *simpliciter* and must be construed in a large and liberal sense. However, it must be noted that Art.9 of the Pakistani Constitution occurs under the caption "security of person". As Muhammad Gul J. of the Lahore High Court observed in the case of Syed Abual A'Ala Maududi v. The State Bank of Pakistan and the Central Government of Pakistan[141], the word "security" in the caption is plainly used in the sense of protection so as to guarantee freedom from physical restraint or incarceration.

According to Art.4(2)(a) of the Constitution of the Islamic Republic of Pakistan "no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law". Although this Article is wider in scope than Art.9, it does not, unlike the later mentioned Article, appear within Part II of the

[137].See, Sec.23(3) & Sec.28, ibid..
[138] See, Moramudalige Podiappuhamy v. Dayananda Liyanage and Others, S.C. App.No.446/93, S.C. Minutes 31/5/94.
[139] See, See, S.Sharvananda, *Fundamental Rights in Sri Lanka - A Commentary* (1993), p.142.
[140] See, S.Sharifuddin Pirzada, *Fundamental Rights and Constitutional Remedies in Pakistan*, (Lahore: All Pakistani Legal Decisions, 1966), p.166.
[141] P.L.D. 1969 Lahore 908 p.944 at p.946.

Constitution where all the fundamental rights are enumerated.[142] Hence it is not regarded as a fundamental right. Nevertheless, neither the operation of Art.4(2)(a) nor any proceedings founded upon it are susceptible to the proclamation of emergencies[143], whereas the operation of Art.9 may be suspended on such proclamations.[144]

For the purpose of Art.9 "deprive" means to take away, dispossess, injure or destroy and "deprivation" conveys the idea of total loss as contrasted with mere restriction.[145] Therefore, any restriction on liberty or partial control thereof is not sufficient to raise an issue under Art.9.[146] However, as some writers have suggested, 'any assault on the body of a person, e.g., whipping, torture, blindfolding, fettering, bastinadoing, house arrest, solitary confinement, preventing a person from reading a book, religious or non-religious, is an invasion of liberty, and in the absence of a law or rule having the force of law authorising it, such act would be violative of Article 9'.[147]

The word "law" in Art.9 has not been used in an abstract or general sense, and thus does not embody the principles of natural justice. According to Justice Muhammad Munir, law, in the context of Art.9, includes only the State made or enacted law[148], i.e., statutory law. However, in the interpretation of the phrase "in accordance with law" in Art.2 of the Constitution of 1962, which was equivalent to Art.4 of the present Constitution, the Supreme Court came to a some what different conclusion. It said,

> "...in determining as to how and in what circumstances a detention would be detention in an unlawful manner one would inevitably have first to see whether the action is in accordance with law, if not, then it is action in an unlawful manner. Law is here not confined to Statute law alone but is used in its generic sense as connoting all that is treated as law in this country including even the judicial principles laid down from time to time by the superior Courts. It means according to the accepted forms of legal process and postulates a strict performance of all the functions and duties laid

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[142] By not including within Part II of the Constitution, issues pertinent to Art.4 have been kept out of the Supreme Court's jurisdiction conferred under Art.184 of the Constitution.

[143] See, *inter alia*, Sherali v. Deputy Commissioner, Mianwali, P.L.D. 1967 Lahore 1; Federation of Pakistan and others v. *Ch.* Manzoor Elahi, P.L.D. 1976 S.C. 430; Mumtaz Ali Bhutto and another v. The Deputy Martial Law Administrator, Sector 1, Karachi and 2 others, P.L.D. 1979 Karachi 307.

[144] See Art.233(2) of the Constitution of the Islamic Republic of Pakistan, 1973. Also see, Habiba Jilani v. Federation of Pakistan, P.L.D. 1973 Lahore 153.

[145] See, See, S.Sharifuddin Pirzada, *Fundamental Rights and Constitutional Remedies in Pakistan*, (Lahore: All Pakistani Legal Decisions, 1966), p.163.

[146] See the judgement of Muhammad Gul J. in Syed Abual A'Ala Maududi v. The State Bank of Pakistan and The Central Government of Pakistan, P.L.D. 1969 Lahore 908 p.944 at p.946.

[147] See, Justice Muhammad Munir, *Constitution of the Islamic Republic of Pakistan*, Vol. I (Lahore: P.L.D. Publishers 1996), p.244; Emmanuel Zaffar, *Constitution of the Islamic Republic of Pakistan 1973*, Vol. I (Lahore: Ifran Law Book House 1992/93), p.153.

[148] See, Justice Muhammad Munir, *Constitution of the Islamic Republic of Pakistan*, Vol. I (Lahore: P.L.D. Publishers 1996), p.247. Also see, S.Sharifuddin Pirzada, *Fundamental Rights and Constitutional Remedies in Pakistan*, (Lahore: All Pakistani Legal Decisions, 1966), p.171.

down by law. It may well be, as has been suggested in some quarters, that in this sense it is as comprehensive as the American 'due process' clause in a new garb."[149]

The main statutory provisions pertinent to arrest in criminal proceedings are laid down in the Code of Criminal Procedure, Act V of 1898. As provided therein an arrest can be made either under a warrant or without a warrant in certain circumstances. The instances where arrest without warrant is permitted are as follows;

Sec. 54(1) Any police officer may, without an order from a Magistrate and without a warrant arrest:

firstly, any person who has been concerned in any cognizable offence or against whom a reasonable complaint has been made or credible information has been received, or a reasonable suspicion exists of his having been so concerned;

secondly, any person having in his possession without lawful excuse, the burden of proving which excuse shall lie on such person, any implement of house-breaking;

thirdly, any person who has been proclaimed as an offender either under this code or by order of the Provincial Government;

fourthly, any person in whose possession anything is found which may reasonably be suspected to be stolen property and who may reasonably be suspected of having committed an offence with reference to such things;

fifthly, any person who obstruct a police officer while in the execution of his duty, or who has escaped, or attempts to escape, from lawful custody;

sixthly, any person reasonably suspected of being a deserter from the armed forces of Pakistan;

seventhly, any person who has been concerned in, or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists, of his having been concerned in, any act committed at any place out of Pakistan, which, if committed in Pakistan, would have been punishable as an offence, and for which he is, under any law relating to extradition or otherwise, liable to be apprehended or detained in custody in Pakistan;

eighthly, any released convict committing a breach of any rule made under section 565, subsection (3);

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

Sec.55 Any officer in-charge of a police station may, in like manner, arrest or cause to be arrested -

(a) any person found taking precautions to conceal his presence within the limits of such station, under circumstances which afford reason to believe that he is taking such precautions with a view to committing a cognizable offence; or

(b) any person within the limits of such station who has no ostensible means of subsistence, or who cannot give satisfactory account of himself; or

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[149] See, Government of West Pakistan and another v. Begum Agha Abdul Karim Shorish Kashmiri, P.L.D. 1969 Supreme Court, p.14 at p.16. *c.f.* in, Muhammad Younus v. Province of Sind, P.L.D. 1973 Karachi 694; Mumtaz Ali Bhutto and another v. The Deputy Martial Law Administrator, Sector 1, Karachi and 2 others, P.L.D. 1979 Karachi 307 - as was held in this case, Art.4 of the 1973 Constitution "...has to be read in a manner that a person is entitled to such treatment as is consistent not only with enacted law but also with principles of natural justice.". However, it would presumably be an overstatement to say that the guarantee against unlawful arrest in Pakistan imports the concept of substantive due process.

(c) any person who is by repute an habitual robber, house breaker or thief, or an habitual receiver of stolen property knowing it to be stolen, or who by repute habitually commits extortion or in order to the committing of extortion habitually puts or attempts to put persons in fear of injury.

Sec.57(1) When any person who in the presence of a police officer has committed or has been accused of committing a non-cognizable offence refuses, on demand of such officer, to give his name and residence or gives a name or residence which such officer has reason to believe to be false, he may be arrested by such officer in order that his name or residence may be ascertained.

(2) When the true name and residence of such person have been ascertained, he shall be released on his executing a bond, with or without sureties, to appear before a Magistrate having jurisdiction if so required...

Sec.59(1) Any private person may arrest any person who in his view commits a non-bailable and cognizable offence, or any proclaimed offender, and without unnecessary delay, shall make over any person so arrested to a police officer or, in the absence of a police officer, take such person or cause him to be taken in custody to the nearest police station.

(2) If there is reason to believe that such person comes under the provisions of section 54, a police officer shall re-arrest him.

(3) If there is reason to believe that he has committed a non-cognizable offence, and he refuses on the demand of a police officer to give his name and residence, or gives a name or residence which such officer has reason to believe to be false, he shall be dealt with under the provisions of section 57. If there is no sufficient reason to believe that he has committed any offence, he shall be at once released.

Sec.64 When any offence is committed in the presence of a Magistrate within the local limits of his jurisdiction, he may himself arrest or order any person to arrest the offender, and may thereupon, subject to the provisions herein contained as to bail commit the offender to custody.

Sec.65 Any Magistrate may at any time arrest or direct the arrest, in his presence, within the local limits of his jurisdiction, of any person, for whose arrest he is competent at the time and in the circumstances to issue a warrant.

Sec.66 If a person in lawful custody escapes or is rescued, the person from whose custody he escaped or was rescued may immediately pursue and arrest him in any place in Pakistan.

Sec.151 A police officer knowing of a design to commit any cognizable offence may arrest, without orders from a Magistrate and without a warrant, the person so designing, if it appears to such officer that the commission of the offence cannot be otherwise prevented.

Sec.157(1) If, from information received or otherwise, an officer in charge of a police station has reason to suspect the commission of an offence which he is empowered under section 156 to investigate, he shall forthwith send a report of the same to a Magistrate empowered to take cognizance of such offence upon a police report and shall proceed in person, or shall depute one of his subordinate officers not being below such rank as the Provincial Government may, by general or special order, prescribe in this behalf, to proceed, to the spot, to investigate the facts and circumstances of the case, and, if necessary, to take measures for the discovery and arrest of the offender...

Sec.401(3) If any condition on which a sentence has been suspended or remitted is, in the opinion of the Provincial Government, not fulfilled, the Provincial Government

> may cancel the suspension or remission, and thereupon the person on whose favour the sentence has been suspended or remitted may, if at large, be arrested by any police officer without warrant...

The 'credible information' or the 'reasonable suspicion' upon which an arrest can be made without a warrant must be based on definite facts and materials placed before the police officer making the arrest. Also, before taking any action, he/she must consider those materials or facts for him/herself.[150] However, whether the information was credible or the suspicion was reasonable, is a justiciable question.[151] In order to meet the requirements of Art.9, it must be shown that, a reasonable person would have, on the basis of the facts and materials the arresting officer had before him/her, come to a conclusion similar to that which the officer concerned came prior to making the arrest.[152] In other words, no arrest without warrant would be regarded as "in accordance with law" unless the credibility of the information or the reasonableness of the suspicion is objectively justified. The mere fact that the arresting officer was acting with bona fide intentions *per se* does not make an arrest lawful.

If the offence concerned is a "non-cognizable"[153] one, a valid warrant of arrest[154] must be obtained before arresting the suspect.[155] Once issued such a warrant remains in force until it is cancelled by the court which issued it, or until it is executed.[156] The existence of a warrant is equivalent to credible information, and it matters little that the warrant is not entrusted upon the particular police officer who makes the arrest.[157] Any court issuing a warrant for the arrest of any person may in its discretion direct by endorsement on the warrant that, if such person executes a bond with sufficient sureties for his/her attendance before the court at a specified time and thereafter until otherwise directed by the court, the officer to whom the warrant is directed shall take such security and shall release such person from custody.[158]

In making an arrest, the Criminal Procedure Code requires the police officer or the other person to actually touch or confine the body of the person to be arrested, unless

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[150] See, Fakhar-ud-Din Siddiqui, *The Code of Criminal Procedure*(Lahore: Punjab Law House 1996), p.39.
[151] See, Government of East Pakistan v. Mrs.Rowshan Bijaya Shaukat Ali Khan, P.L.D. 1966 S.C. 286.
[152] See, *inter alia*, Abdul Baqi Baluchi v. The Government of Pakistan *et al,* P.L.D. 1968 S.C. 313; Government of West Pakistan and another v. Begum Agha Abdul Karim Shorish Kashmiri, P.L.D. 1969 Supreme Court, p.14; Government of East Pakistan v. Mrs.Rowshan Bijaya Shaukat Ali Khan, P.L.D. 1966 S.C. 286.
[153] See, Sec.4(f) of the Code of Criminal Procedure, Act V of 1898.
[154] See, Part B of Chapter VI, ibid..
[155] However, see, Sec.57 & 59(3), ibid..
[156] Sec.75(2), ibid..
[157] See, Fakhar-ud-Din Siddiqui, *The Code of Criminal Procedure*(Lahore: Punjab Law House 1996), p.39.
[158] See, Sec.76(1) of the Code of Criminal Procedure, Act V of 1898

there be submission to the custody by word or by action.[159] Accordingly, an arrest cannot be completed exclusively by oral declarations. Also, as was held in the case of Hamida Bano v. Ashiq Hussain[160], a person would not be regarded as arrested until he/she is placed in immediate danger or restraint at the minimum level necessary for an arrest.[161]

If the person to be arrested forcibly resists the endeavour to arrest, or attempts to evade the arrest, the person making the arrest may use all means necessary to effect the arrest.[162] However, at no time must the person concerned be subjected to more restraint than is necessary to prevent his/her escape.[163] Also, in making an arrest, death must not be caused of a person who is not accused of an offence punishable with death or with imprisonment for life.[164]

The liberty of the subject is too precious an asset to be interfered with in an arbitrary, unguided or uncontrolled manner.[165] Any invasion thereupon, no matter whether by a private individual or by a public official or a body, must be justified with reference to some law of the country. 'It is an inalienable right of every citizen to be treated in accordance with law and only in accordance with law, that is, according to the accepted norms of legal process and in strict compliance with all the functions and duties laid down by law'.[166] If an authority deprives a person of his/her liberty in flagrant violation of the law under which it purports to act, then the courts will interfere and declare the deprivation unlawful and make the fundamental rights guaranteed by the Constitution available to the aggrieved party.[167]

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[159] See, Sec.46(1), ibid..
[160] P.L.D. 1963 S.C. 109.
[161] Note, there is no difference between detention by the police and formal arrest. "When a person is detained by the police, he is arrested. It is not necessary that in order to make the arrest legal he should further be handcuffed or put in the police or the judicial lock-up." (see, Fazlur Rahman v. The State, P.L.D. 1960 Pesh. 74).
[162] Sec.46(2) of the Code of Criminal Procedure, Act V of 1898.
[163] Sec.50, ibid..
[164] Sec.46(3), ibid..
[165] See, Siraj-Ud-Din v. The State, P.L.D. 1957 (W.P.) Lahore 962; Government of West Pakistan and another v. Begum Agha Abdul Karim Shorish Kashmiri, P.L.D. 1969 Supreme Court, p.14.
[166] See, Muhammad Younus v. Province of Sind, P.L.D. 1973 Karachi 694. *c.f.* from, Government of West Pakistan and another v. Begum Agha Abdul Karim Shorish Kashmiri, P.L.D. 1969 Supreme Court, p.14.
[167] See, Sakhi Daler Khan v. Superintendent in Charge, Recovery of Abducted Women, P.L.D. 1957 (W.P.) Lahore 813.

2.1.1.4 - Bangladesh.

On the first sight it is not very clear whether it is Art.31 or Art.32 of the Constitution of the People's Republic of Bangladesh which should be invoked against unlawful arrests. As provided by Art.31

> "(t)o enjoy the protection of the law, and to be treated in accordance with law, and only in accordance with law, is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Bangladesh, and in particular no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law."

On the other hand, according to Art.32, "(n)o person shall be deprived of life or Personal liberty save in accordance with law." Obviously both these articles must not have been embodied in a fundamental document like the Constitution for the same purpose. Also, as a matter of principle, no Constitutional provision can be treated as superfluous or redundant.

Both, Art.31 and Art.32, require all encroachments on life and liberty to be in accordance with law. Also, they both appear in Part III of the Constitution under the heading "Fundamental Rights", and thus, albeit couched in negative language, confer fundamental rights. However, the application of Art.31 is not limited to action that is detrimental to life, liberty or property of the individuals. The word "liberty" in Art.31 has been used in simpliciter. Hence it covers the entire range of human activities and freedoms, including those covered by Art.32, and can be invoked whenever a public or a private right is infringed by State action.[168]

Further, as M.H.Rahman J. observed in the case of Mujibur Rahman v. Bangladesh, Art.31 does not merely embody the principle of rule of law but also incorporates the concept of 'due process' as is known in the American jurisprudence.[169] According to Mahmudul Islam this means the incorporation of not only the procedural aspect, but also the substantive aspect of the concept of due process.[170] Thus, a law that authorises arrest would fail the test of Art.31 unless it, i.e., the law, is reasonable and prescribes a non-arbitrary procedure for the making of arrest.

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[168] See, F.K.M.A.Munim, *Rights of the Citizens Under the Constitution and Law* (Dacca: Bangladesh Institute of Law and International Affairs 1975), p.45 - *vide*, Muhammad Sharif & others v. Muhammad Saeed-Uz-Zaman & another, P.L.D. 1968 Lahore 122.

[169] 44 D.L.R. (A.D.) (1992) 111, p.122 para.43. For the meaning of 'due process' as is understood in the American jurisprudence see, *inter alia*, Mugler v. Kansas, (1887) 123 U.S. 623; Holden v. Hardy, (1898) 169 U.S. 366; Lochner v. N.Y., (1905) 198 U.S. 45; Nebbia v. N.Y., (1934) 291 U.S. 502; De Jong v. Oregon, (1937) 290 U.S. 353; Louisiana v. N.A.A.C.P., (1961) 366 U.S. 293; Mathews v. Eldridge, (1976) 424 U.S. 319. Also see, David Bodenhamer, *Fair Trial : Rights of the Accused in American History*, (New York: Oxford University Press 1992)

[170] See, Mahmudul Islam, *Constitutional law of Bangladesh* (Dacca: Bangladesh Institute of Law and International Affairs 1995), pp.148-166.

On the other hand, as in the case of Art.21 of the Indian Constitution, the phrase "liberty" in Art.32 has been qualified by the word "personal". According to Munim, by this limitation the drafters of the Constitution have purported to dispel the impression that the word "liberty" in Art.32 has any reference to the seven democratic freedoms guaranteed in Art.36 to 41.[171] With regard to the distinction between Art.31 and Art.32 Mahmudul Islam writes;

> "(b)ecause of the seriousness of deprivation the framers of the Constitution made this specific provision even though deprivation can be covered by art.31. No provision of the Constitution can be treated as surplusage and we must find something more in the quality of the protection provided by art.32 than is provided in art.31. No right is so basic and fundamental as the right to life and personal liberty and exercise of all other rights is dependent on the existence of the right to life and personal liberty...the due process concept of art.31 involves a relaxed scrutiny of reasonableness of a law passed by Parliament and the court refers to the wisdom of the legislators. If the framers of the Constitution intended to apply the same standard of reasonableness to a law involving deprivation of life or personal liberty, making a separate provision as in art.32 was unnecessary. From the scheme of Part III it may be concluded that in making the separate provision in respect of deprivation of life and personal liberty, the framers of the Constitution intended application of a stricter scrutiny of reasonableness. A law providing for deprivation of life or personal liberty must be objectively reasonable and the court will inquire whether in the judgement of an ordinary prudent man the law is reasonable having regard to the compelling, and not merely legitimate, governmental interest. It must be shown that the security of the State or of the organised society necessitates the deprivation of life or personal liberty."[172]

According to this author, although the much broader guarantee of Art.31 against unreasonable and arbitrary action detrimental to life liberty and body covers the area contemplated by Art.32, i.e., unreasonable and arbitrary deprivation of life or personal liberty, there exists a difference in the depth of the respective judicial reviews afforded by the two Articles. While the judicial scrutiny under Art.32 for substantive and procedural reasonableness of actions that deprive life or personal liberty demands for objective justifications, the judicial scrutiny under Art.31 for the same, of actions that are detrimental to life and personal liberty, stops at, and does not question beyond, the wisdom of the legislature.

Whatever the difference between Art.31 and Art.32 it is clear that neither of these two Articles uses the term "law" to denote only statutory law. As per Bhattacharya J., if read in the context of the preamble of the Constitution, the word "law" in Art.31 and Art.32 encompasses all that is treated as law in the country, including even the judicial

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[171] See, F.K.M.A.Munim, *Rights of the Citizens Under the Constitution and Law* (Dacca: Bangladesh Institute of Law and International Affairs 1975), pp.59-60.

[172] See, Mahmudul Islam, *Constitutional law of Bangladesh* (Dacca: Bangladesh Institute of Law and International Affairs 1995), p.166.

principles laid down from time to time by the superior courts.[173] It also includes those principles and rules, for example, like the principles of natural justice, which are usually regarded as binding upon courts of law, even if such principles and rules are not made specifically a part of positive enactment.[174] It follows that, for the purpose of both Art.31 Art.32, a deprivation of personal liberty would not be regarded as "in accordance with law" if such deprivation is based on, and/or results from, a law or procedure which is vague, uncertain or arbitrary.[175]

In connection with criminal proceedings, the Criminal Procedure Code of Bangladesh, Act.No.V of 1898, authorises deprivation of personal liberty by way of arrest either under a warrant or without a warrant in certain circumstances.[176] Although separate changes have been introduced from time to time, both Pakistan and Bangladesh, who were a single country since partition from India in 1947 until Bangladesh, which was known as East Pakistan during this period, gained independence in 1971, still uses the same Criminal Procedure Code introduced by the British rulers in 1898. As a result the instances where a person can be arrested without a warrant under the Criminal Procedure Code of Bangladesh[177] is, *mutatis mutandis*, identical to that of Pakistan.[178] Their corresponding jurisprudences also coincide to a greater extent. Thus, for example, the reasonable suspicion upon which a police officer may make an arrest without a warrant under the first provision of Sec.54 of the Criminal Procedure Code of Bangladesh, must, as under the corresponding provision of the Pakistani Criminal Procedure Code, be based upon definite facts. Similarly, the reasonableness of the suspicion is also not *ipse dixit* of the police officer.[179] It must be objectively justified by placing the materials, which gave rise to the suspicion, before the court.[180]

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[173] See, Abdul Latif Mirza v. Bangladesh, 31 D.L.R. (A.D.) (1979) 1 p.15 at p.24 para.51. Here the learned Judge refers to the Pakistani case of Government of West Pakistan and another v. Begum Agha Abdul Karim Shorish Kashmiri (P.L.D. 1969 Supreme Court, p.14).

[174] Ibid..

[175] See, Mahmudul Islam, *Constitutional law of Bangladesh* (Dacca: Bangladesh Institute of Law and International Affairs 1995), pp.148-169.

[176] However, this is not the only legislation which authorises arrest without warrant. For example, see, the Special Powers Act, 1974; the Bangladesh Public Safety Ordinance, 1958.

[177] See, Sec.54, 55, 57(1), 59, 64, 65, 66, 151 and 401(3) of the Criminal Procedure Code of Bangladesh, Act. No. V of 1898.

[178] However, the Seventh provision of Sec.54 of the Code of Criminal Procedure of Bangladesh includes, in addition to laws relating to extradition, the Fugitive Offenders Act, 1881. This part of Sec.54 of the Pakistani Criminal Procedure Code was omitted by Ordinance XXVII of 1981.

[179] See, *inter alia*, Maimunnessa v. State, 26 D.L.R. (1974) 241; Mashiur Rahman alias Jadu Mia v. State, 27 D.L.R. (1975) 334.

[180] See, Habibur Rahman v. Government of Bangladesh, 26 D.L.R. (1974) 201. For a definition of the word "reasonable", see, Oali Ahad v. Government of Bangladesh, 26 D.L.R. (1974) 376.

In the context of Art.32 of the Constitution deprivation means "total loss" and "personal liberty" is synonymous with freedom from physical restraint.[181] As such, restrictions imposed upon one's freedom of movement, which is guaranteed under Art.36, would not bring Art.32 in to operation. Also, as provided by Sec.46 of the Criminal Procedure Code, a person would not be regarded as arrested unless and until the police officer or other person making the arrest actually touches or confines the body of the person to be arrested. Thus, an arrest cannot be completed solely by words spoken.[182] But, on the other hand, touching or confinement is not imperative if there be a submission to the custody by word or by action.[183] Moreover, if the person to be arrested is already in custody it not necessary that he/she further be handcuffed to make the arrest legal.[184] Although the person making the arrest is empowered to use all means necessary to effect the arrest, exertion of force more than what is required to prevent the escape of the person to be arrested would be repugnant of the Criminal Procedure Code.[185] Under no circumstances, in the attempt to arrest him/her, must death be caused of a person who is not accused of an offence punishable with death or with imprisonment for life.[186]

Personal liberty, as guaranteed by Art.31 and reinforced with more precision and extra safeguards under Art.32 of the Constitution of the People's Republic of Bangladesh, can be curtailed only in accordance with law but not in colourable exercise of the power conferred under the law. If an authority, empowered to take an action prejudicial to the personal liberty of a person, acts unlawfully, then the courts have a duty to interfere and rectify the wrongful exercise of power.[187] For, it is an inalienable right of every citizen and any other person for the time being within Bangladesh to be treated in accordance with law and only in accordance with law.[188]

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[181] See, F.K.M.A.Munim, *Rights of the Citizens Under the Constitution and Law* (Dacca: Bangladesh Institute of Law and International Affairs 1975), p.60 ; Mahmudul Islam, *Constitutional law of Bangladesh* (Dacca: Bangladesh Institute of Law and International Affairs 1995), p.166.

[182] See, F.K.M.A.Munim, *Rights of the Citizens Under the Constitution and Law* (Dacca: Bangladesh Institute of Law and International Affairs 1975), p.87. Here the author refers to the Pakistani case of Hamida Bano v. Ashiq Hussain, P.L.D. (1963) S.C. 109.

[183] See, Sec.46 of the Criminal Procedure Code of Bangladesh, Act. No. V of 1898.

[184] See, F.K.M.A.Munim, *Rights of the Citizens Under the Constitution and Law* (Dacca: Bangladesh Institute of Law and International Affairs 1975), p.87. Here the author refers to the Pakistani case of Fazlur Rahman v. The State, P.L.D. (1960) Pesh. 74.

[185] See, Sec.46(2) & 50 of the Criminal Procedure Code of Bangladesh, Act. No. V of 1898.

[186] Sec.46(3), ibid..

[187] See, A.B.M.Mafizul Islam Patwari, *Liberty of the People : Britain and Bangladesh*, (Dhaka: Institute of Human Rights and Legal Affairs 1987) p.133.

[188] See, for example, Faisal Mahbub v. Bangladesh, 44 D.L.R. (1992) 168.

2.1.1.5 - Nepal.

Unlawful arrest in the Kingdom of Nepal is prohibited by Art.12(1) of the 1990 Constitution. As it provides "(n)o person shall be deprived of his personal liberty save in accordance with law...". In addition, under the Public Offences Act of 1970, before making an arrest the police must obtain a warrant of arrest unless the person concerned is caught in the act of committing a crime. Also, for many offences judicial proceedings must be initiated within seven days of arrest. If the court upholds the detention, the law authorises the police to hold the suspect for twenty five days to complete investigation, with a possible extension of further seven days.[189]

Art.12(1) uses the word "law" plainly without any qualification, such as for example, 'the procedure established by', or, 'the due course of', added to it. Whether this implies the incorporation of both substantive as well as procedural due process into the guarantee of Art.12(1) is not clear.[190] However, as mentioned in the Preamble to the 1990 Constitution one of the aims of the Constitution is 'to establish an independent and competent system of justice with a view to transforming the concept of the Rule of Law into a living reality'.[191] In connection with this concept Ravi Sharma Aryal observes,

> "(t)he government, while discharging its power, should abide with principle of rule of law. The rule of law demands proper legal limits on the exercise of power. This does not mean merely that acts or authority must be justified by law, for if the law is wide enough can justify a dictatorship based on tyrannical but perfectly legal principle...The rule of law requires something further. Power must first be approved by parliament, and must then be granted by parliament within definable limits. These limits must be consistent with certain principles, for instance, with the principle of Natural Justice."[192]

Further, according to Kusum Shrestha[193] the 1990 Constitution has given an unlimited power of judicial review to the Supreme Court in order, among other things, to determine *vires* of legislations, delegated legislations, rules and orders.[194] Thus, it may be argued that, for the purpose of Art.12(1), a law or an action which authorises or causes deprivation of personal liberty of an individual by way of arrest has to be

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[189] See, *U.S. Department of State, Nepal Country Report on Human Rights Practices for 1998*, Released by the Bureau of Democracy, Human Rights, and Labor, February 26, 1999.

[190] For a discussion about due process of law under the Napalese Constitution see, Gunanidhi Nyaupane, 'A Critical Appraisal of Due Process of Law Under the Napalese Constitution', *Essays on Constitutional Law*, Vol.17 (1994) Nepal Law Society, Kathmandu, p.28,.

[191] For a discussion about the Preamble to the 1990 Constitution of the Kingdom of Nepal see, Hari Bansh Tripathi, 'The Preambular Promise of Our Constitution', in *Essays on Constitutional Law*, Vol.14 (1993), Nepal Law Society, Kathmandu, p.1.

[192] See, Ravi Sharma Aryal, 'Remedial Right Under the Constitution of the Kingdom of Nepal', *Essays on Constitutional Law*, Vol.18 (1994), Nepal Law Society, Kathmandu, p.97.

[193] See, Kusum Shrestha, 'Fundamental Rights in Nepal', in *Essays on Constitutional Law*, Vol.15 (1993), Nepal Law Society, Kathmandu, p.1.

[194] See, Art.88(1) of Constitution of the Kingdom of Nepal 2047 (1990).

reasonable as well as non-arbitrary and, whether or not they are reasonable and non-arbitrary is a justiciable question.

2.1.2- European Convention on Human Rights.

As provided by Art.5(1) of the Convention for Protection of Human Rights and Fundamental Freedoms in Europe;

> "(e)veryone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law...
>
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so..."

In the context of Art.5 the term "liberty" does not bear an abstract meaning. For, the Article guarantees only the right to "liberty of **person**", i.e. freedom of physical movement. However, this guarantee does not relate to mere restrictions on movement. Albeit the reference in the French text of the Convention to *"la liberte' d'aller et de venir"* i.e. the freedom of physical movement from one place to another, the protection Art.5 affords, as the jurisprudence of the Strasbourg organs reveals, is exclusive to deprivations of liberty by arbitrary arrests and detentions.[195] According to the Court in Engel *et al*

> "(i)n proclaiming the 'right to liberty' paragraph I of Article 5 is contemplating individual liberty in its classic sense, that is to say the physical liberty of the person. Its aim is to ensure that no one should be dispossessed of this liberty in an arbitrary fashion. As pointed out by the Government and the Commission, it does not concern mere restrictions upon liberty of movement...This is clear both from the use of the terms 'deprived of his liberty', 'arrest' and 'detention', which appear also in the paragraphs 2 to 5, and from a comparison between Article 5 and other normative provisions of the Convention and its Protocols."[196]

This line of jurisprudence conforms with the overall construction of Art.5 and with Art.2 of Protocol No.4 which contains a substantive provision guaranteeing right to liberty of movement.[197] Despite the reference to "right to liberty" in the first sentence of Art.5(1), the remainder of the Article is concerned exclusively with deprivation of liberty and uses the terms such as "deprived of his liberty", "arrest", "detention", etc.

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[195] See, App.No.16360/90, S.F v. Switzerland, 76B D & R (1994) 13; App.No.7050/75, Arrowsmith v. United Kingdom, 19 D & R (1980) 5; Case of Engel and Others, Judgement of 8th June 1976, Ser.A Vol.22 (1977) 4; App.No.5573/72 & 5670/72(joined), Alder and others and Bivas v. FRG, 20 YBECHR (1977) 102; App.No.5058/71 X v. FRG, 40 CD (1972) 80; App.No.5877/72, X v. United Kingdom, 45 CD 90.

[196] Case of Engel and Others, Judgement of 8th June 1976, Ser.A Vol.22 (1977) 4. at p.25 para.58.

[197] If the term "liberty" in Art.5(1) is understood to be concerned with the substantive right of movement, Art.2 of Protocol No.4 would become redundant.

Similarly, the term "security" in Art.5(1) also has to be understood within the context of that article. On several occasions the Commission has emphasised on the need for interpretation of the expression "liberty and security of person" as a whole.[198] In the case of Arrowsmith v. United Kingdom it said;

> "'(p)ersonal liberty' in Art.5 means primarily freedom from arrest and detention. The right to security of person comprises the guarantee that individuals will be arrested and detained only for the reasons and according to the procedure prescribed by law. This is a guarantee against arbitrariness in the matter of arrest and detention."[199]

Accordingly, "security" within the meaning of Art.5 must be understood in the context of "liberty"[200] and it does not for example guarantee mental, social or economic security[201] or security of property.[202] Nor does it oblige the Contracting States to provide protection against encroachments on, or threats to, physical liberty, unless the action or inaction of a public authority has arbitrarily deprived the right to liberty of person with in the meaning of Art.5(1).[203] Although threatening with arrest or detention in accordance with the law could not constitute a breach of Art.5, threatening with arbitrary or unjustified arrest or detention can infringe the right to security of person.[204]

Thus it is clear that the object of Art.5 is to prohibit arbitrary arrest and detention.[205] Although arrest and detention usually means the apprehension of a person by the

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[198]App.No.4403/70-4419/70, 4422/70, 4423/70, 4434/70, 4443/70, 4476/70-4478/70, 4486/70, 4501/70 and 4526/70-4530/70 (joined), East African Asians v. United Kingdom, 78A D & R (1994) 5, p.64 para.218; App.No.5877, X v. United Kingdom, 16 YBECHR (1973) 328, p.326 para.2 App.No.10871/84, Winer v. United Kingdom, 48 D & R (1986) 154, p.168 para.2; App.No.5573/72 and 5670/72 (joined), Alder and others and Bivas v. FRG, 7 D & R (1977) 8, p.26 para.28; App.No.5058/71, X v. FRG, 40 CD (1972)80; App.No.5302/71, X & Y v. United Kingdom, 44 CD (1973) 29, p.46 para.19.

[199]App.No.7050/75, 19 D & R (1980) 5, p.18 para.64.

[200]However in Kamma v. Netherlands [App.No.4771/71, 1 D & R (1975) 4] the Commission considered the right to liberty and right to security of person separately.

[201] See, Frede Castberg, *The European Convention on Human Rights*, edited by Torkel Opsahl and Thomas Ouchterlony (New York: Oceana Publications Inc. 1974), p.92.

[202] See, App.No.5302/71, X & Y v. United Kingdom, 44 CD (1973) 29 (esp.p.46); App.No.4403/70-4419/70, 4422/70, 4423/70, 4434/70, 4443/70, 4476/70-4478/70, 4486/70, 4501/70 and 4526/70-4530/70 (joined), East African Asians v. United Kingdom, 78A D & R (1994) 5.

[203] See, App.No.10871/84, Winer v. United Kingdom, 48 D & R (1986) 154, p.168 para.2; App.No.6040/73, X v. Ireland, 16 YBECHR (1973) 385 - Art.5 does not oblige the Contracting States to Provide individual protection in case of an alleged threat to life.

[204] App.No.8334/78, X v. FRG, 24 D & R (1981) 103.

[205] Some writers, however, do not agree with the narrow interpretation of the expression "liberty and security of person". See, Frede Castberg, *The European Convention on Human Rights*, edited by Torkel Opsahl and Thomas Ouchterlony (New York: Oceana Publications Inc. 1974) , p.92; P.Van dijk and G.J.H.van Hoof, *The Theory and Practice of the European Convention on Human Rights*, second edition (Deventer: Kluwer Law and Taxation Publishers 1990), p.253; Jim Murdoch, 'Safeguarding the liberty of the person: Recent Strasbourg Jurisprudence', 42 *ICLQ* (1993) 494, p.495. According to Sally Dolle "The economic language of this text (Art.5) hides a mine of essential guarantees for the right to liberty and security of person...", see, Sally Dolle, 'Liberty and security of person', in

authorities and his/her confinement to a cell respectively, jurisprudence of the European Convention encompasses a some what wider phenomena. Under certain circumstances the cumulative effect of combination of various conditions, which if taken separately or considered under different circumstances might draw a different conclusion, may come within the Strasbourg definition of deprivation of liberty and constitute a breach of Art.5.

The question whether a deprivation of liberty has occurred depends on actual facts, but not on implied or theoretical considerations. In this connection, however, serious difficulties have emerged with regard to the drawing of the line between the applicability of Art.5 and Art.2 of Protocol No.4, especially when the measure adopted by the authorities equals, for example to an open detention. Strasbourg organs have approached such situation with circumspection taking into consideration a whole range of criteria such as the type, duration, effect and the manner of implementation of the measure in question.[206]

In order for Art.5 to become applicable the alleged measure must have given rise to a deprivation of liberty amounting to an arbitrary arrest or detention. A mere restriction imposed on liberty effecting the right to liberty of movement would come under the purview of Art.2 of Protocol No.4, not Art.5(1). According to the Court in Guzzardi Case "(t)he difference between deprivation of and restriction upon liberty is...merely one of degree or intensity and not one of nature or substance."[207] In this case the Applicant, on being suspected of involvement in illegal Mafia activities, was required by a judicial compulsory residence order to live in the remote island of Asinara off Sardinia coast for sixteen months. However, the authorities had made the order in question in pursuance of a statute[208], but not in connection with a conviction or any of Applicant's suspected Mafia involvements. As such the order did not fit into any of the exceptions listed in Art.5(1).

It was obvious that the Applicant had been denied liberty. The question was whether this denial was one of deprivation of liberty within the meaning of Art.5 (i.e. a detention) or whether it was a mere restriction of movement subject to Art.2 of Protocol No.4. According to the Court starting point of the inquiry into finding an answer to this question is the concrete situation the Applicant had been subject to.

International Human Rights Law in the Commonwealth Caribbean, ed. by Angela Byre and Beverly Y Byfield (Netherlands: Kluwer Academic Publications 1991), 33 at p.34.

[206] See, Guzzardi case, Judgement of 6th November 1980, Ser.A 39 (1981), p.33 para.92.

[207] Ibid., para 93.

[208] Act No.1423 of 27th December 1956.

Although neither the Commission nor the Court regarded the measure provided in the relevant Statute itself as amounting to a deprivation of liberty, they both concluded otherwise about the manner in which the measure had been implemented and found a deprivation of liberty with in the meaning of Art.5. The Court said,

> "(a)s provided for under the 1956 Act...special supervision accompanied by an order for compulsory residence in a specified district does not itself come within the scope of Article 5...It does not follow that 'deprivation of liberty' may never result from the manner of implementation of such a measure, and in the present case the manner of implementation is the sole issue that falls to be considered...Deprivation of liberty may...take numerous...forms. Their variety is being increased by development in legal standards and in attitudes; and the Convention is to be interpreted in the light of the notions currently prevailing in democratic states."[209]

In the Court's opinion the Applicant's situation in Asinara resembled a detention in an "open prison".

In connection with the applicability between Art.5(1) and Art.2 of Protocol No.4, (viz. the difference between detention and restriction on liberty of movement) Harris, O'Boyle, and Warbrick write, "(a)s the Guzzardi case demonstrates...as the degree of physical constraints lessens...so considerations such as social isolation and the other circumstances of detention identified by the Court come into play."[210] In an application made by the same Applicant in 1977, after his transfer from Asinara to the district of Force, in the province of Ascoli Piceno, on the Italian mainland, the Commission found no deprivation of liberty, albeit the movements of Mr Guzzardi were restricted to a inhabited village. However, on this occasion his living conditions were not different from that of other residents of the same village, except that he was subject to a reporting condition. The Commission considered the circumstances involved here as restrictions on liberty of movement and freedom to choose one's residence which fell within the sphere of Art.2 of Protocol No.4.[211]

In Engel *et al*[212] the Court did not view the constraints imposed upon the liberty of soldiers as deprivations of liberty contrary to Art.5 of the Convention. For, rather wide limitations upon the freedom of movement of the members of the armed forces are entailed by reason of the specific demands of military service, as well as such conditions incidental to normal military services have been expressly sanctioned by Art.4(3) of the Convention. However, in connection with further constraints which

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[209] Guzzardi case, Judgement of 6th November 1980, Ser.A 39 (1981), pp.33-34, para.94.

[210] See, D.J.Harris, M.O'Boyle, and C.Warbrick, *Law of the European Convention on Human Rights*, (London: Butterworths, 1995), p.98.

[211] App.No.7960/77, Guzzardi v. Italy (unreported), cited from Guzzardi case Ser.A Vol.39 (1981),p.20, para.56. Also see, Stefan Trechsel, 'The Right to Liberty and Security of the Person - Article 5 of the European Convention on Human Rights in the Strasbourg Case Law', 1 *HRLJ* 88, p.90. See further, Cyprus v. Turkey, App.No.6780/74 and 6950/75, 4 EHRR (1982) 482, p.529 para.285.

[212] Ser.A Vol.22 (1972).

deviated from the normal conditions of life within the armed forces of the Contracting States and which were imposed in connection with disciplinary offences, the Court came to a different conclusion.[213] In the Court's opinion "strict arrest", which confined non-commissioned officers and ordinary servicemen round the clock to a locked cell and which accordingly excluded them from performing their normal military duties, constituted a deprivation of liberty of person within the meaning of Art.5.[214] So was the committal of military personnel to disciplinary units.[215] On the other hand, although the Commission, in addition to strict arrest, found a deprivation of liberty also in the case of aggravated arrest[216], the Court did not find so. With regard to light arrest neither the Commission nor the Court found a deprivation of liberty within the meaning of Art.5.[217]

The case of X v. The Federal Republic of Germany[218] involved a ten year old girl of Turkish nationality. She had been taken to a police station along with two of her friends in connection with a theft of fountain pens belonging to fellow pupils. While in the police station the children were questioned approximately for one hour. When they were not being questioned they had been kept in an unlocked cell. Altogether the children had remained in the police station for about two hours. The Commission found no deprivation of liberty within the meaning of Art.5 because the object of police action was interrogation rather than arrest or detention.[219]

The right to personal liberty and security, as has been guaranteed by Art.5, is not an absolute one.[220] The Convention has recognised the obvious need of arrest and detention in some occasions for the safeguarding of public interest, and has in Art.5(1)

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[213] Ibid., p.25 para.59.

[214] Ibid., p.26 para.63.

[215] Privates condemned to this penalty following disciplinary proceedings were not separated from those so sentenced by way of supplementary punishment under the criminal law, and during a month or more they were not entitled to leave the establishment. The committal lasted for a period of three to six months. Ibid., p.26, para.64.

[216] Report of 19th July 1979, Engel, Ser.B Vol.20 (1974-1976) p.60. The soldiers subjected to aggravated arrest were required to stay in a specially designated unlocked place which they could not leave to visit the canteen, cinema or recreation room.

[217] Although confined during off-duty hours to their dwellings or to military buildings or premises, as the case may be, soldiers subjected to "light arrest" were not locked up and continued to perform their duties. They remained, more or less, within the ordinary framework of their army life. See, Ser.A Vol.22 (1972) pp.25-26, para.61.

[218] App.No.8819/79, 24 D & R (1981) 158.

[219] Ibid., p.161. It is interesting to note that here the Commission had taken into consideration the intention of the authorities in order to determine whether the circumstances involved amount to detention.

[220] However, the right to security of person, that is, according to European jurisprudence, right to be free from arbitrary arrest and detention [see, for example App.No.7050/75, Arrowsmith v. United Kingdom, 19 D & R (1980) 5, p.18 para.64], is guaranteed under Art.5 in absolute terms. See App.No.4771/71, Kamma v. Netherlands, 18 YBECHR (1975) 300, p.316.

provided an exhaustive list[221] of six instances in which deprivation of liberty of person is acceptable. Nonetheless, as the "security of person" requires, even in these exceptional instances arrest and detention must not be arbitrary and must be in accordance with a procedure prescribed by law. This, however, does not mean that every arrest or detention must follow a judicial procedure. What Art.5(1) requires is that the rules governing, and the procedures followed by the authorities, including the courts[222], in ordering and executing arrest and detention to be fair, proper, and not be arbitrary.

In addition to the general requirement to be in accordance with a procedure prescribed by law, an arrest or a detention in any of the exceptional instances provided in sub-paragraphs of Art.5(1) must also be "lawful".[223] The "lawfulness", according to the Court,

> "...presupposes conformity with the domestic law in the first place and also, as confirmed by Article 18, conformity with the purposes of the restrictions permitted by Article 5(1)...it is required in respect of both the ordering and the execution of the measure involving deprivation of liberty...As regards the conformity with the domestic law, the Court points out that the term 'lawful' covers procedural as well as substantive rules. There thus exists a certain overlapping between this term and the general requirement stated at the beginning of Article 5(1), namely, observance of 'a procedure prescribed by law'...Indeed, these two expressions reflect the importance of the aim underlying Article 5(1)...in a democratic society subscribing to the rule of law, no detention that is arbitrary can ever be regarded as 'lawful'".[224]

Further, as the Commission's decision in Zamir v. United Kingdom[225] suggests, in order to be lawful, the domestic law relied upon for the arrest or detention must also be accessible and foreseeable in its application.[226] Furthermore, when determining the

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[221] See, Engel *et al*, Judgement of 8th June 1976, Ser.A Vol.22 (1977) p.24 para.57; Ireland v. United Kingdom, 2 EHRR (1979-80) 25 p.87 para.194; Winterwerp v. Netherlands, 2 EHRR (1979-80) 387, pp.401-402 para.37.

[222] See, Van der Leer v. Netherlands, Judgment of 21st February 1990, Ser.A Vol.170-A (1990); Fox, Campbell and Hartley v. United Kingdom, Judgement of 30th August 1990, Ser.A Vol.182 (1990).

[223] The law referred to in Art.5(1) is primarily the municipal law of the Contracting States. According to the Court "...the words 'in accordance with a procedure prescribed by law' essentially refer back to domestic law; they state the need for compliance with the relevant procedure under that law. However, the domestic law must itself be in conformity with the Convention, including the general principles expressed or implied therein. The notion underlying the term in question is one of fair and proper procedure, namely, that any measure depriving a person of his liberty should issue from and be executed by an appropriate authority and should not be arbitrary." (see, Winterwerp v. Netherlands, 2 EHRR (1979) 387, p.405 para.45).

[224] Ibid., pp.402-403 para.39. However, according to some writers these two requirements could have been understood as complementary, distinguishing between the procedure followed in detaining a person and the grounds for detention. See, D.J.Harris, M.O'Boyle, and C.Warbrick, *Law of the European Convention on Human Rights*, (London: Butterworths 1995), p.105.

[225] App.No.9174/80, 40 D & R (1985) 42.

[226] According to Trechsel all the substantive standards, including the accessibility and foreseeability, set in the Sunday Times Case [2 EHRR (1979-80) 245, p. 271 para.49] in connection with Art.10(2) are no doubt applicable also to Art.5(1). See, Stefan Trechsel, 'The Right to Liberty and Security of the Person - Article 5 of the European Convention on Human Rights in the Strasbourg Case Law', 1 *HRLJ* (1980) 88, p.102

compatibility of the action of the authorities with the Convention, in line with the object and purpose of Art.5(1), namely, to ensure that no one should be dispossessed of his/her liberty of person in an arbitrary manner, the exceptional instances provided in sub-paragraphs of Art.5(1) are generally given a narrow interpretation.[227] All in all, although the Convention does not expressly incorporate the concept of substantive due process[228], in an indirect manner it has empowered the supervisory organs to examine in the abstract the compatibility of municipal laws with the provisions of the Convention.[229]

On the whole, in order to prevent arbitrary deprivation of liberty of person, Art.5(1) requires every arrest and detention to fulfil three conditions. Firstly, every arrest and detention must result from a procedure prescribed by law. Secondly, every such arrest and detention must have been sanctioned by a substantive law. And thirdly, every arrest and detention must fall in to one of the exceptions provided in sub-paragraphs of Art.5(1).[230]

2.1.2.1 - Article 5 Paragraph 1(c).

Article 5(1)(c) permits the lawful arrest and detention of a person, firstly, effected for the purpose of bringing him/her before a competent legal authority on reasonable suspicion of having committed an offence or, secondly, when it is reasonably considered necessary to prevent his committing an offence or, thirdly, when it is reasonably considered necessary to prevent his fleeing after having committed an offence. The exact meaning of this Article is somewhat ambiguous. On the first sight it seems to authorise both, arrest and detention in three different instances. Nevertheless, a closer analysis of the Article and the Strasbourg jurisprudence thereof reveal that it is not rational to assume that all components of Art.5(1)(c) authorise arrest and detention equally.

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[227] See, Winterwerp v. Netherlands, 2 EHRR (1979- 80) 387, pp.401-402 para.37.

[228] See, *inter alia*, App.No.4324/69, X v. FRG, 14 YBECHR (1971) 342 p.346; App.No.7050/75, Arrowsmith v. United Kingdom, 19 D & R (1980) 5, p.18 para.64; Klass and others V. FRG, 2 EHRR (1979/80) 214, p.227 para.33.

[229] Nonetheless, as the Court conceded in the Winterwerp Case, "...the logic of the system of safeguard established by the Convention sets limits upon the scope of this review. It is in the first place for the national authorities, notably the courts, to interpret and apply the domestic law, even in those fields where the Convention 'incorporates' the rules of that law: the national authorities are, in the nature of things, particularly qualified to settle the issues arising in this connection." [2 EHRR (1979-80) 387, p.405 para.46]. The Court in the same case said, "...the national authorities are to be recognised as having a certain discretion, since it is in the first place for the national authorities to evaluate the evidence adduced before them in a particular case; the Court's task is to review under the Convention the decisions of those authorities." (Ibid., p.403 para.40).

[230] See, App.No.6998/75, X v. The United Kingdom, the Report of the Commission, 16 March 1980, para.86.

The first component of the article is clear. It sanctions the lawful arrest and detention of a person effected for the purpose of bringing him/her before a competent legal authority on reasonable suspicion of having committed an offence. However, some complications have emerged with the interpretation of the remaining components.

According to the respondent government in the Lawless case the second component of Art.5(1)(c) confers a general power of preventive detention. Referring to the preparatory works of the Convention it was contended that this provision was purported to cover cases in which it might be impossible to produce evidence of the commission of an offence triable before a court. Therefore, it was argued that it is not imperative under the scheme of the Convention to bring someone arrested or detained on preventive grounds before a judicial authority.[231]

Both the Commission and the Court rejected this construction of Art.5(1)(c). In the Courts opinion such an assumption, with all its implications of arbitrary power, would lead to conclusions repugnant to the fundamental principles of the Convention.[232] The Court said,

> "...the expression 'effected for the purpose of bringing him before the competent legal authority' qualifies every category of cases of arrest or detention referred to in that sub-paragraph...it follows that the said clause permits deprivation of liberty only when such deprivation is effected for the purpose of bringing the person arrested or detained before the competent judicial authority, irrespective of whether such person is a person who is reasonably suspected of having committed an offence, or a person whom it is reasonably considered necessary to restrain from committing an offence or a person whom it is reasonably considered necessary to restrain from absconding after having committed an offence."[233]

Accordingly, arrest for the purpose of prevention of committing an offence is not permitted under Art.5(1)(c).[234] For, a person arrested on such grounds could be brought, as required by the Convention, before a court[235] only if such an attempt to commit an offence itself is an offence under the domestic law of the member state concerned. On the other hand, if such an attempt itself is an offence the person could be arrested using the first component of Art.5(1)(c), i.e. on reasonable suspicion of

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[231] See the Counter-Memorial Submitted by the Government of Ireland, Lawless Case, Ser.B; Pleadings, Oral Arguments and Documents 1960-1961, Publications of the European Court of Human Rights, p.209 at pp.222-224 para.9. Also see, the Opinion of the European Commission of Human Rights, Ciulla Case, Ser.A. Vol.148 (1989) 23, Annex p.26 para.80.

[232] See, Lawless Case (Merits) Judgement of 1st July 1961, Ser.A Vol. 3 pp.51-53 para.14.

[233] Ibid.

[234] Also see Guzzardi Case, Ser.A Vol.39 (1981) pp.38-39 para.102.

[235] Instead of the phrase "competent legal authority" the word "court" is used here since Art.5(3), which is closely connected with Art.5(1)(c), envisages trial of the person arrested or detained under the provisions of the latter mentioned article.

having committed an offence. The third component seems totally redundant as far as arrest is concerned since a person fleeing after having committed an offence could in any event be arrested using, again, the first part of Art.5(1)(c).

Thus, it becomes apparent that the two later components of Art.5(1)(c) have no coherent relationship with arrests. Only the first component seems to be applicable. In other words, under Art.5(1)(c) the Contracting States are able to authorise arrest only when there exists a reasonable suspicion that an offence has been committed.

On the other hand, a person so arrested could be detained, as provided in Art.5(1)(c), firstly, on the same suspicion of having committed an offence or, secondly, when there exist reasonable grounds to assume that if released the arrested person might again commit an offence[236] or might abscond.[237] Support for such construction of Art.5(1)(c) could be found in the Commission's decision in De Jong, Baljet and Van den Brink case. There the Commission said,

> "...in Article 5(1)(c) of the Convention are listed three alternative circumstances in which *detention*[238] may be ordered; where a person is reasonably suspected of having committed an offence or when it is reasonably considered necessary to prevent him from committing an offence or fleeing after having done so. The wording 'or' separating these three categories of persons clearly indicates that this enumeration is not cumulative and that it is sufficient if the *arrested*[239] person falls under one of the above categories."[240]

As can be seen, the Commission here has made a clear distinction between arrest and detention in the interpretation and application of the three components of Art.5(1)(c). This decision, together with the above discussed reasons, make it obvious that not all components of Art.5(1)(c) authorise arrest and detention equally.

It follows that under Art.5(1)(c) a person could be arrested only if there exists a "reasonable suspicion" that he/she has committed an offence. If the suspicion is not reasonable the arrest and any subsequent detention based thereupon would become contrary to Art.5(1)(C). The reasonableness of the suspicion, however, does not require that the suspected person's guilt must at the time of arrest be established and

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[236] The offence that is intended to prevent must be specific and concrete. See Guzzardi Case, Ser.A Vol.39 (1981) pp.38-39 para.102.

[237] According to the jurisprudence of Strasbourg organs detention could, in addition to the grounds mentioned in Art.5(1)(c), also be ordered if there exists a danger of collusion [App.No.9614/81, G., S. and M v. Austria, 34 D & R (1983) 119 p.121] or suppression of evidence [Wemhoff Case, Judgement of 27th June 1968, Ser.A Vol.7 (1968) p.25 para.14] by the suspect.

[238] *Emphasis* added. Note here the Commission has exclusively used the word "detention".

[239] *Emphasis* added.

[240] Opinion of the European Commission of Human Rights, the Case of the De Jong, Baljet and Van den Brink, Ser.A Vol.77 (1984), Appendix p.31 at p.34 para.76. *c.f.* in Lukanov v. Bulgaria, 21 EHRR (1996) CD 20.

proven. In fact, for an arrest to be reasonable, it is not necessary even to show that an offence has been committed.[241]

However, a mere honest or a genuine suspicion of the arresting authority, which constitutes one indispensable element of reasonableness, may not be sufficient for the purpose of Art.5(1)(c).[242] According to the Court "...'reasonable suspicion' presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence".[243] As the Commission has observed, problems in this area arise, as a rule, on the level of facts. "The question then is whether the arrest and detention were based on sufficient objective elements to justify a 'reasonable suspicion' that the facts at issue had actually occurred..."[244]

The reasonableness of a suspicion, however, is a factual matter dependent upon all the circumstances that exist at the time of arrest and detention.[245] According to the Commission the suspicion would not be reasonable if the acts or facts involved against a detained person did not constitute a crime at the time when they occurred.[246] Moreover, the degree of reasonableness required may vary according to the offence concerned. For instance, if the suspected offence risk a longer period of deprivation of liberty a greater level of suspicion may be required.[247] However, as the Court said in the Case of Murray v. The United Kingdom, "...facts which raise a suspicion need not be of the same level as those necessary to justify a conviction or even the bringing of a charge, which comes at the next stage of the process of criminal investigation."[248]

In connection with arrests and detentions involving terrorist activities the practice of Strasbourg organs has been somewhat lenient towards the national authorities. It is

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[241] See, App.No.10803/87, X v. Austria, 11 EHRR (1989) 112, p.115; App.No.9627/81, Ferrari Bravo v. Italy, 37 D & R (1984) 15, pp.36-37 para.3; Appl.No.8339/78, Schertenleib v. Switzerland, 17 D & R (1980) 180 pp.218-219 para.1.

[242] See, the Case of Murray v. The United Kingdom, Judgement of 28th October 1994, Ser.A Vol.300-A (1995) pp.24- 25 para.50-61; The Case of Fox, Campbell and Hartley, Judgement of 30th August 1990, Ser.A Vol.182 (1990) pp.17-18 para.34.

[243] See, the Case of Fox, Campbell and Hartley, Judgement of 30th August 1990, Ser.A Vol.182 (1990) 16 para.32.

[244] See, Lukanov v. Bulgaria, 21 EHRR (1996) CD 27 para.68.

[245] See, the Case of Fox, Campbell and Hartley, Judgement of 30th August 1990, Ser.A Vol.182 (1990) 16 para.32; App.No.343/57, Nielsen case, Digest of Case-Law Relating to the European Convention on Human Rights (1955-1967) p.32 para.7; App.No.1602/62, Stogmuller v. Austria, 7 YBECHR (1964) 168, p.188; App.No.1936/63, Neumeister v. Austria, 7 YBECHR (1964) 224, p.244.

[246] Lukanov v. Bulgaria, 21 EHRR (1996) CD 28 para.71.

[247] See, the Case of Murray v. The United Kingdom, Judgement of 28th October 1994, Ser.A Vol.300-A (1995) p.27 para.56.

[248] Ibid., para.55. *c.f.* in K.-F v. Germany, Judgement of 27th November 1997, Reports of Judgements and Decisions, No.58 (1997 III) 2657 p.2673 para.57.

deemed that Art.5(1)(c) should not be applied in such a manner as to put disproportionate difficulties in the way of the police authorities of the Contracting States in taking effective measures to counter terrorism. Accordingly, the Contracting States are not asked to establish the reasonableness of the suspicion grounding the arrest of a suspected terrorist by disclosing the confidential sources of supporting information or even facts which would be susceptible of indicating such sources or their identity and thereby expose them to potential dangers and threats.[249] This, nevertheless, does not mean, as the Court went on to say in the Case of Murray v. The United Kingdom[250], "...that the investigating authorities have *carte blanche* under Art.5 to arrest suspects for questioning, free from effective control by the domestic courts or by the Convention supervisory institutions, whenever they choose to assert that terrorism is involved." There is a great danger of the objectives of the Convention being significantly thwarted if the exigencies of dealing with terrorist crimes was given a free hand. For, it would potentially result in the stretching of the notion of "reasonableness" to the point where the essence of the safeguard secured by Art.5(1)(c) is impaired. It follows that even in offences involving terrorist crimes the respondent governments have to furnish at least some facts or information capable of satisfying the Court that the arrested person was reasonably suspected of having committed the alleged offence.[251]

As mentioned earlier both the arrest and the detention must always be effected for the purpose of bringing the person concerned before a competent legal authority.[252] This does not mean that the arrest and detention must necessarily culminate in court proceedings. According to the Court in the case of Brogan and others the existence of such a purpose must be considered independently of its achievement.[253] In this case a breach of Art.5(1)(c) was alleged since the applicants, who were arrested and detained, were neither charged nor brought before a court. In the Courts opinion, however, there was no reason to believe that the police investigation which followed the Applicants arrest was not in good faith or that their detention was not intended to

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[249] See, the Case of Fox, Campbell and Hartley, Judgement of 30th August 1990, Ser.A Vol.182 (1990) p.17 para.34.
[250] Judgement of 28th October 1994, Ser.A Vol.300-A (1997) p.27 para.58. *c.f.* in the Case of Sakik and Others v. Turkey, Judgment of 26th November 1997, Report of Judgments and Decisions, No.58 (1997-VII) 2609 p.2623 para.44.
[251] See, the Case of Fox, Campbell and Hartley, Judgement of 30th August 1990, Ser.A Vol.182 (1990) pp.16-18 para.32-34.
[252] Lawless Case, *supra footnote no.*232.
[253] The Case of Brogan and Others, Judgment of 29th November 1988, Ser.A Vol.145-B (1989) 11 at p.29 para.53.

further that investigation by way of confirming or dispelling the concrete suspicions which grounded their arrest.[254] As such the Court found no violation of Art.5(1)(c).

Accordingly, when there exists a reasonable suspicion that a person has committed an offence he/she may be arrested and detained in good faith in order for bringing him/her before a competent legal authority. Further, it is expected that arrest and detention would underpin the unhindered conduct of investigations which aim to establish the existence and the nature of the offence of which the person concerned is suspected of committing.[255] The fact that the person was later released during or at the end of such investigation without charge(s) being brought against or producing before a court for lack of incriminatory evidence would not itself render the arrest and detention contrary to Art.5(1)(c). In fact, in the absence of arbitrariness, not even a later judicial decision which orders the release of the arrested or detained person could make an arrest or detention retrospectively unlawful.[256] Nonetheless, an issue may arise if the detention did not support an investigation, or if, in view of the nature of the offence, this aim of detention, i.e., support an investigation, appeared disproportionate to the severity of the deprivation of liberty which detention entails.[257] Furthermore, if the suspicion disappeared or became unreasonable at any stage of the investigations the suspect must be released immediately. For, as the Court once said, the persistence of a reasonable suspicion is a condition *sine qua non* for the validity of the continued detention.[258]

Art.5(1)(c) permits arrest and detention only in connection with criminal proceedings. This is apparent from it's wording, which must be read in conjunction both with sub-paragraph (a) and with paragraph (3), which forms a whole with it.[259] In the case of Brogan and Others[260], brought against the United kingdom, all the Applicants were arrested using the power to arrest without warrant granted by Sec.12 of the Prevention

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[254] Ibid. Also see the Case of Murray v. the United Kingdom, Ser.A Vol. 300-A (1995) p.30 para. 67.

[255] See, App.No.8224/78, Georges Bonnechaux v. Switzerland, 15 D & R (1979) 211, pp.239-240 para.3; App.No.8339/78, Francis Schertenleib v. Switzerland, 17 D & R (1980) 180, pp.218-219 para.1; App.No.9627/81, Ferrari Bravo v. Italy, 37 D & R (1984) 15 pp.36-37 para.3; App.No.10803/84, X v. Austria, 11 EHRR (1989) 112 p.115.

[256] See, Appl.No.8083/77 X v. The United Kingdom, 19 D & R (1980) 223 pp.224-225 para.1.

[257] See, App.No.10803/84, X v. Austria, 11 EHRR (1989) 112, p.116.

[258] See, Stogmuller v. Austria, 1 EHRR(1979/80) 155 p.190 para.4. In this connection it must note, as the Court went on to say "Article 5(3) clearly implies, however, that the persistence of suspicion does not suffice to justify, after a certain lapse of time, the prolongation of the detention..."

[259] See, Lawless v. Ireland (No.3) (Merits), 1 EHRR (1979/80) 15 pp.27-28 para.14; Ireland v. The United Kingdom, 2 EHRR (1979/80) 25 pp.87-88 para.196; Schiesser v. Switzerland, 2 EHRR (1979) 417 p.425 para.29; Case of De Jong, Baljet and Van den Brink, Judgement of 22nd May 1984, Ser.A Vol.77 (1984) pp.21-22 para.44; Ciulla Case, Judgement of 22nd February 1989, Ser.A Vol.148 (1989) p.16 para.38; B v. Austria, Judgement of 28th March 1990, Ser.A Vol.175 (1990) p.14 para.36.

[260] Ser.A Vol.145-B (1989).

of Terrorism (Temporary Provisions) Act 1984. The arrests were grounded on the suspicion of Applicants being involved in the Commission, preparation or instigation of acts of terrorism in connection with the affairs of Northern Ireland.

A breach of Art.5(1)(c) was alleged on the ground that the arrests were not made on suspicion of an "offence". The Applicants maintained that their arrests and detentions were grounded on suspicion, not of having committed a specific offence, but rather of involvement in unspecified acts of terrorism, something which did not constitute a breach of the criminal law in Northern Ireland and could not therefore be regarded as an "offence" under Art.5(1)(c).

Sec.14 of the 1984 Act defines terrorism as "the use of violence for political ends", which includes "the use of violence for the purpose of putting the public or any section of the public in fear". Although, as the Applicants had contended, involvement in such activities did not itself constitute a criminal offence under the law of Northern Ireland, the Court has previously found this definition of terrorism to be "well in keeping with the idea of an offence"[261].

Moreover, the Applicants were not suspected of involvement in terrorism in general, even though the 1984 Act does not expressly require an arrest to be based upon suspicion of committing a specific offence. Within a few hours of their arrests all the Applicants were questioned about specific offences of which they were suspected of being involved in and each of which constituted an offence under the law of Northern Ireland. Therefore, in the opinion of the Court, it was reasonable to assume that by the phrase "acts of terrorism" the 1984 Act indirectly implied specific criminal offences under the law of Northern Ireland. Accordingly no violation of Art.5(1)(c) was recorded. As was observed, the arrests and detentions were based on a reasonable suspicion of commission of an offence.[262]

In order to conform with the general requirement of lawfulness under Art.5(1) arrest and detention in any of the instances permitted by Art.5(1)(c) must, both in substance and in procedure, be sanctioned by the applicable domestic laws. Such laws and the action followed by the authorities in making an arrest must in turn be consistent with the standards set by the Convention. In other words not only that the arrest and the detention must not be arbitrary but also they must conform with the purpose of the

[261] See, Ireland v. The United Kingdom, Judgement of 18th January 1978, Ser.A Vol.25 (1978) pp.74-75 para.196.
[262] Ser.A Vol.145-B (1989) p.29 para.51.

restriction permitted by Art.5(1)(c).[263] As regard the modalities of arrest the Convention seems to have left the matter to be regulated by the domestic law. For example arrest without warrant would not, in the absence of bad faith, necessarily fall foul of Art.5(1)(c) if such mode of arrest, under the circumstances, is allowed by domestic law.[264]

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Art.5 of the European Convention incorporates both substantive as well as procedural aspect of the due process concept. Thus, it is not only the procedure followed in making an arrest that has to comply with the requirements of Art.5, but also the substantive laws which authorise arrest must be consistent with the standards set by the Convention. On the other hand in South-Asia only the Constitution of Bangladesh imports the concept of substantive due process in to the guarantee against unlawful arrest.[265]

Further, Art.5 of the European Convention is not designed to protect personal liberty alone. It is designed to protect security of person along with liberty of person. Although this might not oblige the Contracting States to guarantee for example, mental, social or economic security or security of property or to provide protection against encroachments on, or threats to, physical liberty, it presumably makes all forms of threats of arbitrary or unjustified arrest or detention unlawful. None of the South-Asian Constitutions, except for that of Pakistan, mentions security of person in the corresponding guarantee. Nevertheless, even in Pakistan it is extremely doubtful whether proceedings against threats of arbitrary or unjustified arrest or detention could be initiated under Art.9, albeit it occurs under the caption "security of person". For, to initiate proceedings under Art.9 there must have been a total loss of personal liberty and, a threat of arbitrary or unjustified arrest or detention *per se* hardly gives rise to any such loss. On the other hand, in spite of the absence of any provision in the

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[263] See, the Case of De Jong, Baljet and Van den Brink, Judgement of 22nd May 1984, Ser.A Vol.77 (1984) pp.21-22 para.44; Wassinik case, Judgement of 27th September 1990, Ser.A Vol.185-A (1991) p.11 para.24; The case of Kemmache, Judgement of 24th November 1994, Ser.A Vol.296-C (1995) p.88 para.42; Lukanov v. Bulgaria, 21 EHRR (1996) CD 29 para.82; Scott v. Spain, 24 EHRR (1997) 391 p.412 para.64.

[264] See, App.No.7755/77, X v. Austria, 9 D & R (1978) 210. Also see, the admissibility decision of App.No.21444/93, Ohlinger v. Austria, 22 EHRR (1996) CD 75, CD 77.

[265] However, to the credit of the Indian Supreme Court it must be mentioned here that it was nearly two years after the pronouncement of Justice Bhagwati's judgement in the case of Maneka Gandhi v. Union of India [(1978) 2 SCR 621 p.663 at p.674], the European Court of Human Rights came to hold in Winterwerp Case [2 EHRR (1979) 387], that the phrase 'procedure prescribed by law' in Art.5(1) of the European Convention on Human Rights means that it must be a 'fair and proper' procedure and not 'arbitrary'.

Constitution to guarantee security of person, according to the Supreme Court of Sri Lanka, a threat of coercion may result in the breach of Art.13(1).[266]

Arrest is permitted under Art.5(1)(c) of the European Convention only if there exists a "reasonable suspicion" that the person concerned has committed an offence. A mere honest or a genuine suspicion of the arresting authority is not sufficient to justify an arrest. According to Strasbourg jurisprudence a reasonable suspicion presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence. However, a suspicion would not be reasonable if the acts or facts involved against the arrested person did not constitute a crime at the time when they occurred. Moreover, for the purpose of Art.5(1)(c) the degree of reasonableness required vary according to the offence concerned. If the suspected offence risk a longer period of deprivation of liberty a greater level of suspicion is required. In India, Sri Lanka, Pakistan and Bangladesh whenever a person is arrested on the suspicion of committing an offence the law requires the suspicion to be an objectively justifiable one.

Further, under Art.5 of the European Convention arrest in connection with criminal offences is lawful only if it is made with the object of bringing the arrestee before a competent legal authority for trial. Such a requirement cannot be found in any of the corresponding provisions of the South-Asian Constitutions.[267] This absence can potentially be dangerous for personal liberty. For example, in the South-Asian countries would it be unconstitutional if someone is arrested merely for the purpose of assisting, in the detection of a crime or, in the arrest or prosecution of an offender?[268] However, it must be noted that in Bangladesh, where the Constitutional guarantee to personal liberty incorporates the concept of substantive due process, the abstract reasonableness of laws, if any, that sanction arrest such as those mentioned in the last instance, which are neither punitive nor preventive, is open to challenge.

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[266] See, Piyasiri & Others v. Nimal Fernando, A.S.P. & Others, (1988) 1 Sri.L.R. 173 p.183.

[267] Note, in Europe this requirement has made keeping someone in custody solely for preventive purposes unlawful. On the other hand, in South-Asia all the countries, except Sri Lanka, have Constitutionally sanctioned preventive detention. Also see, Sec.151(1) of the Criminal Procedure Code of India, Sec.107(3) of the Criminal Procedure Code of Sri Lanka, Sec.151 of the Criminal Procedure Code of Pakistan and Sec.151 of the Criminal Procedure Code of Bangladesh. All these provisions have authorised arrest for preventive purposes.

[268] In Sri Lanka, Amerasinghe J. in the case of Mahinda Rajapakse v. Kudahetti and Others [(1992) 2 Sri.L.R. 223 p.243] has indirectly conceded the possibility of arresting someone for the purpose of assisting in the detection of a crime or in the arrest or prosecution of an offender or for some such or other purpose of the officer making, or authority ordering, the arrest. Also see, Sec.41(2) of the Criminal Procedure Code of India.

Neither the European Convention nor any of the South-Asian Constitutions under consideration regards restrictions imposed upon liberty of movement as amounting to arrest. According to Strasbourg jurisprudence, the difference between deprivation of and restriction upon liberty is merely one of degree or intensity and not one of nature or substance. However, the question whether there has been an arrest or a detention contrary to Art.5 does not depend exclusively upon the degree of physical constraints imposed. If the degree of physical restraints is low then the Strasbourg organs look for other factors such as the intensity of social isolation engendered by the impugned measure, the nature of orders, if any, the individual concerned had to comply with, the extent of deviations the alleged measure caused from the normal mode of life of the person concerned, etc. in order to determine whether there has been a deprivation of liberty. On the other hand, in India, Pakistan and Bangladesh no proceedings against unlawful arrest could be initiated unless the action pursued by the authorities has resulted in a total loss of personal liberty. However, as per the Supreme Court of Sri Lanka, lack of freedom of movement brought about not only by detention but also by threatened coercion may give rise to a breach of Art.13(1).

In India, according to the Supreme Court, a total loss of personal liberty could result not only from direct physical restraints but also from indirect calculated coercions which bring about psychological fears. Thus, a person who has not been formally arrested could still claim to have been deprived of personal liberty as guaranteed by Art.21 if his/her actions have been channelled through anticipated grooves by conditioning his/her mind using scientific methods or by creating conditions which engender inhibitions and fear complexes. As the relevant jurisprudences stand at present whether similar claims could be made in any of the other four South-Asian countries under the corresponding Constitutional provisions relating to personal liberty is extremely doubtful.

2.2 - Right to be Informed of the Grounds of Arrest

The least a person arrested can expect is to know why he/she was put under arrest. Communicating this information to persons arrested is extremely important for the safeguard of the personal liberty of individuals in any society. For example, the authorities may make an arrest as a result of misinterpretation of a situation or misidentification of a person. If the reasons for the arrest are made known to the arrestee, he/she stands at least some chance of having an opportunity to clarify the

situation or his/her identification and thereby prevent any unreasonable restriction of personal liberty.

2.2.1 - South Asia.

2.2.1.1 - India.

According to Art.22(1)[269] of the Constitution of India "(n)o person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest..."[270] As the relevant jurisprudence and writings of the jurists reveal this safeguard is purported to achieve three objectives. First and foremost, it is meant to afford at the outset of criminal proceedings an opportunity for the arrested person to remove any mistake, misapprehension or misunderstanding in the minds of the arresting authority.[271] Secondly, it seeks to facilitate the making of an application for bail or the moving of the appropriate court for a writ of habeas corpus.[272] Thirdly, the safeguard also aims to ensure that the person concerned is able to prepare his/her defence well in advance and meet the case against him/her properly.[273]

The nature and type of information Art.22 requires to be communicated under the term "grounds of arrest" are connected very much with the above mentioned objectives of the safeguard.[274] As a Full Bench of Allahabad High Court held in the case of Vikram v. State[275] the arrested person must be informed of the bare necessary facts which led to his/her arrest, including the date, time and place of the alleged offence. An arrest would be declared illegal if the grounds made known are illusory or irrelevant.[276] This, however, does not mean that the authorities are obliged to furnish, at the very moment of arrest, full details of the offence. According to the High Court

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[269] Also see, Sec.50(1) of the Indian Criminal Procedure Code, Act II of 1974. As it provides Every police officer or other person arresting any person without warrant shall forthwith communicate to him full particulars of the offence for which he/she is arrested or other grounds for such arrest'.

[270] However, according to Art.22(3) nothing in Art.22(1) shall apply to any person who for the time being is an enemy alien.

[271] See, *In re* Madhu Limaye, A.I.R 1969 S.C. 1014 p.1018 para.11.

[272] See, K.K.Nigam, 'Due Process of Law : A Comparative Study of Procedural Guarantees Against Deprivation of Personal Liberty in the United States and India', *Journal of Indian Law Institute*, Vol.4 (1962), p. 99 at p.112.

[273] See, Hansraj v. State of U.P., A.I.R. 1956 All 641; Vimal Kishore v. State of U.P., A.I.R. 1959 All 56. Also see, H.M.Seervai, *Constitutional Law of India : A Critical Commentary*, Second edition (Bombay: N.M.Tripathi Pvt. Ltd.1975), pp.557-558.

[274] See, State of Bombay v. Atma Ram, A.I.R. 1951 S.C.157; Vimal Kishore v. State of U.P., A.I.R. 1959 All 6 at pp.58-59, 61.

[275] 1996 Cr.L.J. 1536 (All).

[276] See, Shibban Lal Saxena v. State of U.P., A.I.R. 1954 S.C. 179; 1954 Cr.L.J 486.

of Punjab in Prem Nath v. Union of India[277], withholding of facts does not violate the Constitutional rights of the accused insofar as the information furnished is comprehensive enough to enable the person concerned to understand why he/she has been arrested and make a representation against the arrest.[278].

However, the mere communication of a section of a statute, without giving any particulars of the alleged act for which the arrest is being effected, is not sufficient for the purpose of Art.22. In the case of Vimal Kishore v. State of U.P.[279], the Petitioner was simply told that he was being arrested under Sec.7 of the Criminal Law Amendment Act 1932. Recording a breach of Art.22 M.C.Desai J. said'

> "(i)f a person... is arrested without warrant, he must be told why he has been arrested. If he is arrested for committing an offence, he must be told that he has committed a certain offence, for which he would be placed on trial. In order to inform him that he has committed a certain offence, he must be told of the acts done by him which amounted to the offence...He must be informed of precise act done by him for which he would be tried; informing him merely of the law applicable to that would be not enough."[280]

A similar conclusion was reached in the case of Madhu Limaye v. State[281] where the Petitioner had been merely informed that he had been arrested under Sec.7 of the Criminal Law Amendment Act. 1932 and Sec.143, read in conjunction with Sec.117, of the Penal Code.

According to the Supreme Court of India the obligation to inform the person arrested of the grounds of arrest does not arise if the circumstances are such that the person being arrested must know the general nature of the alleged offence for which he/she is being arrested.[282] Also, in the case of an arrest effected under a warrant the ground or the reason for arrest is the warrant, which under the Indian Criminal Procedure Code has to state quite clearly the offence with which the person to be arrested stands charged of.[283] Thus, as M.C.Desai J observed in Vimal Kishore v. State of U.P[284], if the warrant is read over to the person being arrested, it is sufficient compliance with the requirement that he/she should be informed of the grounds of arrest.[285]

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[277] A.I.R. 1957 Punj. 235; 1957 Cr.L.J. 1168.

[278] Also see, K.K.Nigam, 'Due Process of Law : A Comparative Study of Procedural Guarantees Against Deprivation of Personal Liberty in the United States and India', *Journal of Indian Law Institute*, Vol.4 (1962), p. 99 at p.112.

[279] A.I.R. 1959 All 56.

[280] A.I.R. 1959 All 56 at p.61.

[281] A.I.R. 1959 Punj. 506; 1959 Cr.L.J. 1209.

[282] See, *In re* Madhu Limaye, A.I.R 1969 S.C. 1014 p.1019 para.13.

[283] See, Form No.2 of the Second Schedule of the Code of Criminal Procedure, Act II of 1974. Also see, The State of Punjab v. Ajaib Singh and another, A.I.R. 1953 S.C. 10 p.14 para.16.

[284] A.I.R. 1959 All 56 at p.61.

[285] Also see Sec.75 of the Indian Criminal Procedure Code, Act II of 1974. As it provides '(t)he police officer or other person executing a warrant of arrest shall notify the substance thereof to the person to be arrested, and, if so required, shall show him the warrant.'

Under Art.22(1) a person who has been arrested must be informed of the grounds or the reasons of arrest "as soon as possible". Although the obligation here is for the authorities to communicate the stipulated information with the greatest despatch, it is not essential that they do so at the time of arrest or immediately after it.[286] The requirements of Art.22(1) remain satisfied as long as the reasons or the grounds of arrest are made known to the person concerned with in a reasonable time of his/her arrest. The question what time is reasonable depends upon the particular circumstances of each case.[287] No definite period has been laid down as reasonable and applicable in all cases.[288] However, a detention, or a refusal of bail cannot be justified if the authorities are unable to say what particular offence the person arrested had committed, or was definitely suspected of, and if, for several months no complaint has been made.[289] Also, in a habeas corpus proceeding any communication of the reasons or grounds of arrest subsequent to the filing of the return cannot save a detention from being contrary to Art.22(1).[290]

Art.22(1) is designed to provide protection against the acts of the executive or other non-judicial authority. It must be complied with whenever a person is arrested on the allegation or accusation that he/she has, or is suspected to have, committed, or is about to or likely to commit, an act of a criminal or quasi-criminal nature.[291] This obligation cannot be dispensed with by offering bail to the arrested person.[292] Art.22(1) will be violated if the reasons or the grounds of arrest are not made known within a reasonable period of time, and, as was held in *In re* Madhu Limaye [293], no subsequent action, not even judicial action, could cure that constitutional infirmity.

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[286] See, Vimal Kumar Sharma v. State of U.P., 1995 Cr.L.J. 2335 (All).
[287] See, Tarapada v. State of West Bengal, A.I.R. 1951 S.C. 174.
[288] See, Raj Bahadur v. Legal Remembrancer, A.I.R. 1953 Cal 522.
[289] See, Safiulla v. State of Tripura, A.I.R. 1958 Tripura 34; 1958 Cr.L.J. 1248.
[290] See, Vimal Kishore v. State of U.P., A.I.R. 1959 All 56; Ram Narayan Singh v. State of Delhi, A.I.R. 1953 S.C. 277.
[291] See, The State of Punjab v. Ajaib Singh and another, A.I.R. 1953 S.C. 10 p.15 para.20. Also see the case of Mannava Venkayya v. Kannegonti China Punnaiah (1957 Cr.L.J. 624), according to which the obligation to give reasons of arrest does not arise if the arrest is made in pursuance of a conviction made by a court.
[292] See, State of M.P. v. Shobaram, A.I.R. 1966 S.C. 1910.
[293] A.I.R 1969 S.C. 1014 p.1019 para.14.

2.2.1.2 - Sri Lanka.

In Sri Lanka as per the second part of Art.13(1) of the 1978 Constitution "...(a)ny person arrested shall be informed of the reasons for his arrest."[294] Like its Indian counterpart, this guarantee too purports "...to afford the earliest opportunity to the arrested person to remove any mistake, misapprehension or misunderstanding in the mind of the arresting official and disabuse his mind of the suspicion which actuated the arrest."[295] Also, this provision is expected to act as a 'safeguard against despotism and over-zeal preventing the police from arresting, on vague general suspicion not knowing the precise crime suspected but hoping to obtain evidence of the commission of some crime for which they have power to arrest'.[296] In addition, according to former Chief Justice S.Sharvananda, "...for the arrested person to know exactly what the allegation or accusation against him is so that he can consult his attorney-at-law and be advised by him."[297]

Under Art.13(1) the authorities are obliged to communicate to the arrestee, not any other person[298], in a language he/she understands, all the material facts and particulars which form the foundation of arrest so as to enable him/her to understand why arrest was being effected.[299] To this end, informing the arrestee of the offence[300] or giving explanations of the object of the arrest[301] is not sufficient compliance with the requirements of Art.13(1). According to Amerasinghe J in the Wadduwa Case,

> "(t)he constitutional right is not to be simply given any explanation. For example, ' I do not like the shape of your nose' or 'I do not like your political party' are in a sense explanations or reasons; but a reason for arrest, a reason to deprive a person of his personal liberty within the meaning of Art.13(1) of the Constitution must be a ground

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[294] Also see, Sec.23(1) of the Sri Lankan Code of Criminal Procedure, Act.No.15 of 1979. As it provides '(i)n making an arrest the person making the same...shall inform the person to be arrested of the nature of the charge or allegation upon which he is arrested.' According to the Supreme Court of Sri Lanka (see, Dharmatilleke v. Abeynaike, SC Application No.156/86, SC Minutes of 15th February 1988), Art.13(1) of the Constitution has to be read with Sec.23(1), Sec.53 and Sec.58(1) of the Code of Criminal Procedure.

[295] See, Mariadas Raj v. Attorney-General and another, FRD(2) 397 at p.404. Also see, Gunasekera v. De Fonseka (1972) 75 NLR 246 p.250; SC Application No.121/88, Mallawarachchi v. Seneviratne and others, (1992) 1 Sri L.R. 181 p.190; SC Application Nos. 146/92-155/92, The 'Wadduwa' Case, *Supreme Court Fundamental Rights Decision* (Colombo 3: Nadesan Centre), p.55; Rajitha Senaratne v. Punya De Silva and others, SC Application 18/95, SC Minutes of 3rd November 1995.

[296] See, Mariadas Raj v. Attorney-General and another, ibid., p.403, Sharvananda J quoting Prof. Glanville L.Williams from, 'Requisites of a Valid Arrest', *Criminal Law Journal*, Vol.6 (1954) p.16.

[297] See, S.Sharvananda, *Fundamental Rights in Sri Lanka - A Commentary* (1993), p.141.

[298] See, Rajitha Senaratne v. Punya De Silva and others, SC Application 18/95, SC Minutes of 3rd November 1995.

[299] Ibid..

[300] See, Dharmatilleke v. Abeynaike, SC Application No.156/86, SC Minutes of 15th February 1988

[301] See, Selvakumar v. Douglas Devananda and others, SC Application No.150/93, SC Minutes of 13th July 1994. Also see, S.Sharvananda, *Fundamental Rights in Sri Lanka - A Commentary* (1993), p.141. As this author (a former Chief Justice of Sri Lanka) notes '(a) bald statement that the arrestee is a terrorist falls far short of the required standards.'

> for arrest. There can be no such ground other than a violation of the law or a reasonable suspicion of the violation of the law."[302]

This, however, does not mean that in order to comply with the requirements of Art.13(1) the authorities must quote chapter and verse from statutes and legal literature which authorise the arrest. As was observed in the case of Fernando v. Attorney General[303] there is no obligation upon the arresting authority to state the applicable law to the arrested person. The grounds or the reasons communicated would be regarded as adequate for the purpose of Art.13(1) if they are (a) such as prima facie to warrant arrest and, (b) based upon information which is considered reliable.[304]

On the other hand, the necessity of communicating the reasons or the grounds of arrest does not arise if it is obvious from the circumstances involved why the arrest was being effected.[305] In Lundstron v. Cyril Herath and others[306] the Petitioner was a qualified paediatric nurse of Swedish nationality maintaining homes for handicapped children in Sri Lanka. She was arrested on suspicion of kidnapping normal healthy children for adoption by foreigners. The arrest was preceded by a raid on one of the homes maintained by the Petitioner. This raid had resulted in the taking into custody of twenty three normal and healthy children and the staff who worked in the home. Subsequently, the petitioner had visited these children and staff at the police station. Moreover, at the time of the arrest in question the police officer who effected it had informed the petitioner that he (the police officer) had received instructions from the Inspector General of Police to take the petitioner into custody in connection with the above raid. In the Supreme Court's opinion this reference to the raid at the time of the arrest, together with all the other circumstances involved, 'would clearly have conveyed to the petitioner the general nature of the offence for which she was being detained'.[307]

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[302] SC Application Nos. 146/92-155/92, The 'Wadduwa' Case, *Supreme Court Fundamental Rights Decision* (Colombo 3: Nadesan Centre), p.52. Also see, Kumarasena v. Sriyantha and others, SC Application No.257/93, SC Minutes of 23rd May 1994, Judgement of Amerasinghe J: Rajitha Senaratne v. Punya De Silva and others, SC Application 18/95, SC Minutes of 3rd November 1995.

[303] (1983)1 Sri L.R. 374 p.383.

[304] See, S.Sharvananda, *Fundamental Rights in Sri Lanka - A Commentary* (1993), p.141.

[305] For example, as A.R.B.Amerasinghe has noted, '...if a person is caught flagrant delicto, - caught in the act - it may not be necessary to tell a man why he is being arrested.' (See, A.R.B.Amerasinghe, *Our Fundamental Rights of Personal Security And Physical Liberty* (Ratmalana: Sarvodaya Book Publishing Services 1995), p.112. Also see, Gunasekera v. De Fonseka, (1972) 75 NLR 246 p.250.

[306] SC Application No.27/87, SC Minutes of 29th April 1988.

[307] Ibid., p.14.

In the case of arrest effected under warrant it is incumbent upon the authority executing the warrant to notify the substance thereof to the person arrested. Also, if so requested by the person arrested the warrant or a copy thereof signed by the authority who issued it must be shown to the arrestee.[308] These obligations cannot be dispensed with by merely informing the arrested person of the offence.[309]

Somewhat strangely Art.13(1) does not stipulate a time period within which the reasons or the grounds of arrest must be made known to the person concerned. This lapse, which would have rendered the whole safeguard of Art.13(1) illusory, has to some extent been amended by the Supreme Court through constructive interpretation of the provision, with reference being made, *inter alia*, to Art.22(1) of the Indian Constitution and Art.5(2) of the European Convention on Human Rights.[310] Thus, the obligation of the person making the arrest is to give the reasons or the grounds at the moment of the arrest, or where it is in the circumstances not practicable, at the first reasonable opportunity.[311] In Lalanie and Nirmala v. De Silva and others[312] a breach of Art.13(1) was recorded since the reasons were given a day after the arrest.

The requirement under Art.13(1) to communicate the grounds or the reasons of arrest is a salutary one. It serves as a restraint on the exercise of power to arrest and ensures that that power will not be arbitrarily employed.[313] Moreover, as H.N.G.Fernando CJ observed in Gunasekera v. De Fonseka[314], citizens have a right to resist unlawful arrests. But this right cannot be exercised effectively unless the grounds or the reasons for arrest are made known to the person being arrested. Under these circumstances the Courts do not regard any failure on the part of the authorities effecting arrest to comply with the requirements of Art.13(1) as a mere irregularity[315].

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[308] See, Sec.53 of the Code of Criminal Procedure, Act No.15 of 1979. As it provides '(t)he person executing a warrant of arrest shall notify the substance thereof to the person arrested, and if so required by the person arrested shall show him the warrant or a copy thereof signed by the person issuing the same'.

[309] See, Dharmatilleke v. Abeynaike, SC Application No.156/86, SC Minutes of 15th February 1988.

[310] See, SC Application No.121/88, Mallawarachchi v. Seneviratne and others, (1992) 1 Sri L.R. 181 pp.187-189.

[311] Ibid., p.190. *c.f.* in, Elasinghe v. Wijewickrema and others, SC Application No.218/92, SC Minutes of 19th March 1993; The 'Wadduwa' Case, SC Application Nos. 146/92-155/92, *Supreme Court Fundamental Rights Decision* (Colombo 3: Nadesan Centre), p.52.

[312] SC Application No.53/88, SC Minutes of 2nd and 4th May 1989.

[313] See, S.Sharvananda, *Fundamental Rights in Sri Lanka - A Commentary* (1993), p.141.

[314] (1972) 75 NLR 246 at p.249. *c.f.* in, The 'Wadduwa' Case, SC Application Nos. 146/92-155/92, *Supreme Court Fundamental Rights Decision* (Colombo 3: Nadesan Centre), p.52; Rajitha Senaratne v. Punya De Silva and others, SC Application 18/95, SC Minutes of 3rd November 1995.

[315] See, Mariadas Raj v. Attorney-General and another, FRD(2) 397 at p.403.

2.2.1.3 - Pakistan.

As provided by Art.10(1) of the Constitution of Pakistan "(n)o person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest..."[316] This safeguard purports to provide an opportunity for the arrested person to make an effective application to the appropriate court for bail, or move the High Court for a writ of habeas corpus. Also, it is deemed that once the nature of the accusation against him/her is made clear, the person concerned would be able to prepare his/her defence in time for the purposes of trial.[317]

In connection with Art.10 the courts of Pakistan have identified a difference between grounds and facts.[318] It is not necessary for the authorities to disclose all the material "facts" they have in their possession. No violation of Art.10(1) would occur as long as the information communicated contains data sufficient to enable the person concerned to make an effective representation against his/her deprivation of liberty.[319] Also, there is no requirement that the grounds be stated with the precision of a charge.[320] However, a mere communication of the section of the Penal Code does not satisfy the requirement of disclosure of grounds of arrest.[321]

The objectives of Art.10(1) would be thwarted if the arrested person is unable to understand the nature of the accusation made against him/her from the information furnished by the authorities. Hence, it is essential that the information authorities furnish in compliance with Art.10(1), contains sufficient particulars as regards the grounds or reasons of arrest, in addition to being communicated in a language intelligible to the person concerned.[322] However, there is no necessity to give the

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[316] According to para.9 of Art.10 nothing in Article 10 'shall apply to any person who for the time being is an enemy alien'.

[317] See, S.Sharifuddin Pirzada, *Fundamental Rights and Constitutional Remedies in Pakistan* (Lahore: P.L.D. Publishers), p.182; Justice Muhammad Munir, *Constitution of the Islamic Republic of Pakistan*, Vol. I (Lahore: P.L.D. Publishers 1996), p.258; Emmanuel Zaffar, *Constitution of the Islamic Republic of Pakistan 1973*, Vol. I (Lahore: Ifran Law Book House), p.162; A.B.M.Mafizul Islam Patwari, *State of Fundamental Right to Personal Liberty* (Thesis submitted for the Degree of Doctor of Philosophy in the University of Dhaka 1985) p.206. Also see, the judgement of S.A.Rahman J. in Government of East Pakistan v. Mrs. Rowshan Bijaya Shaukat Ali Khan, P.L.D. 1966 SC 286 p.288.

[318] See, Government of East Pakistan v. Mrs. Rowshan Bijaya Shaukat Ali Khan, ibid., p.302.

[319] Ibid..

[320] See, Justice Muhammad Munir, *Constitution of the Islamic Republic of Pakistan*, Vol. I (Lahore: P.L.D. Publishers 1996), p.258; Emmanuel Zaffar, *Constitution of the Islamic Republic of Pakistan 1973*, Vol. I (Lahore: Ifran Law Book House), p.162. Also see, Government of East Pakistan v. Mrs. Rowshan Bijaya Shaukat Ali Khan, P.L.D. 1966 SC 286 p.302.

[321] See, Zahoor Illahi v. State, 1975 P.Cr.L.J. 1413 p.1423 para.26.

[322] See, Justice Muhammad Munir, *Constitution of the Islamic Republic of Pakistan*, Vol. I (Lahore: P.L.D. Publishers 1996), p.258; Emmanuel Zaffar, *Constitution of the Islamic Republic of Pakistan 1973*, Vol. I (Lahore: Ifran Law Book House), p.162; A.B.M.Mafizul Islam Patwari, *State of Fundamental Right to Personal Liberty* (Thesis submitted for the Degree of Doctor of Philosophy in the University of Dhaka 1985), p.207.

information in writing. If the arrested person is illiterate, the grounds or the reasons of arrest may be communicated orally.[323] As S.Rahman J. observed in Zahoor Illahi v. State[324],

> "(i)t is true that the disclosure may be oral or may be in writing but it must be sufficient to give an indication to the detenu of the broad facts forming the basis of his apprehension and trial. The extent of disclosure of the grounds may vary from case to case and from individual to individual, depending upon the attending circumstances, and the media available to the detenu for acquainting himself with facts."

In the case of arrests effected under warrants the authority executing the warrant should notify the substance thereof to the person to be arrested, and if so required, shall show him/her the warrant.[325] This is sufficient compliance with Art.10(1) since a warrant issued by a court, as was observed in Bazal Ahmad Ayyubi v. The West Pakistan Province[326], would on its face contain the grounds of arrest such as are required to be communicated to the arrestee by the Constitution.

Under Art.10(1) the reasons or the grounds of arrest must be communicated to the arrested person "as soon as may be". Here the words "as soon as may be" mean as soon as practicable after the detention.[327] No definite time period has been laid down as reasonable for all cases.[328] According to Inamullah J in Muhammad Hashim v. The State[329] "...(t)he question whether the grounds were communicated 'as soon as may be' is a question of facts which has to be determined according to the facts and the circumstances of each case." In contrast, in Ghulam Muhammad Loondkhawar v. The State[330], Kayani J. gave a fairly progressive interpretation to the phrase "as soon as may be". Referring to Art.7 of the 1956 Constitution, the equivalent of Art.10 of the 1973 Constitution, the learned Judge said;

> "Article 7 of the Constitution, in clauses (1) and (2), confers upon every citizen a fundamental right, upon being arrested, to be informed of the grounds for his arrest 'as soon as may be', to consult and be defended by a counsel of his choice and to be produced before the nearest Magistrate within twenty-four hours...I have already pointed out, while dealing with clause (1) that the words 'as soon as may be' used in that clause ought to be interpreted with reference to the period of twenty-four hours within which the prisoner will be produced before a Magistrate. For a prisoner is not produced before a Magistrate merely to inform him that there are Magistrates in the land...he is produced so as to enable him to complain to the Magistrate if there is

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[323] See, Jhumma Khan Baluch v. Government of West Pakistan, P.L.D. 1957 Karachi 939.
[324] 1975 P.Cr.L.J. 1413 p.1423 para.27.
[325] See, Sec.80 of the Pakistan's Code of Criminal Procedure, Act V of 1898.
[326] P.L.D. 1957 (W.P.) Lahore 388 p.395.
[327] See, Ibrahim v. Deputy Martial Law Administrator, Karachi and another, P.L.D. 1979 Karachi 571 p.572.
[328] See, S.Sharifuddin Pirzada, *Fundamental Rights and Constitutional Remedies in Pakistan* (Lahore: P.L.D. Publishes), p.181; Justice Muhammad Munir, *Constitution of the Islamic Republic of Pakistan*, Vol. I (Lahore: P.L.D. Publishers 1996), p.258.
[329] P.L.D. 1956 (W.P.) Karachi 485 at p.489.
[330] P.L.D. 1957 (W.P.) Lahore 497.

> ground for any complaint. And the first complaint which a prisoner will make will be : Why have I been arrested? And if the Magistrate cannot tell him why, there is no charm in styling this production a fundamental right. The grounds of arrest should thus become known to the prisoner in any case within twenty-four hours."[331]

Art.10 of the Constitution of Pakistan contains a safeguard against the arbitrary arrest and detention of a citizen.[332] It covers all arrests effected in criminal or quasi-criminal proceedings, including those made under orders of criminal courts.[333] If the authorities failed to fulfil the requirements of this Article, 'then whether that non-fulfilment has made any difference to the detenu or not, the detention is illegal. That is because a constitutional safeguard has been violated.'[334] As a corollary the person arrested becomes entitled to be set at liberty at once.[335]

2.2.1.4 - Bangladesh.

According to Art.33(1) of the Constitution of the People's Republic of Bangladesh "(n)o person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest..."[336] The jurisprudence of this safeguard is somewhat similar to the jurisprudence of the corresponding safeguards in the Indian and Pakistan constitutions. Like in the two countries last mentioned, the safeguard embodied in Art.33(1) of the Constitution of the People's Republic of Bangladesh purports primarily, (a) to enable the arrested person to prepare his/her defence in order to meet the case against him/her, and (b) to provide him/her an opportunity to move the appropriate court for bail or writ of habeas corpus.[337]

Art.33(1) does not oblige the authorities to furnish full details of the offence to the arrested person[338]. However, any information communicated must be sufficient for the person concerned to understand why his/her liberty has been deprived.[339] Also, the

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[331] Ibid., pp.504-505. Also see, Sakhi Daler Khan v. Superintendent in Charge, Recovery of Abducted Women, P.L.D. 1957 (W.P.) Lahore 813 p.820.
[332] See, Ibrahim v. Deputy Martial Law Administrator, Karachi and another, P.L.D. 1979 Karachi 571 p.572.
[333] See, Bazal Ahmad Ayyubi v. West Pakistan Province, P.L.D. 1957 (W.P.) Lahore 388 p.396.
[334] See, Ghulam Muhammad Loondkhawar v. The State, P.L.D. 1957 (W.P.) Lahore 497, p.504.
[335] See, Sakhi Daler Khan v. Superintendent in Charge, Recovery of Abducted Women, P.L.D. 1957 (W.P.) Lahore 813 p.821.
[336] As provided by Art.33(3) nothing in Art.33(1) shall apply to any person who for the time being is an enemy alien.
[337] See, Mahmudul Islam, *Constitutional law of Bangladesh* (Dacca: Bangladesh Institute of Law and International Affairs 1995), p.171.
[338] Ibid.. (Here the author refers to the Indian case of Hansmukh v. Gujarat, A.I.R. 1981 S.C.28)
[339] See, F.K.M.A.Munim, *Rights of the Citizens Under the Constitution and Law* (Dacca: Bangladesh Institute of Law and International Affairs 1975), p.95. (Here the author refers to the Indian case of Madhu Limaye v. The State, A.I.R. 1959 Punj. 506)

information communicated must be adequate to give the arrested person an idea of the offence he/she is alleged to have committed.[340] Thus, it may be necessary to inform the arrested person of the basic facts on which the satisfaction of the arresting authority is based.[341] A mere disclosure of the provision of law would not fulfil the requirements of Art.33(1).[342]

Under Art.33(1) the grounds of or the reasons for arrest must be stated in a language the arrested person understands.[343] It is, however, not imperative that this communication be in written form. An oral communication would not breach Art.33(1) if the illiteracy of the person arrested makes it impracticable to communicate the grounds in writing.[344] In the case of an arrest effected under a warrant the officer executing the warrant is obliged to notify the substance thereof to the person to be arrested, and, if so required, should show him/her the warrant.[345]

Art.33(1) requires the grounds or reasons of arrest to be made known to the person concerned "as soon as may be". Here the expression "as soon as may be" denotes a reasonable period of time that depends upon the circumstances of each case. Albeit no definite time period has been laid down as reasonable and applicable in all cases[346], according to Mahmudul Islam[347], the authorities must communicate the grounds of arrest before the arrested person is taken to a Magistrate.[348]

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[340] See, Rowshan Bijaya S.Ali Khan v. East Pakistan, 17 DLR 1.

[341] See, Mahmudul Islam, *Constitutional law of Bangladesh* (Dacca: Bangladesh Institute of Law and International Affairs 1995), p.171.

[342] See, F.K.M.A.Munim, *Rights of the Citizens Under the Constitution and Law* (Dacca: Bangladesh Institute of Law and International Affairs 1975), p.95. (Here the author once again refers to the Indian case of Madhu Limaye v. The State, A.I.R. 1959 Punj. 506)

[343] See, Mahmudul Islam, *Constitutional law of Bangladesh* (Dacca: Bangladesh Institute of Law and International Affairs 1995), p.171. (Here the author refers to the Indian case of Hari Kishan v. Maharashtra, A.I.R. 1962 S.C. 911)

[344] See, F.K.M.A.Munim, *Rights of the Citizens Under the Constitution and Law* (Dacca: Bangladesh Institute of Law and International Affairs 1975), p.95.

[345] See, Sec.80 of the Code of Criminal Procedure, 1898 of Bangladesh. As F.K.M.A.Munim has observed [*Rights of the Citizens Under the Constitution and Law* (Dacca: Bangladesh Institute of Law and International Affairs 1975), p.93], a warrant of a court and an order of any authority must show on their face the reason for arrest. (The author here refers to the Indian case of State of Madhya Pradesh v. Shobaram, A.I.R. 1966 S.C. 1910)

[346] See, F.K.M.A.Munim, *Rights of the Citizens Under the Constitution and Law* (Dacca: Bangladesh Institute of Law and International Affairs 1975), p.95. (Here the author refers to the Indian case of Raj Bahadur v. Legal Remembrancer, A.I.R. 1953 Cal. 522)

[347] See, Mahmudul Islam, *Constitutional law of Bangladesh* (Dacca: Bangladesh Institute of Law and International Affairs 1995), p.171. (The author here refers to the Pakistani case of G.M.Loondkhawar v. State, P.L.D. 1957 497)

[348] According to Art.33(2) of the Constitution of the People's Republic of Bangladesh '(e)very person who is arrested and detained in custody shall be produced before the nearest Magistrate within a period of twenty-four hours of such arrest, excluding the time necessary for the journey from the place of arrest to the court of Magistrate...'. Also see Sec.61 of the Code of Criminal Procedure, 1898 of Bangladesh.

2.2.1.5 - Nepal.

As provided by Art.14(5) of the Constitution of the Kingdom of Nepal "(n)o person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest...".[349] Although the Supreme Court of Nepal examined this provision in a number of cases it has not been interpreted to any satisfactory extent.[350] Nevertheless, unlike in other South Asian countries, it has been suggested by the Pradhan Nyayalaya in Nepal that the authority concerned should be punished according to law if no grounds of arrest were communicated to the arrested person as stipulated by Art.14(5).[351]

According to Dr.Amir Ratna Shrestha[352] the purpose of Art.14(5) is to enable the arrested person to defend him/herself before the court. As such, it is necessary that the grounds of arrest be communicated in a clear and an unambiguous manner. This must be done in writing in the form of a detention order served on the person arrested.[353] In Prem Prasad Pande v. Judge, Bagmati Zone Special Court and Special Police Department[354] the Supreme Court ordered the release of the detained person since the grounds of arrest contained in the detention order were not clear. However, as Kusum Shrestha has observed, there is no obligation under Art.14(5) for the authorities to state the exact legal provision which the person concerned is supposed to have violated, until the investigations are over.[355]

Art.14(5) stipulates the grounds or the reasons of arrest to be communicated to the arrestee "as soon as may be". Although the Supreme Court of Nepal in Jagan Lal Amatya v. H.M.G. Police Headquarters[356] emphasised the importance of furnishing the required information as soon as possible, it did not define the phrase "as soon as may be". According to Dr.Amir Ratna Shrestha this phrase has to be understood as meaning a reasonable period of time.

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[349] According to Art.14(7) nothing in Art.14(1) applies to a citizen of an enemy state.

[350] See, *inter alia*, Jagan Lal Amatya v. H.M.G. Police Headquarters, 2034 Nep.L.Rep. (1977) 212; Hem Kumar v. Land Reform Officer, Jhapa, Writ No.876, Decided on 2028/1/22 B.S. (1971).

[351] See, Phulwar Khawas v. Sharada Pokharel, Assistant, Biratnagar, Appeal Case No. Phou. Tha. No.889/2010, decided on 2010/4/22 B.S. (1953) [Referred from Dr.Amir Ratna Shrestha, 'An Overview of the Fundamental Rights Relating to Criminal Justice in the Constitutional Law of Nepal', *Essays on Constitutional Law*, Vol.22 (1996), Nepal Law Society, Kathmandu, p.57 at p.60].

[352] See, Dr.Amir Ratna Shrestha, Ibid., p.59.

[353] See, *inter alia*, Tirth Lal Kayastha v. Bhaktapur Court Tahasil, Case No.32/2013, decided on 2013.8/8 B.S. (1956); Tika Prasad Thakali v. Bhav Nath Sharma, Secretary, Ministry of Forestry, 2018 Nep.L.Rep.(1961) 147.

[354] Habeas Corpus Writ No.498 of 2026 B.S. (1969), decided on 2026/7/22 B.S. (1969).

[355] See, Kusum Shrestha, 'Fundamental Rights in Nepal', *Essays on Constitutional Law*, Vol.15 (1993), Nepal Law Society, Kathmandu, 1 at p.27.

[356] 2034 Nep.L.Rep. (1977) 212.

2.2.2 - European Convention on Human Rights.

Art.5(2) of the European Convention on Human Rights and Fundamental Freedoms contains the elementary safeguard that any person arrested should know why he/she is being deprived of liberty of person. The Article requires everyone who is arrested to be informed promptly, in a language which he/she understands, of the reasons for his/her arrest and of any charges against him/her.[357] The underlying rationale is that such information would provide at the very outset of criminal proceedings an opportunity to the person arrested to deny the alleged offences by clarifying and rectifying any misunderstanding or misidentification on the part of the arresting authority, and thereby prevent, without resorting to judicial proceedings, any unreasonable restrictions of personal freedom and liberty.[358] Further, this guarantee is also expected to enable the arrestee to judge the lawfulness[359] of the arrest and take steps to challenge its legality if he/she sees fit, availing him/herself of the right guaranteed by Art.5(4).[360]

The information communicated for the purpose of Art.5(2) must be adequate for a reasonable person to understand why he/she has been deprived of liberty of person. According to the European Court of Human Rights[361], such information should contain the essential legal and factual grounds for the arrest. A bare indication of the legal basis for the arrest would be insufficient for the purpose of Art.5(2).[362] In the case of Ireland v. The United Kingdom[363] the persons concerned were simply told that

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[357] Although the obligation to inform the grounds of arrest under Art.5(2) usually occurs on the initial arrest, according to the European Commission of Human Rights, it may also become applicable in the case of continued detention or rearrest after a significant period of conditional release if the grounds for detention change or new relevant facts arise, since new reasons may call for a modified or new defence. See, the Report of 16th July 1980, App.No.6998/75, X v. The United Kingdom, referred from Sally Dolle, 'Liberty and Security of Person', in Angela Byre and Beverly Y Byfield (eds.), *International Human Rights Law in the Commonwealth Caribbean* (Netherlands: Kluwer Academic Publications 1991), pp.44-45. Also see, App.No.4741/71, X v. Belgium, 43 CD (1973) 14.

[358] See, App.No.8098/77, X v. The Federal Republic of Germany, 16 D & R (1979) 111 pp.112-115 para.1.

[359] That is, lawfulness under both the Convention as well as the municipal law. See, App.No.8022/77, 8025/77, 8027/77, (joined) McVeigh, O'Neil and Evans v. The United Kingdom, 25 D & R (1982) 15 p.46 para.211.

[360] Ibid. p.45 para.208. Also see, App.No.8098/77, X v. The Federal Republic of Germany, 16 D & R (1979) 111 p.113; App.No.9614/81, G., S. & M v. Austria, 34 D & R (1983) 119 p.121 para.3; X v. The United Kingdom, Judgment of 5th November 1981, Ser.A Vol.46 (1982) p.28 para.66; Van der Leer Case, Judgment of 21st February 1990, Ser.A Vol.170-A, p.13 para.28; According to Article 5(4) '(e)veryone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful'.

[361] Hereinafter referred to as 'the Court'.

[362] See, the Case of Fox, Campbell and Hartley, Judgment of 30th August of 1990, Ser.A Vol.182 (1990) p.19 para.40.

[363] Ser.A Vol.25 (1978).

the arrests were made pursuant to the emergency regulations. No further details were given. In the Court's opinion this practice fell short of meeting the required standards of Art.5(2).[364]

This does not, however, mean that in order to comply with the requirements of Art.5(2) a complete description of all the charges that may be brought against the person at a later stage should be communicated at the moment of arrest.[365] Further, as far as precision and details are concerned, Art.5(2) does not in any event require the information communicated to be at the same level as those communicated for the purpose of Art.6 which guarantees to everyone a right to a fair trial.[366] In G., S. and M v. Austria, the fact that the Applicants were denied access to their criminal file did not violate Art.5(2) since such denial did not actually deprive the Applicants of information which would have been essential for asserting their rights under Art.5(4).[367] In X v. Belgium[368] the mere statement 'you are accused of corruption' was found to be sufficient to comply with Art.5(2).

In the case of Fox, Campbell and Hartley v. U.K.[369], the Applicants, who were suspected of being involved in terrorist activities, were simply told by the arresting officer the name and the provision of a specific statute which authorised the arrest of suspected terrorists. Although this information, taken alone, fell short of meeting the required standards of Art.5(2), subsequent interrogations by the police about the Applicants' involvements in specific criminal acts and their suspected membership of proscribed organisations amended the shortcoming. The Court said "(t)here is no ground to suppose that these interrogations were not such as to enable the applicants to understand why they had been arrested. The reasons why they were suspected of being terrorists were thereby brought to their attention during their interrogation".[370] The implication here is that Art.5(2) would not be breached even if the arrested person is not informed expressly of the reasons for arrest and the charges insofar as those

[364] Ibid. p.75 para.198.
[365] See, App.No.4220/69, X v. The United Kingdom, 14 YBECHR (1971) 250 p.278; App.No.8098/77, X v. The Federal Republic of Germany, 16 D & R (1979) 111 pp.112-115; App.No.8828/79, X v. Denmark, 30 D & R (1983) 93 p.94.
[366] See, App.No.343/57, Nielsen v. Denmark, 2 YBECHR (1958/1959) 412 p.462; App.No.9614/81, G., S. and M. v. Austria, 34 D & R (1983) 119 pp.121-122 para.3. Also see, the admissibility decision of App.No.21444/93, Ohlinger v. Austria, 22 EHRR (1996) CD 75, CD 78.
[367] Ibid.
[368] App.No.1103/61, 5 YBECHR (1962) 168 p.189.
[369] Ser.A Vol.182 (1990).
[370] Ibid. p.19 para.41.

reasons and charges could be inferred from the circumstances surrounding the arrest.[371]

Art.5(2) does not require the reasons for arrest or the charges against the person to be communicated in a particular manner. In this connection it must be noted that it is not essential even for the text of the decision authorising arrest to contain the information stipulated by Art.5(2).[372] In fact such information need not be given in writing at all.[373] As the jurisprudence of the Strasbourg organs[374] suggests a mere oral communication of the reasons for arrest and the charges against the person would be sufficient for the purpose of Art.5(2).[375]

In order to conform with Art.5(2) the required information must be communicated to the person concerned "promptly". However, it is not necessary to relate the information in its entirety by the arresting authority at the very moment of arrest.[376] Particularly, the condition and/or the action of the person being arrested[377] may make the immediate informing of the reasons for arrest and the charges impossible. In such situations lack of promptness would not breach Art.5(2) since the responsibility for the delay cannot be attributed to the authorities.[378] If the arrested person is of unsound mind and not in a position to comprehend what he/she is being told the authorities must make sure that the required information is communicated within a reasonable time to those persons who represent the arrestee's interests, such as a lawyer or a guardian.[379]

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[371] Also see, App.No.1963/63, Neumeister v. Austria, 7 YBECHR (1964) 224 p.244; App.No.8916/80, Freda v. Italy, 21 D & R (1980) 250 p.257 para.5.

[372]See, App.No.2621/65, X v. The Netherlands, 9 YBECHR (1966) 474, pp.480-482. *c.f.* in App.No.8098/77, X v. The Federal Republic of Germany, 16 D & R (1979) 111 p.113.

[373]App.No.1211/61, X v. The Netherlands, 5 YBECHR (1962) 224 p.228. *c.f.* in App.No.8098/77, X v. The Federal Republic of Germany, ibid..

[374]viz., the jurisprudence of the European Court of Human Rights and the European Commission of Human Rights.

[375]See, App.No.1103/61, X v. Belgium, 5 YBECHR (1962) 168 p.188; App.No.8098/77, X v. The Federal Republic of Germany, 16 D & R (1979) 111 pp.112-115; App.No.8828/79, X v. Denmark, 30 D & R (1983) 93 p.94; The Case of Fox, Campbell and Hartley, Judgment of 30th August 1990, Ser.A Vol.182 (1990) pp.18-20 para.37-43; The Case of Murray v. The United Kingdom, Judgment of 28th October 1994, Ser.A Vol.300-A pp.31-33 para.71-80.

[376]See, the Case of Fox, Campbell and Hartley, Judgment of 30th August 1990, Ser.A Vol.182 (1990) p.19 para.40.

[377]For instance if the person being arrested is drunk or semi-conscious [see, App.No.7125/75, X v. The Untied Kingdom, 1 Digest (1977) 458, referred from, D.J.Harris, M.O'Boyle and C.Warbrick, *The Law of the European Convention on Human Rights* (London: Butterworths 1995), p.131] or when about to be arrested he/she immediately made a counter-attack or started running away.

[378]According to Harris, O'Boyle and Warbrick Art.5(2) presumably requires the authorities to make reasonable efforts to communicate with the person concerned. See *The Law of the European Convention on Human Rights*, ibid..

[379]See, the Report of 16th July 1980, App.No.6998/75, X v. The United Kingdom, referred from Sally Dolle, 'Liberty and Security of Person', in Angela Byre and Beverly Y Byfield (eds.), *International*

As in the case of precision and detail the sufficiency of promptness is also assessed in the circumstances of each individual case.[380] The policeman in X v. Denmark who arrested the Applicant as a possible suspect near the scene of an attempted bank robbery, at the time of the arrest, stated the reasons in broad terms. However, within less than six hours the Applicant was properly informed of the reason. This was considered sufficient to comply with the requirements of promptness.[381] In Delcourt v. Belgium[382] the arresting officer did not speak the language of the Applicant. Nonetheless, the Applicant was interrogated by the examining judge the next day in French which the Applicant understood. The Commission found no violation of Art.5(2). Similarly, a two days lapse has also been regarded as acceptable.[383] Nevertheless, taking ten days to communicate the required information would be a clear breach of Art.5(2).[384]

The fact that the reasons for arrest are not given at one time but in several stages would not breach the requirement of promptness insofar as all the necessary information is communicated within a reasonable period after the arrest.[385] In the case of Fox, Campbell and Hartley[386] the reasons for the Applicants arrest had been brought to their attention in several stages through various questions asked of them during interrogations that took place a few hours after the Applicants arrests. The facts were similar in the case of Murray v. The United Kingdom.[387] There the Applicant, who was arrested at 7.00a.m. had subsequently been interviewed between 8.20 and 9.35a.m the same day. During the interview the questions from which the Applicant should have realised why she was arrested, had been asked of her. In both occasions the Court found no violation of Art.5(2).

Human Rights Law in the Commonwealth Caribbean (Netherlands: Kluwer Academic Publications 1991), pp.44-45.

[380]The Case of Fox, Campbell and Hartley, Judgment of 30th August 1990, Ser.A Vol.182 (1990) p 19 para.40.

[381]App.No.8828/79, 30 D & R (1983) 93 p.94 para.1.

[382]App.No.2689/65, 10 YBECHR (1967) 238 pp.270-272 para.2.

[383]App.No.8582/79, Skoogstrom v. Sweden, 5 EHRR (1983/84) 278.

[384]See, Van der Leer Case, Judgment of 21st February 1990, Ser.A Vol.170-A (1990) pp.12-13 para.25-31.

[385]See, App.No.8098/77, X v. The Federal Republic of Germany, 16 D & R (1979) 111 pp.112-114 para.1; App.No.8828/79, X v. Denmark, 30 D & R (1983) 93 p.94; The Case of Fox, Campbell and Hartley, Judgment of 30th August 1990, Ser.A Vol.182 (1990) pp.18-20 para.37-43; The Case of Murray v. The United Kingdom, Judgment of 28th October 1994, Ser.A Vol.300-A pp.31-33 para.71-80.

[386]The Case of Fox, Campbell and Hartley, Judgment of 30th August 1990, Ser.A Vol.182 (1990) pp.18-20 para.37-43.

[387]The Case of Murray v. The United Kingdom, Judgment of 28th October 1994, Ser.A Vol.300-A pp.31-33 para.71-80.

In order to comply with Art.5(2) the required information must be communicated in a language which the arrested person understands.[388] This purports to ensure that the arrestee comprehends the reasons for his/her arrest at least to an extent that would be sufficient to make a judgement about the lawfulness of the measure, which also would in turn give the rights guaranteed under Art.5(4) a purposeful meaning. Thus, while using a language which the arrested person understands the information must be formulated in a simple non-technical manner[389] that could be understood by a person of average intelligence.[390]

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In one respect the safeguard of Art.5(2) of the European Convention on Human Rights differs significantly from the corresponding safeguards of the Constitutions of the South-Asian countries. Unlike the latter mentioned safeguards, which, *inter alia*, seek to assist the arrested person in making his/her defence for the purposes of trial, the former has no bearing what so ever on the subsequent trial. Art.5(2) of the European Convention is designed for a different purpose. It is closely connected with the guarantee of Art.5(4) and applies exclusively to pre-trial procedures that determine the lawfulness of the deprivation of liberty of person of the arrestees.

On the other hand, although Art.5(2) of the European Convention has no relationship with the subsequent trial, it clearly requires the authorities to communicate to the arrested person, in addition to the reasons of arrest, any charges against him/her. However, none of the South-Asian Constitutions imposes such an obligation on the authorities, albeit the corresponding provisions of all those Constitutions have direct links with the subsequent trial. Further, unlike the Constitutions of India, Pakistan, Bangladesh and Nepal, Art.5(2) of the European Convention guarantees expressly and unambiguously to everyone who has been deprived of liberty of person a right to know the grounds of arrest.[391] In India, Pakistan, Bangladesh and Nepal this right is confined only to those who have been detained after arrest.

The rest of the jurisprudence between Art.5(2) of the European Convention and the corresponding provisions of the Constitutions of the South-Asian states seems to

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[388] See, App.No.2689/65, Delcourt v. Belgium, 10 YBECHR (1967) 238.

[389] See, the Case of Fox, Campbell and Hartley, Judgment of 30th August 1990, Ser.A Vol.182 (1990) p.19 para.40.

[390] See, F.G.Jacobs and R.C.A.White, *The European Convention on Human Rights*, Second Edition (Oxford: Clarendon Press 1996), p.88.

[391] This aspect of Art.5(2) of the European Convention is somewhat similar to Art.13(1) of the Sri Lankan Constitution.

coincide to a greater extent.[392] Neither the European Convention nor the South-Asian Constitutions under consideration, except for the Constitution of Nepal, oblige the authorities to inform the arrestee of the grounds of arrest if the circumstances are such that the person being arrested must know those grounds. Written communication of reasons for arrest is required only under the Constitution of Nepal. Further, none of these documents, including the Constitution of Nepal, requires the information furnished to be in the precision of a charge. Furthermore, although under Art.5(2) of the European Convention the authorities are obliged to state the grounds of arrest "promptly": as is evident from the Strasbourg jurisprudence, the meaning of the word 'prompt' does not differ to any significant degree from the meaning of the phrase 'as soon as 'employed by the South-Asian Constitutions. Moreover, in Europe the fact that the reasons for arrest are not given at one time but in stages does not breach the requirement of promptness in Art.5(2), as long as all the necessary information is communicated within a reasonable period after arrest. There is no express provision in any of the South-Asian Constitutions requiring the grounds or the reasons for arrest to be communicated at one time. Presumably, therefore, communicating the stipulated information in several stages should not lead to any Constitutional infirmity in so far as all the required particulars are furnished within a reasonable period of time after arrest.

2.3 - Right to Judicial Control of Arrest and Detention.

The essence of this right requires the authorities to produce arrested persons before an independent and impartial body, presumably a judicial officer, without undue delay to determine the lawfulness and validity of the arrest. Once produced, such a body is expected to judicially decide, after reviewing the circumstances militating for and against arrest, whether it is necessary to deprive the individual of his/her liberty any longer or whether he/she should be freed. It is important that the body or the person who determines the lawfulness and validity of arrest be impartial and independent. Under no circumstances must such a body or person have any connections or links with the executive, particularly with the arresting officer or authority who may have an interest in depriving the freedom of the individual concerned.

[392]However, note that under Art.5(2) the obligation to communicate the grounds of arrest arises not only on the initial arrest but also in the case of continued detention or rearrest after a significant period of conditional release if the grounds for detention change or new relevant facts arise. See, above note no.92.

2.3.1 - South Asia.

2.3.1.1 - India.

In addition to the requirement of Art.21, according to which every deprivation of personal liberty must result from a procedure established in accordance with law, as provided by para.2 of Art.22 of the Constitution of India "(e)very person who is arrested and detained in custody shall be produced before the nearest Magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the Magistrate and no such person shall be detained in custody beyond the said period without the authority of a Magistrate".[393] It is deemed that this provision would, *inter alia*, achieve the following three important objectives. Firstly, restrain authorities from making arrests or detentions for the purpose of either extracting confessions or compelling people to give information about crimes. Secondly, prevent police stations from being used as jails or prisons. Thirdly, provide an early opportunity for the arrestee to challenge the lawfulness of his/her arrest before a judicial officer or to take steps, such as applying for bail, necessary to restore personal liberty.[394]

The language used in Art.22(2) makes no distinction between arrests made with warrant and without warrant.[395] It simply requires "*every person who is arrested and detained in custody*" to be produced before the nearest Magistrate within the stipulated time period.[396] This requirement has been reinforced by the provisions of the Criminal Procedure Code, Act II of 1974. According to Sec.57 of the Code no police officer has the authority to detain in custody a person arrested without warrant for a longer period than under all the circumstances of the case is reasonable, and such

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[393] However, this guarantee does not apply to any person who for the time being is an enemy alien [see, Art.22(3)(a)].

[394] See, U.N.Gupta, *Constitutional Protection of Personal Liberty in India - A Comparative and Case Law Study* (University of Allahabad 1970), pp.206-207; Manjula Batra, *Protection of Human Rights in Criminal Justice Administration : A Study of the Rights of Accused in Indian and Soviet Legal Systems* (New Delhi: Deep & Deep Publication 1989), p.28; R.V.Kelkar, *Lectures on Criminal Procedure*, 2nd Edition, revised by Dr.K.N.Chandrasekharan Pillai, (Lucknow: Eastern Book Company, 1990), p.31.

[395] However, in some of the pre 1973 decisions (see, for example, the case of State of Punjab v. Ajaib Singh, A.I.R. 1953 S.C. 10; Naik Ram Pandey v. District Magistrate, 1960 All.L.J 227) the courts of India, for the purpose of Art.22(2), had made a distinction between these two types of arrests and had held that the obligation to produce arrestees before the nearest Magistrate did not apply in the case of arrests made under warrant. This distinction was largely based on the wording of Sec.60 &61 of the previous Criminal Procedure Code. For criticisms of this approach see, D.D.Basu, *Commentary on the Constitution of India*, Vol.II fifth edition, [Calcutta: S.C.Sakar & Sons (Private) Ltd. 1965] pp.107-108; U.N.Gupta, *Constitutional Protection of Personal Liberty in India - A Comparative and Case Law Study* (University of Allahabad 1970), p.206. Also see, Lallu v. Bachchu Singh, 1954 All.L.J. 355.

[396] Note, according to Sec.59 of the Code of Criminal Procedure, Act II of 1974, "No person who has been arrested by a police officer shall be discharged except on his own bond, or on bail, or under the special order of a Magistrate.

period shall, in the absence of a special order from a Magistrate under Sec.167, not exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court.[397] Similarly, if the arrest is made in pursuance of a warrant, Sec.76 of the Code obliges the police officer or other person executing the warrant to bring, subject to the provisions of Sec.71 as to security, without unnecessary delay the person arrested before the court before which he/she is required by law to produce such person. Such delay must, as the proviso of Sec.76 stipulates, not, in any case, exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the place of the Magistrate's Court. Non compliance of these provisions will not only raise an issue under Art.22(2) but also render detention contrary to Art.21 of the Constitution. Nonetheless, it must be noted that Art.22(2) has no application if the arrest has been made in pursuance of a conviction made by a court[398], or in pursuance of a conviction made by a legislative assembly for contempt.[399]

The requirement under Art.22(2) is to produce the person arrested before a Magistrate within twenty-four hours of the arrest. Thus, the actual time of arrest is crucial for the determination of the lawfulness of custody, as detention beyond twenty-four hours from that time onwards, without the authority from a Magistrate, is contrary to Art.22(2).[400] Any police officer in whose custody an arrestee is kept without production before a Magistrate for more than twenty-four hours can be held guilty of wrongful detention.[401] However, for the purpose of Art.22(2) it is immaterial whether the arrestee is produced before the Magistrate during the working hours of the day or not.[402] Nor it is relevant where the Magistrate is sitting at the particular time.[403] What is important is to ensure that the Magistrate before whom the arrestee is produced is

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[397] Note, as provided by *Sec.56* a police officer making an arrest without a warrant must, without unnecessary delay and subject to the Code's provisions as to bail, take or send the person arrested before a Magistrate having jurisdiction in the case, or before the officer in charge of a police station. According to Sec.58 of the Code the officer in charge of the police station must report to the District Magistrate, or, if he/she so directs, to the Sub-divisional Magistrate, the cases of all persons arrested without warrant, within the limits of their respective stations, whether such persons have been admitted to bail or otherwise.

[398] See, Mannava Venkayya v. Kannegonti China Punnaiah, 1957 Cr.L.J. 624.

[399] See, Keshav Singh v. Speaker, Legislative Assembly, U.P., A.I.R. 1965 All.349.

[400] See, Sunil Kumar Bose v. Chief Secretary, Govt. of West Bengal, A.I.R. 1950 Cal. 274; Shravan Kumar Gupta v. Superintendent, District Jail Mathura, 1957 Cr.L.J. 427; A.B.Desai v. State of Maharashtra, 1992 (3) S.C.J. 377. However, in Manoj Kumar Agarwal v. State of Uttar Pradesh [1995 Cr.L.J. 646 (All)] the Allahabad High Court came to the conclusion that production of the accused before the Magistrate after 24 hours of his arrest did not render the custody illegal.

[401] See, Sharif Bhai v. Abdul Razak, A.I.R. 1961 Bom. 42.

[402] See, Prabhaker Nath Dwivedi v. District Magistrate, Allahabad, 1960 All.L.J. 206; Naik Ram Pandey v. District Magistrate, Allahabad, 1960 All.L.J. 227.

[403] See, Prabhat Malla Barooah v. D.C.Kamrup, 1952 Cr.L.J 1659; Ram Manohar v. Superintendent Central Prison, A.I.R. 1955 All. 193; Naik Ram Pandey v. District Magistrate, 1960 All.L.J 227.

sitting as a judicial officer and fully applies the mind to all relevant factors when he/she passes the order of detention.[404]

Whatever the nature of the offence involved or the status of the person making the arrest, the requirements of Art.22(2) must be complied with for an arrest to be lawful. In Gunupati v. Nafisul Hassan[405], the editor of a weekly news paper was arrested in Bombay and taken in custody to Luknow to be produced before the Speaker of Uttar Pradesh Legislative Assembly to answer a charge of breach of privilege. Although detained in Speaker's custody, the arrestee was not produced before a Magistrate within twenty-four hours. The Supreme Court found "a clear breach of the provision of Article.22 of the Constitution of India which is quite peremptory in its terms".[406]

One of the objectives of Art.22(2) is to provide an early opportunity for the arrestee to challenge the lawfulness of his/her arrest before a judicial officer who is independent of the person making the arrest. In Swami Hariharananda Saraswati v. The Jailer, District Jail Benaras[407], the arrest was made by a Magistrate, who on the same day remanded the petitioners into jail custody. The High Court of Allahabad found a violation of Art.22(2) on the ground that the petitioners were not properly produced before a competent Magistrate. In the opinion of the court the petitioners should have been produced before a Magistrate other than the one who made the arrest.[408]

Art.22(2) also aims to ensure the 'immediate application of a judicial mind to the legal authority of the person making the arrest and the regularity of the procedure adopted by him'.[409] This aim would be defeated if the Magistrate signs the detention order mechanically without properly reviewing the circumstances involved.[410] Thus, in order to make the guarantee of Art.22(2) meaningful, once an arrested person is produced before him/her[411], the Magistrate must apply a judicial mind to scrutinise the

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[404] See, Har Pal Singh v. State, A.I.R. 1950 All. 562; In re Madhu Limaye, A.I.R. 1969 S.C. 1014.
[405] A.I.R. 1954 S.C. 636.
[406] Ibid., at p.637.
[407] A.I.R. 1954 All. 601.
[408] Also see, Bir Bhadra Pratap v. D.M. Azamgarh, A.I.R. 1959 All 384 - the constitutional requirement of Art.22(2) will not be fulfilled if the Magistrate before whom the arrestee is produced, is him/herself a witness of the case.
[409] See, the State of Punjab v. Ajaib Singh, A.I.R. 1953 S.C. 10 p.15 para.20.
[410] See, Bir Bhadra Pratap Singh v. District Magistrate, Azamgarh, A.I.R. 1959 All. 384.
[411] Sec.167(1) of the Code of Criminal Procedure, Act II of 1974, obliges the police to forward to the nearest Judicial Magistrate anyone arrested and detained in custody in connection with offences if it appears that the investigation cannot be completed within the period of twenty-four hours fixed by Sec.57, and there are grounds for believing that the accusation or information is well founded. Also, as provided by Sec.170 of the Code if, upon an investigation under Chapter XII, it appears to the officer in charge of the police station that there is sufficient evidence [a mere admission of guilt or confession during the investigation of an offence does not necessarily amount to sufficient evidence - see,

lawfulness of the deprivation of personal liberty. Detention must be ordered only if he/she is satisfied, firstly, that the arrest has been made in accordance with the procedure established by law[412], and secondly, that the continued deprivation of personal liberty is necessary and lawful.[413] Also, Art.21 of the Constitution, which requires every deprivation of personal liberty to be in accordance with procedure established by law, would be offended if a Magistrate lightly and without good cause order the detention of a person when no accusation is made to the effect that he/she has committed or is likely to commit any offence.[414] Further, as provided by Sec.167(2)(b) of the Code of Criminal Procedure, no Magistrate must authorise detention in any custody unless the accused is physically produced before him/her.[415] However, remand in judicial custody may be extended in the absence of the detainee if the responsibility for such absence cannot be attributed to the authorities[416]. Thus, for example, absence of the detenu due to ill health or confinement in a hospital[417] is not a bar to extension of his/her remand in judicial custody.

No Magistrate has the authority to order detention in police custody for more than fifteen days in total.[418] A Magistrate authorising under Sec.167 detention in the custody of the police is obliged to record his/her reasons for doing so.[419] Any continuation of detention beyond the period of fifteen days must be in judicial custody only.

Lakshmipat Choraria, (1964) 67 Bombay L.R. 618] or reasonable ground of suspicion to justify the forwarding of the accused to a Magistrate, such officer shall forward the accused under custody to a Magistrate empowered to take cognizance of the offence upon a police report and to try the accused or commit him/her for trial, or, if the offence is bailable and the accused is able to give security, shall take security from him for his appearance before such Magistrate on a day fixed and for his/her attendance from day to day before such Magistrate until otherwise directed. On the other hand, according to Sec.169, if upon an investigation under Chapter XII, it appears to the officer in charge of the police station that there is no sufficient evidence or reasonable ground of suspicion to justify the forwarding of the accused to a Magistrate, such officer shall, if such person is, in custody, release him/her on his/her executing a bond with or without sureties, as such officer may direct, to appear, if and when so required, before a Magistrate empowered to take cognizance of the offence on a police report, and to try the accused or commit him/her for trial.

[412] See, *In re* Madhu Limaye, A.I.R. 1969 S.C. 1014 p.1019 para.13 &14.

[413] See, C.B.I. - Special Investigation Cell, New Delhi v. A.J.Kulkarni, 1992 (3) S.C.J. 50.

[414] See, Lalmani Devi v. The State, A.I.R. 1957 Patna 689.

[415] Also see, S.K.Dey, A.I.R. 1974 S.C. 871;

[416] See, Rameshkumar Ravi v. State of Bihar, 1987 Cr.L.J. 1489 (Patna); K.A.Abbas v. Sri Satyanarayanan Rao, 1993 Cr.L.J. 2948 (Knt.); Rahul Gupta v. State of Madhya Pradesh, 1995 Cr.L.J. 3340 (M.P.).

[417] See, Noor Jehan v. State of Karnataka, 1993 Cr.L.J. 102 (Knt.). Also see, Kurra Dashratha Ramaiah v. State of Andhra Pradesh, 1992 Cr.L.J. 3485 (A.P.) - Non production before the Magistrate does not automatically entitled the detainee to be released.

[418] See, Sec.167(2) of the Code of Criminal Procedure, Act II of 1974. Also see, G.K.Moopanar, M.L.A. v. State of Tamil Nadu, 1990 Cr.L.J. 2685 (Mad.); State v. Ravinder Kumar Batnagar, 1982 Cr.L.J. 2366 (Del.).

[419] See, Sec.167(3) of the Code of Criminal Procedure, Act II of 1974.

Detention in excess of sixty days is permitted only if the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years.[420] However, even in such cases the detenu becomes entitled to be released on bail if by the expiry of the ninetieth day no charge sheet has been submitted against him/her.[421] For all other offences the maximum permissible period of detention is sixty days[422] and if by then no charge sheet is brought against him/her the detenu must be released on bail.[423]

If the offence involved is a bailable one, steps must be taken to release the person concerned on a bail bond with or without a surety.[424] It must be noted that under Sec.436 of the Criminal Procedure Code bail is a matter of right for bailable offences.[425] In the case of non-bailable offences the Criminal Procedure Code forbids the release on bail of any person who is arrested or detained without warrant by an officer in charge of a police station or any person who appears or is brought before a court other than the High Court or Court of Session, (i) if there appears reasonable grounds for believing that he/she has been guilty of an offence punishable with death or imprisonment for life, or (ii) if the non-bailable offence involved is a cognizable one and the person concerned had been previously convicted of an offence punishable with death, imprisonment for life or imprisonment for seven years or more, or he/she had been previously convicted on two or more occasions of non-bailable and cognizable offence.[426] However, even such a person may be directed to be released on bail if he/she is under the age of sixteen or if its a woman or sick or infirm person or if the court is satisfied that it is just and proper to do so for any other special reason.[427] The mere fact that the person arrested may be required for being identified by a witness during investigation is not a sufficient ground for refusing to grant bail if he/she is otherwise entitled to be released on bail and gives an undertaking that he/she shall comply with such directions as may be given by the court.[428] Nevertheless, a

[420] See, Sec.167(2)(a)(i), ibid..

[421] See, Reaz Ahmed v. State, 1990 Cr.L.J. 536 (J & K); Madaba Ramaiah v. State of Andhra Pradesh, 1992 Cr.L.J. 676 (A.P.).

[422] See, Sec.167(2)(a)(ii) of the Code of Criminal Procedure, Act II of 1974.

[423] See, State of Uttar Pradesh v. Laxmi Brhmananda, A.I.R. 1983 S.C. 439; Mangal Hemrum v. State of Orissa, 1982 Cr.L.J. 687.

[424] As provided by Sec.50(2) of the Code of Criminal Procedure, Act II of 1974, any police officer making an arrest without a warrant must, if the offence involved is a bailable one, inform the person arrested that he is entitled to be released on bail and that he may arrange for sureties on his behalf.

[425] See, Dharmu v. Rabindranath, 1978 Cr. L.J. 864 (Orissa HC); Talab Haji Hussain v. Madhukar Purshottam Mondkar and another, A.I.R. 1958 SC 376.

[426] See, Sec.437 of the Code of Criminal Procedure, Act II of 1974.

[427] Ibid..

[428] Ibid.. However, a court may refuse to grant bail if it feels that the suspect might, if let at large, abscond and thereby avoid facing trial. The possibilities of absconding are generally assessed in the

court cannot on its own initiative release a detained person on bail. It is up to the detenu to press for bail in time.[429] Whatever the circumstances, in order not to offend Art.21, any procedure followed, including discretions exercised in extending detention or granting bail, must be just, fair and non-arbitrary.[430] Thus, for example, fixing as bail-bond a sum that is too excessive in the light of the facts involved, would be against Art.21 as it practically amounts to an unfair denial of bail entailing unreasonable deprivation of personal liberty.[431]

The lawfulness of custody is imperative not only at the initial stages of arrest but throughout the whole period of detention.[432] Art.21 would be violated, for instance, if a person is kept in custody under a detention which was valid *ab initio* but became unlawful subsequently because of a violation, made at some point after the arrest, of a law. In such a situation the arrested person becomes entitled to be set at liberty from the moment the detention became unlawful.[433] Moreover, as provided by Sec.437(2) of the Code of Criminal Procedure, Act II of 1974, if it appears, to an officer in charge of a police station who arrests or detains without a warrant someone who is accused or suspected of committing a non-bailable offence, or to a court, at any stage of the investigation, inquiry or trial, as the case may be, that there are no reasonable grounds for believing that the person in custody has committed a non-bailable offence, but that there are sufficient grounds for further inquiry into his/her guilt, he/she shall be released on bail, or at the discretion of such officer or court, on the execution of a bond without sureties.[434] Thus, notwithstanding what is said expressly in Art.22(2), the authorities are obliged to produce the persons kept in custody before a Magistrate, not only within twenty-four hours of the arrest, but also from time to time thereafter

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light of the seriousness of the charge, the nature of the evidence, the severity of the punishment prescribed for the offence, and, in some cases, the character, means and standing of the accused. [See, Ratanlal Ranchhoddas and Dhirajlal Keshavlal Thakore, *Ratanlal & Dhirajlal's The Code of Criminal Procedure*, 15th edition (New Delhi: Wadhwa and Co. 1997) p.667]

[429] See, Hitendra Vishnu Thakur v. State of Maharashtra, A.I.R. 1994 S.C. 2623.

[430] See, Babu Singh v. State of Uttar Pradesh, 1978 Cr.L.J. 651.

[431] Also see, Sec.440(1) of the Code of Criminal Procedure, Act II of 1974. As it provides the amount of every bond executed under chapter XXXIII shall be fixed with due regard to the circumstances of the case and shall not be excessive.

[432] See, Mangal Hemrum and others v. State of Orissa, 1982 Cr.L.J. 687.

[433] See, State of Bombay v. Atma Ram, A.I.R. 1951, S.C. 157.

[434] Also see Sec.437 sub-paragraph (6) & (7). According to sub-para.6 "If, in any case triable by a Magistrate, the trial of a person accused of any non-bailable offence is not concluded within a period of sixty days from the first date fixed for taking evidence in the case, such person shall, if he is in custody during the whole of the said period, be released on bail to the satisfaction of the Magistrate, unless for reasons to be recorded in writing, the Magistrate otherwise directs." As provided by sub-para.7 "If, at any time after the conclusion of the trial of a person accused of a non-bailable offence and before judgement is delivered, the Court is of opinion that there are reasonable grounds for believing that the accused is not guilty of any such offence, it shall release the accused, if he is in custody, on the execution by him of a bond without sureties for his appearance to hear judgement delivered."

throughout the whole period of detention in order to review the lawfulness of continued deprivation of personal liberty.[435]

In addition to guaranteeing a right to know the grounds of arrest, Art.22(1) also guarantees to arrested persons a right to counsel as well as a right to be defended by a legal practitioner of their choice.[436] These rights become available from the moment of arrest[437] and can be availed of not only during police interrogations[438] but also when the arrested persons are produced before the Magistrates.[439] The fact that the arrested person is released on bail does not deprive him/her of the right to counsel.[440] Those who are unable to engage the services of a lawyer due to poverty or indigence are entitled to free legal aid at the cost of the State.[441] It is the duty of the Magistrates to inform such persons about this right.[442] The fact that the detenu failed to apply for it is not a valid reason to deny free legal aid.[443] As Bhagwati J. said in the case of Khatri and others (II) v. State of Bihar and others,

> "...constitutional obligation to provide free legal services to an indigent accused does not arise only when the trial commences but also attaches when the accused is for the first time produced before the Magistrate. It is elementary that the jeopardy to his personal liberty arises as soon as a person is arrested and produced before a Magistrate, for it is at that stage that he gets the first opportunity to apply for bail and obtain his release as also to resist remand to police or jail custody. That is the stage at which an accused person needs competent legal advice and representation and no procedure can be said to be reasonable, fair and just which denies legal advice and representation to him at this stage. We must, therefore, hold that the State is under a constitutional obligation to provide free legal services to an indigent accused not only at the stage of trial but also at stage when he is first produced before the Magistrate as also when he is remanded from time to time."[444]

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[435] See, Khatri and others (II) v. State of Bihar and others, (1981) 1 S.C.C. 627, pp.632-633 para.7. Also see, Sec.167 & 437 of the Code of Criminal Procedure, Act II of 1974.

[436] Note, this guarantee does not apply to any person who for the time being is an enemy alien [see, Art.22(3)(a)].The rights of accused persons to counsel and to be defended by legal practitioners of their choice are considered in detail in the next Chapter under the right to a fair trial.

[437] According to the Supreme Court in the case of Nandini Satpathy v. P.L.Dani and another (A.I.R. 1978 S.C. 1025 p.1026) "The spirit of Art.22(1) is that it is fundamental to the rule of law that the services of a lawyer shall be available for consultation to any accused person under circumstances of near-custodial interrogation."

[438] See, Ram Lalwani v. State, 1981 Cr.L.J. 97 - the presence of a counsel at the stage of interrogation of the accused does not interfere with the investigation, and such request for presence of counsel can be made either by the accused or the counsel.

[439] See, Deodat Rai v. State, 1952 Cr.L.J. 1251; Nandini Satpathy v. P.L.Dani and another, A.I.R. 1978 S.C. 1025; Gian Singh v. State, 1981 Cr.L.J. 100.

[440] See, State of Madhya Pradesh v. Shobaram, 1966 Cr.L.J. 152.

[441] See, Kuthu Goala v. State of Assam, 1981 Cr.L.J. 424; Gendra Brahma v. State of Assam, 1981 Cr.L.J. 430.

[442] See, Khatri and others (II) v. State of Bihar and others, (1981) 1 S.C.C. 627, pp.630-632 para.5-6.

[443] See, Sukhdas v. Union Territory of Arunachal Pradesh, 1986 Cr.L.J. 1084.

[444] (1981) 1 S.C.C. 627, pp.630-632 para.5. However, according to this judgement an accused is qualified for free legal aid only if the offence charged against him/her "...is such that, on conviction, it would result in a sentence of imprisonment and is of such a nature that the circumstances of the case and the needs of social justice require that he should be given free legal representation." (p.632 para.6. Also see, Sukhdas v. Union Territory of Arunachal Pradesh, 1986 Cr.L.J. 1084).

Art.22(2), which inhibits detention without authority from a Magistrate, is a healthy provision. It brings executive action under judicial control by enabling the Magistrates to keep check over police investigations. Such judicial control is particularly important for the protection of suspects and accused persons against police brutalities. Thus, as the Indian Supreme Court has observed, the Magistrates should try to enforce the requirements of Art22(2) stringently and whenever they are found to have been disobeyed must come down heavily upon the police.[445]

2.3.1.2 - Sri Lanka.

As provided by Art.13(2) of the Constitution of Sri Lanka "(e)very person held in custody, detained or otherwise deprived of personal liberty shall be brought before the judge of the nearest competent court according to procedure established by law and shall not be further held in custody, detained or deprived of personal liberty except upon and in terms of the order of such judge made in accordance with procedure established by law." This important provision has two primary objectives. First and foremost, by obliging the authorities to produce everyone deprived of personal liberty before the judge of the nearest competent court in accordance with the procedure laid down by the *law* applicable to the situation concerned, it purports to ensure the safety and protection of arrested persons, particularly against over-zealous or barbarous police officers.[446] Secondly, by guaranteeing that any continuation of deprivation of personal liberty from that point onwards would only be upon, and in terms of, an order made by such judge *in accordance with procedure established by law*, it aims to bring executive action under judicial scrutiny.[447]

Although Art.13(2) has not specified a time period within which the persons held in custody should be brought before the judge of the nearest competent court, it requires such persons to be produced before such judge in accordance with *procedure established by law*. In so far as criminal proceedings are concerned, the procedure governing aftermath of arrest is primarily laid down in the Code of Criminal Procedure Act, No.15 of 1979. As provided therein a police officer making an arrest without warrant shall without unnecessary delay and subject to the provisions

[445] See, Khatri and others (II) v. State of Bihar and others, (1981) 1 S.C.C. 627., pp.632-633 para.7.
[446] See, *inter alia*, Kapugeekiyana v. Hettiarachchi, (1984) 2 Sri L.R.153; Kumarasena v. Sriyantha and others, SC App.257/93, SC Minutes of 23 May 1994; Kumara v. Rohan Fernando and others, SC App.22/90, SC Minutes of 21 July 1994.
[447] See, Dharmatilleke v. Abeynaike, SC App.156/86, SC Minutes of 15 February 1988. Also see, A.R.B.Amerasinghe, *Our Fundamental Rights of Personal Security And Physical Liberty*, (Ratmalana: Sarvodaya Book Publishing Services1995), pp.134-135.

contained in the Code as to bail, take or send the person arrested before a Magistrate having jurisdiction in the case.[448] According to Sec.37 of the Code no police officer must detain in custody or otherwise confine a person arrested without warrant for a longer period than under all the circumstances of the case is reasonable, and such period should not exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate.

However, it must be noted here that, as the jurisprudence of the Sri Lankan Supreme Court reveals, the twenty-four hour rule denotes only the outer limit of the time period that may be taken for the production of a person arrested without warrant before the appropriate Magistrate. The cardinal requirement under the Criminal Procedure Code is to produce the arrestees before the nearest Magistrate within a reasonable time of arrest without any undue delays. According to the observations of Fernando J. in the case of Selvakumar v. Douglas Devananda[449], the existence of an outer limit

> "...does not mean that detention for the full period...is either mandatory or proper; or that production before a Magistrate can without justification, be delayed with impunity. If in the circumstances there has been unreasonable delay, either in production or release, it is no answer that the specified time limits have not been exceeded...what is a 'reasonable time' for production before a Magistrate must necessarily be given a strict interpretation."

The question whether the time elapsed between arrest and production before the Magistrate or release from custody is reasonable depends upon the circumstances of each case. In the case of Kumara v. Rohan Fernando and others[450], in which the Petitioner had been subjected to torture by the officers while he was in police custody, the reasonable time was, as the Supreme Court concluded, the time necessary to transport the arrestee from his home to the Magistrate of the nearest competent court. In Kumarasena v. Sriyantha and others[451] the Petitioner was a sixteen year old school girl. She was kept in a police station for over six hours and released without production before a Magistrate. During this period the Petitioner had been sexually assaulted by the police officers. Recording a breach of Art.13(2), Amerasinghe J. said,

> "(i)n the matter before us, the petitioner was released form custody within about six hours after the arrest, and therefore, within the twenty-four hour period specified by section 37 of the code of Criminal Procedure for the production of persons arrested without a warrant before a Magistrate. However, the period of twenty-four hours is the maximum period. The provisions of section 36 and 37 of the Code of Criminal Procedure make it clear that a person arrested must be produced without unnecessary

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[448] See, Sec.36. In addition, Sec.38 of the Code requires officers in charge of police stations to report to the Magistrate's Court of their respective districts the cases of all persons arrested without warrant by any police officer attached to their stations or brought before them and whether such persons have been admitted to bail or otherwise.

[449] SC App.150/93, SC Minutes of 13 July 1994.

[450] SC App.22/90, SC Minutes of 21 July 1994.

[451] SC App.257/93, SC Minutes of 23 May 1994.

> delay and should not be confined for a period than under all the circumstances is reasonable. What is 'reasonable' must depend on the circumstances of each case...In the matter before us, there was no basis at all for the arrest and confinement in the police station for a period of six hours without production before a judge. The salutary nature of the provision that persons arrested without warrant must be produced before a judge without unnecessary delay and not confined without such production for a longer period than under all the circumstances is necessary, has been stressed over and over again by this court...The provision is there 'to ensure the safety and protection of arrested persons.' The desirability of the provision was strongly underlined by the facts of the case before us where much harm was caused even during the short period of detention."

Art.13(2) makes no reference to the modality of arrest. It plainly requires every person held in custody, detained or otherwise deprived of personal liberty to be brought before the judge of the nearest competent court in accordance with procedure established by law. As such, not only the persons arrested without warrant, but also the persons arrested under warrants, if held in custody, must be produced before the judge of the nearest competent court according to procedure established by law.[452] In this connection, Sec.54 of the Criminal Procedure Code requires the person executing a warrant of arrest to bring, unless security is taken as provided by Sec.51, without unnecessary delay the person arrested before the court before which he/she is required by law to produce such person. Also the person executing the warrant must endorse on the warrant the time when and the place where the arrest was made. According to Sec.58(1)

> "(w)hen a warrant of arrest is executed outside the local limits of the jurisdiction of the court by which it was issued the person arrested shall, unless the court which issued the warrant is within twenty miles of the place of arrest or is nearer than the Magistrate's Court within the local limits of the jurisdiction of which the arrest was made or unless security be taken under section 51, be brought before such last mentioned Magistrate's Court."

The scheme of Art.13(2) assumes 'that once a judge - a neutral person - takes over control, the liberty of the person arrested is sufficiently safeguarded'.[453] Under the criminal procedure code, although the police are empowered to make arrests[454], the authority to decide whether, in the light of the circumstances involved, continued deprivation of personal liberty of the arrestees is necessary and lawful, has been delegated to the Magistrates. However, as former Chief Justice Sharvananda has observed, this protection would become illusory if the Magistrates order detention mechanically, acting on the version of the police only. He goes on to say,

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[452] See, Dharmatilleke v. Abeynaike, SC App.156/86, SC Minutes of 15 February 1988.

[453] See, A.R.B.Amerasinghe, *Our Fundamental Rights of Personal Security And Physical Liberty*, (Ratmalana: Sarvodaya Book Publishing Services1995), p.132.

[454] According to Sec.39 of the Code of Criminal Procedure Act, No.15 of 1979 "Any person who has been arrested without a warrant by a peace officer shall not be discharged except on his own bond or on bail or under the special order in writing of a Magistrate."

> "(t)his safeguard mandates the Magistrates to apply a judicial mind to see whether the arrest of the person produced before him is legal, regular and in accordance with the law - otherwise the protection afforded by Art.13(2) would be meaningless. Policemen should not be made judges of the legality of their own arrests."[455]

Thus, when an arrested person is produced before him/her[456], the Magistrate is constitutionally bound to make an impartial determination as to 'what course of action is appropriate in the light of the law applicable to the circumstances of the case'.[457] He/she must not act as a mere rubber stamp and must exercise proper vigilance before deciding whether the deprivation of personal liberty of the arrestee effected by the police should continue or not.[458]

Although Art.13(2) of the Constitution guarantees that deprivation of personal liberty, after production before the judge of the nearest competent court, will continue only upon, and in terms of, an order made by such judge *in accordance with procedure established by law*, as the jurisprudence of the Sri Lankan Supreme Court stands at present, no violation of fundamental rights could be successfully alleged against a decision or an action of a judge even if the alleged decision or action was made or taken in breach of the procedure established by law. For, according to the Supreme Court, its exclusive fundamental rights jurisdiction under Art.126 of the Constitution is limited to investigating and granting relief against only those violations alleged to have been caused by 'executive or administrative' action.[459] Since the acts of judges

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[455] See, S.Sharvananda, *Fundamental Rights in Sri Lanka - A Commentary* (1993), pp.147-148.

[456] According to Sec.115(1) of the Code of Criminal Procedure, whenever an investigation under Chapter XI cannot be completed within the period of twenty-four hours fixed by Sec.37, and there are grounds for believing that further investigation is necessary, the officer in charge of the police station must transmit to the Magistrate having jurisdiction in the case a report of the case, together with a summary of the statements, if any, made by each of the witnesses examined in the course of such investigation relating to the case, and shall at the same time forward the suspect to such Magistrate. Also, if upon investigation it is found that the information of the commission of an offence is well founded, or that further investigation is necessary, such officer is required to forward the suspect under custody before the Magistrate's Court having jurisdiction in the case, or, if the offence is bailable and the suspect is able to give security, to take security from him/her for his/her appearance before such court [see, Sec.116(1)].On the other hand, if upon such an investigation it appears to the officer in charge of the police station or the inquirer that there is not sufficient evidence or reasonable ground of suspicion to justify the forwarding of the accused to a Magistrate's Court, such officer or inquirer shall if such person is in custody release him/her on his/her executing a bond with or without sureties as such officer or inquirer may direct to appear if and when so required before a Magistrate's Court having jurisdiction to try or inquirer into the offence (see, Sec.114).

[457] See, A.R.B.Amerasinghe, *Our Fundamental Rights of Personal Security And Physical Liberty*, (Ratmalana: Sarvodaya Book Publishing Services1995), p.132.

[458] See, Dayananda v. Weerasinghe and others, FRD (2) 292, p.299. Note, if the Magistrate decides that the deprivation of personal liberty should continue, the nature of custody changes from non-judicial authority to judicial authority. (see the judgement of Goonewardene J. in Mohamed Faiz v. Attorney General and others, SC App.89/91, SC Minutes of 19 November 1993).

[459] See, *inter alia*, Kumarasinghe v. The Attorney General and others, SC App.54/82, SC Minutes of 6 September 1982; Dayananda v. Weerasinghe and others, FRD (2) 292; Peter Leo Fernando v. The Attorney General and two others, (1985) 2 Sri L.R. 341; Dharmatilleke v. Abeynaike, SC App.156/86, SC Minutes of 15 February 1988; Chandra Jayasinghe v. Mahendran and others, (1987) 1 Sri L.R 206.

are conceived to be neither executive nor administrative, the Supreme Court has, notwithstanding the explicit provisions in the Constitution, consistently refused to assume jurisdiction to remedy even blatantly obvious breaches of Art.13(2) made by judges at lower levels.[460] If the decision or an action of a judge is not in accordance with the procedure establish by law, the remedy available to the aggrieved party is, as the Supreme Court has repeatedly held, to invoke the appellate or revisionary powers of the Appellate Courts.[461]

In Peter Leo Fernando v. The Attorney General and two others[462], the Petitioner was a Superintendent of a plantation estate. When the alleged incident happened the petitioner was sitting in the well of a court where a case between two other parties, but involving the estate in which he was the superintendent, was going on. Consequent to a complaint made by a counsel to one of the parties to this case that the Petitioner had threatened his (counsel's) client's wife, the Magistrate, without informing the charge and without giving an opportunity to answer the allegation, ordered the Petitioner to be detained in the court cell "in disgrace among criminals from 10.45a.m. to 2.45p.m.". A five member bench of the Supreme Court was unanimous that the Magistrate's order to detain the Petitioner was wrong and made in breach of the provisions of the Criminal Procedure Code. Nonetheless, the petition was dismissed without relief, for, the Magistrate's order, how ever much unlawful it was, was not an 'executive or administrative' action. In Chandra Jayasinghe v. Mahendran and others[463], the Petitioner was a woman detained under the Vagrants Ordinance. She had been in detention for nearly seven months because the Warrant of detention issued by the Magistrate did not specify a period. Under the circumstances of the case she could only have been detained for a maximum period of one month. Again, although the Supreme Court admitted that the Warrant of Detention was irregular, the application was dismissed since the Warrant concerned was a judicial order.

As stated by Amerasinghe J in the Wadduwa Case[464], the purpose of Art.13(2) is to enable a person arrested

> "...to make representations to a judge who may apply his 'judicial mind' to the circumstances before him and make a neutral determination on what course of action is appropriate in relation to his detention and further custody, detention or deprivation of personal liberty...The right to be produced before a judge will be beneficial to the

[460] See, *inter alia*, Kumarasinghe v. The Attorney General and others, ibid.; Peter Leo Fernando v. The Attorney General and two others, ibid..
[461] See, *inter alia*, Dayananda v. Weerasinghe and others, FRD (2) 292 p.298.
[462] (1985) 2 Sri L.R. 341
[463] (1987) 1 Sri L.R 206.
[464] SC Application Nos. 146/92-155/92, The "Wadduwa" Case, *Supreme Court Fundamental Rights Decision*, (Colombo 3: Nadesan Centre), p.62.

person arrested and conducive to a person seeking his liberty, only if the 'production' is real and not technical. as for instance when the person is kept in a motor vehicle outside the judge's house while the police officer alone meets the judge and obtains his order."

The Petitioner in Dharmatilleke v. Abeynaike[465] was a public servant who had been arrested in pursuant to a warrant issued by the High Court for non-attendance in court as a witness. While in police custody the Petitioner had informed the Respondents that she had not received summons or notice to attend the court. A request had also been made to take the Petitioner to a nearby hospital as she was a heart patient under treatment. The 3rd Respondents had asked to make this request in writing in order to get permission from the Magistrate to take the Petitioner to the hospital. Thereafter, the same Respondent had taken the Petitioner in a jeep accompanied by a woman and the Petitioner's son. The jeep had stopped in front of a high parapet wall and covered gate. The 3rd Respondent had alighted from the jeep saying that he was going to see the Magistrate and had asked the Petitioner and her son to wait in the jeep. After a while he had returned and informed that the Magistrate had detained the Petitioner for fourteen days and told her to see the prison doctor. A three judge bench of the Supreme Court accepted the evidence adduced by the Petitioner. The Court also admitted that the Petitioner would not have been detained for such a long period if she had had an opportunity to explain her situation to the Magistrate. Nonetheless, a breach of Art.13(2) was not recorded since the detention in prison resulted from an order made by a court.

In Kumarasinghe v. Attorney General and others[466] the Petitioner had been brutally assaulted by the police officers in the process of arrest for riding a bicycle without a light. As a result he had to be admitted to a hospital. While he was warded in the hospital, the Magistrate had, without even seeing the Petitioner, issued an order to remand him for a period of fourteen days. Delivering the judgement for the Supreme Court, Wimalaratne J. said,

"(t)here may be occasion when suspects warded in Hospital cannot be produced before the Magistrate within the stipulated period, but in that event the Police should produce a medical report to the effect that it would be hazardous to move the suspect from the hospital ward. Magistrates should be vigilant when...reports are filed before them, without the production of the suspect and should probe the reason for the non production of the suspect. If they are not satisfied with the reason adduced by the Police, they should insist on a medical report as to the suspects fitness to be produced.

Magistrates would be abdicating to the Police their judicial duty of deciding upon the period of remand if they do not bring their independent judgement to bear. In the present case a remand for a period of 14 days was quite unnecessary...I am of the view that there has been a violation of the fundamental right guaranteed by Article

[465] SC App.156/86, SC Minutes of 15 February 1988.
[466] SC App.54/82, SC Minutes of 6 September 1982.

13(2) of the Constitution, but this violation has been more the consequence of the wrongful exercise of judicial discretion as a result of a misleading Police report."

Thus, the Petitioner was not granted the relief prayed for.

At the time of the Petition, the Petitioner in the case of Siriyawathie v. Pasupathi and Janz[467], who was arrested in connection with a murder charge, had been languishing in a jail for over seven years without indictment being served. The detention was in consequence of an order made by a Magistrate in terms of Sec.115(2) of the Criminal Procedure Code, which permits remand only for a period of fifteen days. Also, the order of detention had been made *sine die* which, as the Supreme Court admitted, was not in accordance with law. In this instance the Court ordered the Petitioner to be paid compensation for a violation of her fundamental rights. In the Court's opinion, detention under the impugned detention order was illegal and the prison authorities, who are part of the executive, had not, before depriving the Petitioner of her personal liberty, taken the appropriate measures required by the rules made under the Prison Ordinance[468] to rectify the Magistrate's error.

Admittedly, Art.13(2) is a salutary provision. It protects the suspects and accused persons from vexatious interrogations and brutalities which might result from prolonged police detentions. However, in the case of continued detention under orders from a judge, Art.13(2) has, indisputably, little or no importance at all as a guarantee against unlawful deprivation of personal liberty, because of the very limited nature of the Supreme Court's exclusive fundamental rights jurisdiction.

2.3.1.3 - Pakistan.

As provided by Paragraph 2 of Art.10 of the Constitution of the Islamic Republic of Pakistan "(e)very person who is arrested and detained in custody shall be produced before a Magistrate within a period of twenty-four hours of such arrest, excluding the time necessary for the journey from the place of arrest to the Court of the nearest Magistrate, and no such person shall be detained in custody beyond the said period without the authority of a Magistrate."[469] The protection afforded by this provision ensures that the suspects and accused persons will not be deprived of personal liberty

[467] SC App.112/86, SC Minutes of 28 April 1987.

[468] As provided by Rule 156(1) "Whenever persons charged with offences shall be brought to the prison, it shall be the duty of the gate-keeper to see that notice is given to the Jailer or Deputy Jailer, who shall see that the necessary authority for their detention is delivered with them. Any omission or irregularity in the document shall be brought immediately to the notice of the Superintendent for orders."

[469] However, this guarantee does not apply to any person who for the time being is an enemy alien [see, Art.10(9)].

for an indefinite period at the will and pleasure of the executive.[470] Also, the provision entitles everyone arrested to a judicial verdict as to the validity of the measure they are subjected to before the expiration of a specific period of time computed from the moment of arrest.[471]

In addition to Art.10(2), as mentioned earlier in 2.1.1.3, both Art.4(2)(a) and Art.9 of the Constitution require every deprivation of personal liberty to be 'in accordance with law'.[472] As far as criminal proceedings are concerned, the bulk of the law governing detention after arrest is laid down in the Code of Criminal Procedure, Act V of 1898. It is imperative that these laws, and all the other provisions pertinent to detention mentioned in anything that is treated as law under Art.4(2)(a) and Art.9, are strictly complied with for the lawfulness of a continued deprivation of personal liberty of a suspect or an accused person.

It is clear from the language of Art.10(2) that the modality of arrest is not important for the application of its guarantees. As can be seen the obligation imposed is to produce *'every person who is arrested and detained in custody'* before a Magistrate within the stipulated time period.[473] Accordingly, not only those who are arrested without warrant but also those who are arrested under warrants can avail themselves of the guarantees secured by Art.10(2).[474] In other words, anyone arrested and detained by the authorities becomes entitled to be released forthwith once the period of twenty-four hours has passed without compliance with the requirements of Art.10(2).[475] If the arrest is made by a Magistrate acting under Sec.64 of the Criminal Procedure Code, the person arrested must be produced before another Magistrate acting under Sec.167 of the Code.[476]

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[470] See, Khair Muhammad Khan and another v. The Government of West Pakistan and others, P.L.D. 1956 (W.P.) Lahore 668.

[471] See, S.Sharifuddin Pirzada, *Fundamental Rights and Constitutional Remedies in Pakistan*, (Lahore: All Pakistani Legal Decisions, 1966), p.189.

[472] Note, as has been held in Mumtaz Ali Bhutto and another v. The Deputy Martial Law Administrator, Sector 1, Karachi and 2 others (P.L.D. 1979 Karachi 307 p.362), under Art.4 of the 1973 Constitution, the individuals are entitled to such treatment as is consistent not only with enacted law but also with principles of natural justice.

[473] Note, as provided by Sec.63 of the Code of Criminal procedure, Act V of 1898, "(n)o person who has been arrested by a police officer shall be discharged except on his own bond, or on bail, or under the special order of a Magistrate."

[474] See, S.Sharifuddin Pirzada, *Fundamental Rights and Constitutional Remedies in Pakistan*, (Lahore: All Pakistani Legal Decisions, 1966), p.189. Also see, Bazal Ahmad Ayyubi v. West Pakistan Province, P.L.D. 1957 (W.P.) Lahore 388. For a different view see, Sakhi Daler Khan v. Superintendent in Charge, Recovery of Abducted Women, P.L.D. 1957 (W.P.) Lahore 813.

[475] See, The State v. Muhammad Yusuf, P.L.D. 1965 (W.P.) Lahore 324; Sakhi Daler Khan v. Superintendent in Charge, Recovery of Abducted Women, P.L.D. 1957 (W.P.) Lahore 813.

[476] See, S.Sharifuddin Pirzada, *Fundamental Rights and Constitutional Remedies in Pakistan*, (Lahore: All Pakistani Legal Decisions, 1966), p.190

Moreover, as provided by Sec.61 of the Criminal Procedure Code, no police officer has the authority to

> "...detain in custody a person arrested without warrant for a longer period than under all the circumstances of the case is reasonable, and such period shall not, in the absence of a special order of a Magistrate under section 167, exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court."[477]

In connection with arrests made under warrants, Sec.81 of the Code requires the police officer or other person executing the warrant to bring, subject to the provision of the Code as to security, without unnecessary delay the person arrested before the court before which he/she is required by law to produce such person.[478] Any breach of these provisions may render a detention repugnant of both Art.4(2)(a) and Art.9 of the Constitution.

The requirement under Art.10(2), it must be noted, is to *produce* the person arrested or detained before the nearest Magistrate. Accordingly, actual production of the person concerned before such Magistrate is imperative for the lawfulness of a continued detention.[479] The Magistrate's going to the place where the arrestee is held in custody to order detention is not sufficient compliance with requirements of Art.10(2).[480] Nonetheless, the presence of the detenu is not essential for the validity of a subsequent remand order.[481]

As Kayani J. of the Lahore High Court observed in the case of Ghulam Muhammad Loondkhawar v. The State[482], "...a prisoner is not produced before a Magistrate merely to inform him that there are Magistrates in the land...". The whole purpose of such production is to "...ensure the immediate application of a judicial mind to the

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[477] As provided by Sec.60 of the Code a police officer making an arrest without a warrant must, without unnecessary delay and subject to the Code's provisions as to bail, take or send the person arrested before a Magistrate having jurisdiction in the case, or before the officer in charge of a police station. Sec.62 of the Code obliges the officer in charge of the police station to report to the District Magistrate, or, if he/she so directs, to the Sub-divisional Magistrate, the cases of all persons arrested without warrant, within the limits of their respective stations, whether such persons have been admitted to bail or otherwise.

[478] Also see, Sakhi Daler Khan v. Superintendent in Charge, Recovery of Abducted Women, P.L.D. 1957 (W.P.) Lahore 813 p.822.

[479] See, S.Sharifuddin Pirzada, *Fundamental Rights and Constitutional Remedies in Pakistan*, (Lahore: All Pakistani Legal Decisions, 1966), p.189.

[480] See, The State v. Muhammad Yusuf, P.L.D. 1965 (W.P.) Lahore 324; Muhammad Inamullah Khan v. The State, P.L.D. 1977 Lahore 1279. Also see, Justice Muhammad Munir, *Constitution of the Islamic Republic of Pakistan*, Vol. I (Lahore: P.L.D. Publishers 1996), pp.256-7; Emmanuel Zaffar, *Constitution of the Islamic Republic of Pakistan 1973*, Vol. I (Lahore: Ifran Law Book House 1992/93), p.161.

[481] See, S.Sharifuddin Pirzada, *Fundamental Rights and Constitutional Remedies in Pakistan*, (Lahore: All Pakistani Legal Decisions, 1966), p.189.

[482] P.L.D. 1957 (W.P.) Lahore 497, p.505.

legal authority of the person making the arrest and the regulating of the procedure adopted by him".[483] Thus, when an arrested person is produced before him/her in compliance with the requirements of Art.10(2) of the Constitution[484], the Magistrate must judicially review[485] the circumstances involved in order to determine the validity of the arrest. If the arrest is found to be valid he/she must next decide, in accordance with procedure established by law, whether further deprivation of personal liberty is necessary and lawful. Continued detention even under an order made by a Magistrate would be violative of the guarantee of Art.9 if the order has been made by the Magistrate without lawful authority.[486]

When a person is forwarded before him/her in compliance with Sec.167(1) of the Criminal Procedure Code[487], the Magistrate may, whether he/she has or has not jurisdiction to try the case, from time to time authorise the detention of the person so forwarded in such custody as the Magistrate thinks fit for a term not exceeding fifteen days in the whole.[488] However, if detention in the custody of police is authorised, the Magistrate must record reasons for doing so.[489] Also, the Magistrate must not, except in the cases involving qatl or dacoity, supported by reasons to be recorded in writing, authorise the detention of female arrestees in the custody of police.[490]

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[483] See, Sakhi Daler Khan v. Superintendent in Charge, Recovery of Abducted Women, P.L.D. 1957 (W.P.) Lahore 813 p.823.

[484] Sec.167(1) obliges the police officers to forward to the nearest Magistrate anyone arrested and detained in custody in connection with offences, if it appears that the investigation cannot be completed within the period of twenty-four hours fixed by Sec.61, and there are grounds for believing that the accusation or information is well founded. Also, as provided by Sec.170 of the Code if, upon an investigation under Chapter XIV, it appears to the officer in charge of the police station that there is sufficient evidence or reasonable ground of suspicion to justify the forwarding of the accused to a Magistrate, such officer shall forward the accused under custody to a Magistrate empowered to take cognizance of the offence upon a police report and to try the accused or send him/her for trial, or, if the offence is bailable and the accused is able to give security, shall take security from him for his appearance before such Magistrate on a day fixed and for his/her attendance from day to day before such Magistrate until otherwise directed. On the other hand, according to Sec.169, if upon an investigation under Chapter XIV, it appears to the officer in charge of the police station that there is no sufficient evidence or reasonable ground of suspicion to justify the forwarding of the accused to a Magistrate, such officer shall, if such person is, in custody, release him/her on his/her executing a bond with or without sureties, as such officer may direct, to appear, if and when so required, before a Magistrate empowered to take cognizance of the offence on a police report, and to try the accused or commit him/her for trial.

[485] This includes, *inter alia*, giving an opportunity for the person arrested to make his/her complaints, if any, to the Magistrate. [See, Ghulam Muhammad Loondkhawar v. The State, P.L.D. 1957 (W.P.) Lahore 497, p.505]

[486] See, Noor Hussain v. Superintendent, Darul Aman, Multan, and two other, P.L.D. 1988 Lahore 333.

[487] See, *supra, footnote no.*484.

[488] See, Sec.167(2) of the Code of Criminal procedure, Act V of 1898. Also see, Sakhi Daler Khan v. Superintendent in Charge, Recovery of Abducted Women, P.L.D. 1957 (W.P.) Lahore 813.

[489] See, Sec.167(3) of the Code of Criminal procedure, Act V of 1898.

[490] See, Sec.167(5), ibid.. Also, as stipulated by this sub-section, if, presumably, a male police officer investigating an offence wants to interrogate such a detainee, he must do so only in the prison, in the presence of an officer of jail and a female police officer.

According to Sec.496 of the Criminal Procedure Code when any person suspected or accused of committing a bailable offence is arrested or detained without warrant by an officer-in-charge of a police station, or appears or brought before a court, and is prepared at any time while in the custody of such officer or at any stage of the proceedings before such court to give bail, he/she must be released on bail.[491] Nonetheless, if the court or the officer thinks fit, the person concerned may be released, instead of taking bail, on his/her executing a bond without sureties. In non-bailable cases, such court or officer may on its/his/her discretion grant bail unless the person concerned appears on reasonable grounds to be guilty of an offence punishable with either death or with imprisonment for ten or more years. This last mentioned restriction may be disregarded if the suspect/accused is under the age of sixteen or is a woman or is a sick or an infirm person.[492]

Further, release on bail shall be directed, except where the court is of the opinion that the delay in the trial of the accused has been occasioned by an act or omission of the accused or any other person acting on his/her behalf, of any person, who being accused of any offence not punishable with death has been detained for such offence for a continuous period of more than one year and whose trial for such offence has not concluded. In the case of offences punishable with death, such release shall be ordered if the person concerned has been in continuous detention for more than two years. These provision, however, do not apply to a previously convicted offender for an offence punishable with death or imprisonment for life or to a person who, in the opinion of the court, is a hardened, desperate or dangerous criminal or involved in terrorism.[493]

Art.4(2)(a) and Art.9 of the Constitution would be breached unless custody is lawful at every point of detention. Thus, it is important that the conditions warranting continuous detention be reviewed from time to time. Also, as provided by Sec.497(2) of the Criminal Procedure Code, if it appears at any stage of the investigation, inquiry or trial, as the case may be, that there are not reasonable grounds for believing that the accused has committed a non-bailable offence, but there are sufficient grounds for further inquiry into his/her guilt, the accused must be, pending such inquiry, released on bail or recognisance. Further, if, at any time after the conclusion of the trial of a

[491] As provided by Sec.498 of the Code of Criminal procedure, Act V of 1898, the amount of every bond executed must be fixed with due regard to the circumstances of the case, and must not be excessive.
[492] See, Sec.497(1) of the Code of Criminal procedure, Act V of 1898.
[493] Ibid..

person accused of a non-bailable offence and before the judgement is delivered, the court is of opinion that there are reasonable grounds for believing that the accused is not guilty of any such offence, it shall release the accused, if he/she is in custody, on the execution of a bond without sureties for his/her appearance to hear the judgement delivered.[494]

The right of a person deprived of personal liberty to consult and be defended by a legal practitioner, as guaranteed by the second part of Art.10(1) of the Constitution[495], accrues from the moment of arrest, and may be availed of to challenge the lawfulness of deprivation of personal liberty when produced before a Magistrate in compliance with Art.10(2).[496] Also, it must be noted that, continued deprivation of personal liberty in case of remand would not be in accordance with law, and thus be contrary to Art.4, unless the detenu is given an opportunity, if he/she wants so, to be represented by a counsel before the court which orders detention. As the Lahore High Court said in Habibullah v. M.Jamil Ullah Khan[497],

> "...whenever a person is to be treated in accordance with law he is entitled to the assistance of a counsel unless the very purpose of Article 4 is sought to be neglected. In our view, therefore, it is an unqualified right which every citizen of this State possesses and Article 4 makes it inalienable so that it cannot under any circumstances be taken away from him."

The guarantees of Art.10(2) covers all arrests effected in criminal or *quasi*-criminal proceedings, including those made under orders of criminal courts. Those guarantees 'are not empty phrases, but are designed to prevent injustice, because injustice is a great evil, however small its scope may be.'[498] Failure to comply with those guarantees render custody illegal and entitles the arrested persons to be released at once.[499]

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[494] See, Sec.497(3) of the Code of Criminal procedure, Act V of 1898.

[495] Note, this guarantee does not apply to any person who for the time being is an enemy alien [see, Art.10(9)].The rights of accused persons to counsel and to be defended by legal practitioners of their choice are considered in detail in the next Chapter under the right to a fair trial.

[496] See, Justice Muhammad Munir, *Constitution of the Islamic Republic of Pakistan*, Vol. I (Lahore: P.L.D. Publishers 1996), pp.258-9. Also see, Zahoor Illahi v. State, 1975 P.Cr.L.J. 1413. As was held in the case of Rowshan Bijaya Shaukat Ali Khan v. East Pakistan (P.L.D. 1965 Dacca 241) the right to be defended by a lawyer is a necessary part of every law, irrespective of whether the law gives or denies the right. Further, sufficient compliance with the right to counsel contemplates reasonable opportunities being given both, to the arrested person to engage a counsel, and to the counsel to defend the arrestee (see, Moslemuddin Sikdar v. Chief Secretary, P.L.D. 1957 Dacca 101).

[497] L.P.A. 90 of 1974, quoted from Muhammad Saeed Ahmed Khan v. Secretary to Government of the Punjab, Housing and Physical Planning Department, P.L.D. 1983 Lahore 206.

[498] See, Sakhi Daler Khan v. Superintendent in Charge, Recovery of Abducted Women, P.L.D. 1957 (W.P.) Lahore 813 p.822.

[499] See, Justice Muhammad Munir, *Constitution of the Islamic Republic of Pakistan*, Vol. I (Lahore: P.L.D. Publishers 1996), p.257.

2.3.1.4 - Bangladesh.

Art.33(2) of the Constitution of the People's Republic of Bangladesh requires every person who is arrested and detained in custody to be produced before the nearest Magistrate within a period of twenty-four hours of arrest, excluding the time necessary for the journey from the place of arrest to the court of the Magistrate. The Article also makes any detention beyond the said period of twenty-four hours, without the authority of a Magistrate, unlawful.[500] The aim of this provision is to ensure the prompt application of a judicial mind to determine the lawfulness of arrests and detentions. The guarantee of Art.33(2) makes no distinction between arrests made with warrant and without warrant[501], and must be complied with whenever a person is arrested in connection with criminal proceedings.[502]

Additionally to the safeguard of Art.33(2), it must be noted that, both Art.31 and Art.32 of the Constitution guarantee that no action detrimental to personal liberty would be taken except in accordance with law. Thus, it is imperative that the provisions of ordinary law, which, as far as criminal proceedings are concerned, is mainly laid down in the Code of Criminal Procedure, Act V of 1898, are complied with in order for detentions to be lawful. As mentioned earlier in 2.1.1.4, both Pakistan and Bangladesh still use the same Criminal Procedure Code introduced by the British rulers. Consequently, the rules governing the aftermath of arrests, such as for example what the police officers must do when an investigation cannot be completed within twenty-four hours of an arrest[503], or the procedure to be followed in cases where there is not sufficient evidence to entertain a reasonable suspicion against the arrestee[504], are more or less the same in both the countries. Also, it must be noted that the guarantees of Art.31 and Art.32 include both substantive as well as procedural

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[500] Note, the guarantee of Art.33(2) does not apply to any person who for the time being is an enemy alien [see, Art.33(3)(a)].

[501] As Mafizul Islam Patwari has observed [see, *State of Fundamental Right to Personal Liberty* (Thesis submitted for the Degree of Doctor of Philosophy in the University of Dhaka 1985),pp.211-212], Art.33(2) has accorded a constitutional status to Sec.61 of the Code of Criminal Procedure Code, Act V of 1898. According to Sec.61 "No police officer shall detain in custody a person arrested without warrant for a longer period than under all the circumstances of the case is reasonable, and such period shall not, in the absence of a special order of a Magistrate under section 167, exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court." In connection with arrests made under warrants, Sec.81 of the Code requires the police officer or other person executing the warrant to bring, subject to the provision of the Code as to security, without unnecessary delay the person arrested before the court before which he/she is required by law to produce such person.

[502] See, Mahmudul Islam, *Constitutional law of Bangladesh* (Dacca: Bangladesh Institute of Law and International Affairs 1995), p.173.

[503] See, Sec.167(1) of the Code of Criminal Procedure, Act V of 1898.

[504] See, Sec.169, ibid.. Also see, Sections 63, 170, 496 & 497.

aspects of the due process concept.[505] As such, both substantive laws which authorise, and any procedure followed in ordering, detention have to be reasonable and non arbitrary.

Under Art.33(2) the obligation is for the authorities to produce everyone arrested before the nearest Magistrate.[506] Accordingly, the Magistrate's proceeding to the place of detention and ordering remand, instead of the arrestee being brought to the Magistrate, is not sufficient compliance with the constitutional requirements.[507] Further, the purpose of Art.33(2) is to allow a neutral person make a judicial determination as to the lawfulness of arrest and detention. To this end, if the arrest is made by a Magistrate acting under Sec.64 or 65 of the Criminal Procedure Code, it is necessary that the arrestee be produced before a Magistrate other than the one who made the arrest. Also, the aim of Art.33(2) will be defeated if the Magistrate before whom the arrestee is produced, is him/herself a witness of the case.[508]

No detention must be ordered unless the arrested person is actually produced before the Magistrate.[509] However, such production would be of little or no importance at all for the safeguard of arrestee's interests if the Magistrate acted mechanically. In order to make the guarantee of Art.33(2) meaningful, the Magistrate must, when an arrested person is produced before him/her, apply a judicial mind to determine whether the arrest was in accordance with law and whether continued detention is necessary and lawful.[510]

As provided by Sec.167 of the Code of Criminal Procedure, Act V of 1898, the Magistrate to whom an arrested person is forwarded may, whether he/she has or has not jurisdiction to try the case, from time to time authorise the detention of the arrestee in such custody as the Magistrate thinks fit, for a term not exceeding fifteen days in the whole.[511] But if the offence involved is a bailable one, the person

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[505] See, *supra* 2.1.1.4

[506] Note, as provided by Sec.63 of the Code of Criminal procedure, Act V of 1898, "No person who has been arrested by a police officer shall be discharged except on his own bond, or on bail, or under the special order of a Magistrate."

[507] See, F.K.M.A.Munim, *Rights of the Citizens Under the Constitution and Law* (Dacca: Bangladesh Institute of Law and International Affairs 1975), pp.93-94.

[508] See, Mahmudul Islam, *Constitutional law of Bangladesh* (Dacca: Bangladesh Institute of Law and International Affairs 1995), pp.173-174.

[509] See, F.K.M.A.Munim, *Rights of the Citizens Under the Constitution and Law* (Dacca: Bangladesh Institute of Law and International Affairs 1975), p.94. Such production is, however, not necessary to obtain subsequent remand orders.

[510] See, Maimunnessa v. State, 26 D.L.R. (1974) 241. Also see, Mahmudul Islam, *Constitutional law of Bangladesh* (Dacca: Bangladesh Institute of Law and International Affairs 1995), pp.173-174.

[511] However, if detention in the custody of police is ordered, the Magistrate is obliged to record reasons for doing so.

concerned must be released on bail or recognisance.[512] Although in non bailable cases the court has a discretion to release the arrested persons on bail, it must not do so if the arrestee appears on reasonable grounds to be guilty of an offence punishable either with death or imprisonment for life. This restriction may, however, be ignored if the person concerned is under the age of sixteen or is a woman or is a sick or an infirm person [513] Further, as provide by paragraph 5 of Sec.167,

> "(i)f the investigation is not concluded within one hundred and twenty days from the date of receipt of the information relating to the commission of the offence or the order of the Magistrate for such investigation;
>
> (a) the Magistrate empowered to take cognizance of such offence or making the order for investigation may, if the offence to which the investigation relates is not punishable with death, imprisonment for life or imprisonment exceeding ten years, release the accused on bail to the satisfaction of such Magistrate; and
>
> (b) the court of session may, if the offence to which the investigation relates is punishable with death, imprisonment for life or imprisonment exceeding ten years, release the accused on bail to the satisfaction of such court."

If the detainee is not released on bail under the provisions of this paragraph, the Magistrate or, as the case may be, the court of session must record the reasons for it.[514]

Further, if it appears at any stage of the investigation, inquiry or trial, as the case may be, that there are no reasonable grounds for believing that the accused has committed a non-bailable offence, but there are sufficient grounds for further inquiry into his/her guilt, the accused must be, pending such inquiry, released on bail or recognisance.[515] Furthermore, if, at any time after the conclusion of the trial of a person accused of a non-bailable offence and before the judgement is delivered, the court is of opinion that there are reasonable grounds for believing that the accused is not guilty of any such offence, it shall release the accused, if he/she is in custody, on the execution of a bond without sureties for his/her appearance to hear the judgement delivered.[516] Thus, the custody of a suspect/accused will not be in accordance with law, and hence will be contrary to Art.31 as well as Art.32 of the Constitution, unless the reasonable suspicion which warranted arrest exists throughout the period of continued detention.

When produced before the Magistrate, the arrested person must, as guaranteed by Art.33(1) of the Constitution, be allowed to be represented by a legal practitioner of

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[512] See, Sec.496 of the Code of Criminal Procedure, Act V of 1898. As provided by Sec.498, the amount of every bond executed must be fixed with due regard to the circumstances of the case, and must not be excessive.

[513] See, Sec.497 of the Code of Criminal Procedure, Act V of 1898.

[514] Note, as was held in the case of A.T.Mridha v. The State [25 D.L.R. (1973) 335] refusal or withholding of bail might tantamount to a punishment without trial.

[515] See, Sec.497(2) of the Code of Criminal Procedure, Act V of 1898.

[516] See, Sec.497(4), ibid..

his/her choice.[517] As was held in the case of Rowshan Bijaya Shaukat Ali Khan v. East Pakistan[518], the right to be defended by a lawyer is a necessary part of every law, irrespective of whether the law gives or denies the right. Sufficient compliance with this requirement contemplates reasonable opportunities being given both, to the arrested person to engage a counsel, and to the counsel to defend the arrestee.[519] Besides, unless the arrestee is given a reasonable opportunity to be represented by a legal practitioner, the procedure before the Magistrate might, by not being fair and reasonable, offend the guarantees of both Art.31 as well as Art.32. The right to be defended by a legal practitioner continues even if the person concerned is released on bail.[520] If for reasons of indigence a legal practitioner cannot be engaged then the arrestee must be provided with legal aid.[521]

It is deemed that the guarantee of Art.33(2) would prevent police officers from making arrests and detentions with a view to either extracting confessions, or compelling people to give information about crimes.[522] By providing an early opportunity to arrested persons to recourse to a judicial officer independent of the police on all matters pertinent to bail and discharge, this guarantee is also expected to prevent authorities from using police stations as if they were prisons.[523] The importance of the right to be taken out of police custody and produced before a Magistrate, as guaranteed by Art.33(2), in safeguarding the interests of suspects and accused person cannot be underestimated, and whenever that right has not been respected, the custody of arrested persons becomes illegal and unconstitutional.[524]

2.3.1.5 - Nepal.

As stipulated by Art.14(6) of the Constitution of the Kingdom of Nepal, every person who is arrested and detained in custody must be produced before a judicial authority within a period of twenty-four hours.[525] But the period of twenty-four hours is

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[517] Note, this guarantee does not apply to any person who for the time being is an enemy alien [see, Art.33(3)(a)].The rights of accused persons to counsel and to be defended by legal practitioners of their choice are considered in detail in the next Chapter under the right to a fair trial.

[518] 17 D.L.R. 1.

[519] See, Moslemuddin Sikdar v. Chief Secretary, 8 D.L.R. 526.

[520] See, Mahmudul Islam, *Constitutional law of Bangladesh* (Dacca: Bangladesh Institute of Law and International Affairs 1995), p.172.

[521] Ibid., p.173.

[522] See, A.B.M.Mafizul Islam Patwari, *State of Fundamental Right to Personal Liberty* (Thesis submitted for the Degree of Doctor of Philosophy in the University of Dhaka 1985), p.213.

[523] See, Md. Suleman's Case, 30 C.W.N. 985.

[524]See, Mahmudul Islam, *Constitutional law of Bangladesh* (Dacca: Bangladesh Institute of Law and International Affairs 1995), p.173.

[525] Note, the Guarantee of Art.14(6) cannot be availed of by a citizen of an enemy state [see, Art.14(7)]

computed, like in the other South-Asian countries, excluding the time necessary for the journey from the place of arrest to the place of the judicial authority.[526] Article 14(6) also makes detention beyond the said period of twenty-four hours, without an order from such judicial authority, illegal.

In addition to the above safeguard, the guarantee of Art.12(1) requires every deprivation of personal liberty to be in accordance with law. Thus, any detention authorised must be consistent with the requirements of ordinary law.[527] If detention is upheld, the law authorises the police to hold the suspect for twenty five days to complete investigation, with a possible extension of further seven days. However, it must be noted that, for many offences the law requires the judicial proceedings to be initiated within seven days of arrest.[528]

Noticeably, unlike in the corresponding guarantees of the other South-Asian Constitutions, the word *nearest* does not appear before the phrase "judicial authority" in Art.14(6) of the present Napalese Constitution. Under Art.3(7) of the 1958 Constitution of the Kingdom of Nepal it was an explicit requirement to produce the arrested persons before the *nearest* judicial authority. Thus, it is not clear whether the drafters of the present Constitution has intentionally omitted the word *nearest* from Art.14(6). However, in Tika Prasad Thakali v. Bhav Nath Sharma, Secretary, Ministry of Forestry[529], the Supreme Court of Nepal emphasised the importance of producing the arrested persons before the *nearest* judicial authority.

As stipulated by the second part of Art.14(6) no person arrested must be detained beyond twenty-four hours without an order from a judicial authority. Albeit the Supreme Court has on numerous occasions pointed out the importance of complying with this requirement[530], according to its own jurisprudence the fact that the remand order was obtained after the expiry of the time period mentioned in Art.14(6) does not *ipso facto* render continued detention illegal. The circumstances involved in the case

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[526] See, Mina Shrestha v. Kathmandu District Court, 31 N.K.P. 671 (2047).

[527] See, Dinesh Chandra Gupta v. District Police Officer, Sindhupalchok, N.K.P. (Nepal Kanoon Patrika) Vol.8 (2050), p.506. Also see, Surya PS Dhungel *et al*, *Commentary on the Nepalese Constitution*, (Kathmandu: DeLF 1998), p.125. As Surya PS Dhungel *et al* have noted, right to bail in reasonable cases is a Constitutional mandate under Art.12(1), see, ibid., pp.127-128.

[528] See, *U.S. Department of State, Nepal Country Report on Human Rights Practices for 1998*, Released by the Bureau of Democracy, Human Rights, and Labor, February 26, 1999.

[529] 2018 Nep.L.Rep. 147.

[530] See, *inter alia*, Tek Bhadur Rayamajhi v. Ram Chandra Sonar, 2021 Nep.L.Rep. 123; Sanga Ratna Tuladhar v. Special Police Department, 2022 Nep.L.Rep. 227; Bajarang Chaitanya Brahamachary v. H.M.G. District Police office, Dhanusha, Habeas Corpus Writ No.1375/2048.

of *In re* Amber B. Gurung[531] revealed that an arrestee was detained for more than twenty-four hours prior to obtaining a remand order from a judicial authority. Although the Supreme Court passed strictures against the perpetrators of this violation and directed to take appropriate departmental action to punish them, by a majority decision came to the conclusion that the breach of Art.14(6) has not vitiated the lawfulness of subsequent detention effected under the orders of a judicial authority.[532]

In addition to the safeguard discussed in 2.2.1.5, Art.14(5) of the present Constitution of Nepal guarantees to everyone arrested and detained a right to consult and be defended by a legal practitioner of their choice[533] which can be availed of from the moment the person concerned is put under arrest.[534] It is incumbent upon the authorities to inform the arrestee about this right immediately after the arrest.[535] If the person concerned is unable to exercise this right because of destitution, the government must provide him/her with a legal practitioner free of charge.[536]

2.3.2 - Europe.

2.3.2.1 - Article 5 Paragraph 3.

According to Art.5(3) of the European Convention for the protection of Human Right and Fundamental Freedoms "everyone arrested and/or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within reasonable time or to release pending trial. Release may be conditioned by guarantee to appear for trial". While guaranteeing a right to suspects, the Article imposes an unconditional positive obligation upon the authorities of the Contracting States. As stipulated, the authorities must, without waiting for the person concerned to take the initiative, bring automatically and promptly anyone arrested or detained under

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[531] SC Full Bench Decision No.54 of 2048/12/24.

[532] Also see, Kusum Shrestha, 'Fundamental Rights in Nepal', *Essays on Constitutional Law*, Vol.15 (1993), Nepal Law Society, Kathmandu, 1 p.27.

[533] Note, this guarantee does not apply to a citizen of an enemy state [see, Art.14(7)].The rights of accused persons to counsel and to be defended by legal practitioners of their choice are considered in detail in the next Chapter under the right to a fair trial.

[534] See, Amir Ratna Shrestha, 'Constitutional Criminal Jurisprudence in Nepal', *Essays on Constitutional Law*, Vol.14 (1993), Nepal Law Society, Kathmandu, 23 p.25. Also see, Prem Prasad Pande v. Bagmati Special Court, Habeas Corpus Writ No.498/026, Decided on 2026/7/22.

[535] See, Yagyan Murti Banjade v. Durga Das Shrestha, 2027 Nep.L.Rep. 157. Also see, Dr.Amir Ratna Shrestha, 'Constitutional Right to Legal Counsel', *Essays on Constitutional Law*, Vol.20 (1995), Nepal Law Society, Kathmandu, 37 p.42.

[536] See, Amir Ratna Shrestha, 'Constitutional Criminal Jurisprudence in Nepal', *Essays on Constitutional Law*, Vol.14 (1993), Nepal Law Society Kathmandu, 23 p.25.

the provision of Art.5(1)(c) before a judicial officer[537] to determine whether continuation of deprivation of liberty is permissible or the person should be released.

The judicial control of arrest and detention, as envisaged by Art.5(3), is purported to ensure that interference during criminal process by the executive with individuals' right to liberty of person are kept within the rule of law and thus, are not arbitrary.[538] The fact that an arrest is ordered by a court does not relieve the authorities of their obligation to bring the person concerned promptly before a judicial officer, for the Article also intends to keep any deprivation of liberty as short as possible.[539] On the other hand, since Art.5 is concerned only with arrested and detained persons, the obligation ceases if and when the person arrested or detained is provisionally released.[540]

Accordingly, no breach of Art.5(3) could occur if the arrested or detained person is released "promptly" before any judicial control of his/her detention would have been feasible.[541] If not released promptly, however, the person concerned is, as provided, entitled to a prompt appearance before a judicial officer.[542] Although this provision is mainly designed to protect individuals against prolonged police or administrative detentions[543], the word "promptly" in the context of this Article may, conceivably, require a somewhat flexible interpretation than in the case of Art.5(2). Because, unlike in paragraph 2, the requisites of criminal process as stipulated by Art.5, for the first time in paragraph 3 involves a third party, namely a judge or other judicial officer, who is expected to act independently of the arrested and detained person(s) as well as the authorities that executed such arrest and detention. According to van Dijk and van Hoof "(t)he word 'promptly'...must not be interpreted so literally that the investigating judge must be virtually dragged out of bed to arraign the detainee or must interrupt urgent activities for this. However, adequate provisions will indeed have to be made in order that the prisoner can be heard as soon as may be reasonably required in view

[537] See, App.No.9017/80, McGoff v. Sweden, 31 D & R (1983) 72.
[538] See, the Case of Brogan and Others, Judgment of 29th November 1988, Ser.A Vol.145-B (1989) 11 pp.31-32 para.58. *c.f.* in Aksoy v. Turkey, 23 EHRR (1997) 553 p.588 para.76; Sakik and Others v. Turkey, Judgment of 26th November 1997, Report of Judgments and Decisions, No.58 (1997-VII) 2609 pp.2623-2624 para.41-46.
[539] See, the Opinion of the Commission, McGoff Case, Ser.A Vol.83 (1984) 29 p.30 para.24-26.
[540] See, App.No.8233/78, X v. The United Kingdom, 17 D & R (1980) 122 p.131 para.58.
[541] See, the Case of De Jong, Baljet and Van den Brink, Judgment of 22nd May 1984, Ser.A Vol.77 (1984) pp.24-25 para.52. *c.f.* in the Case of Brogan and Others, Judgment of 29th November 1988, Ser.A Vol.145-B (1989) 11 pp.31-32 para.58.
[542] See, the Case of Brogan and Others, ibid..
[543] See, the Opinion of the Commission, the Case of De Jong Baljet and Van den Brink, Ser.A Vol.77 (1984) 31 p.36 para.88. *c.f.* in the Brogan case, see the report of the Commission, Ser.A Vol.145-B (1989) 57 p.62 para.101.

of his interests."[544] Thus, when interpreting and applying the requirement as to promptitude laid down in Art.5(3), the Contracting States are given a certain margin of appreciation.[545]

So far neither the Court nor the Commission has determined for the purpose of promptness under Art.5(3) where the maximum permissible time limit lies, i.e. for how long an arrested person could be kept in custody without production before a judicial officer. Instead, the Court has concluded that the issue of promptness must be assessed in each case according to its special features.[546] As the Strasbourg jurisprudence reveals, in cases concerning ordinary criminal offences a four days delay in complying with the requirements of Art.5(3) would not be inconsistent with the Convention's regime.[547] Any period longer than that may, however, in the Commission's opinion, requires the presence of exceptional circumstances.[548]

Thus, in McGoff Case both the Commission and the Court found a delay of fifteen days irreconcilable with the concept of promptness.[549] In Skoogstrom v. Sweden, the fact that the Applicant had to be transported for 600 kilometres did not justify a delay of seven days.[550]Similarly, in the case of De Jong, Baljet and Van den Brink intervals of six, seven and eleven days in complying with the requirements of Art.5(3) were found to be unacceptable, even after taking into consideration the exigencies of military life and military justice. [551]

On the other hand in X v. Belgium[552] a delay of five days was accepted as permissible for the purpose of Art.5(3). For, after the arrest the authorities had to take the Applicant, on his own request, to a hospital where he was nursed for an illness for four days. The Commission considered this as an exceptional circumstance which

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[544] See, P.Van dijk and G.J.H.van Hoof, *The Theory and Practice of the European Convention on Human Rights*, second edition (Deventer: Kluwer Law and Taxation Publishers 1990), pp.274-75.
[545] See, App.No.2894/66, X v. The Netherlands, 9 YBECHR (1966) 564 p.568.
[546] See, the Case of De Jong Baljet and Van den Brink, Judgment of 22nd May 1984, Ser.A Vol.77 (1984) pp.24-25 para.52. *c.f.* in the Case of Brogan and Others, Judgment of 29th November 1988, Ser.A Vol.145-B (1989) 32 para.59.
[547] See, App.No.2894/66, X v. The Netherlands, 9 YBECHR (1966) 564 p.568. *c.f.* in App.No.11256/84, Egue v. France, 57 D & R (1988) 47 p.70 para.3.
[548] See, App.No.4960/71, X v. Belgium, 43 CD (1973) 49.
[549] Judgment of 26th October 1984, Ser.A Vol.83 (1984) 20 pp.26-27 para.27. For the Commission's opinion see ibid. p.29 pp.31-32 para.28.
[550] See, the Opinion of the Commission, Skoogstrom Case, Ser.A Vol.83 (1984) 12 pp.18-19 para.89.
[551] Judgment of 22nd May 1984, Ser.A Vol.77 (1984) pp.24-25 para.52-53. Also see, the Case of Van der Sluijs, Zuiderveld and Klappe, Judgment of 22nd May 1984, Ser.A Vol.78 (1984) p.20 para.49; the Case of Duinhof and Duijf, Judgment of 22nd May 1984, Ser.A Vol.79 (1984) p.18 para.41; the Case of Koster v. The Netherlands, Ser.A Vol.221 (1992) p.10 para.25.
[552] App.No.4960/71, 42 CD (1973) 49.

justified the delay. The facts involved in the Case of Brogan and Others v. The United Kingdom brought the Commission and the Court into conflicting conclusions.[553] The four Applicants in this case had been arrested under the special powers granted by the Prevention of Terrorism (Temporary Provisions) Act 1984. The arrests, which were followed by long interrogations, grounded on the suspicion that the Applicants were members of a proscribed organisation and had taken part in terrorist activities committed in connection with the Northern Ireland affairs.

The four Applicants were subsequently released; the first after being detained for a period of five days plus eleven hours, the second after a period of six days plus sixteen and a half hours, the third after a period of four days plus six hours and the fourth after a period of four days plus eleven hours. None of them were charged nor brought before a judicial officer. The Commission took into consideration the context in which the Applicants were arrested and the reality of problems presented by the arrest and detention of suspected terrorists which may not be present in ordinary criminal cases. Although it is deemed necessary to strike a balance between the interests of the individual and the general interest of the community, the struggle against terrorism, according to the Commission, requires a particular measure of sacrifice by each citizen in order to protect the community as a whole. Thus, the Commission concluded that only the periods of five days plus eleven hours and, six days plus sixteen and half hours were against the requirement of promptness under Art.5(3). The periods of four days plus six hours and, four days plus eleven hours were, on the other hand, in the light of the circumstances involved, found to be compatible with that requirement.[554]

The Court, however, did not agree with the Commission's findings. In the Court's opinion all four detentions failed to meet the required standards of Art.5(3). According to the Court the significance to be attached to the exceptional circumstances must not extend to the point of impairing the very essence of the right guaranteed by Art.5(3), i.e. to the point of effectively negating the State's obligation to ensure a prompt release or a prompt appearance before a judicial authority. The Court went on to say,

> "...the scope for flexibility in interpreting and applying the notion of 'promptness' is very limited...even the shortest of the four periods of detention, namely the four days and six hours spent in police custody...falls outside the strict constraints as to time permitted by the first part of Art.5(3). To attach such importance to the special

[553] For a discussion about the Brogan Case see, Antonio Tanca, 'Human Rights, Terrorism and Police Custody: The Brogan Case', 1 *EJIL* (1990) 269.

[554] See, the Opinion of the Commission, the Case of Brogan and Others, Ser.A Vol.145-B (1989) 57 p.63 para.106-107.

> features of this case as to justify so lengthy a period of detention without appearance before a judge or other judicial officer would be an unacceptable wide interpretation of the plain meaning of the word 'promptly'. An interpretation to this effect would import into Article 5 (3) a serious weakening of a procedural guarantee to the detriment of the individual and would entail consequences impairing the very essence of the right protected by this provision. The Court thus has to conclude that none of the applicants was either brought 'promptly' before a judicial authority or released 'promptly' following his arrest. The undoubted fact that the arrest and detention of the applicants were inspired by the legitimate aim of protecting the community as a whole from terrorism is not on its own sufficient to ensure compliance with the specific requirements of Article 5(3)."[555]

As provided by Art.5(3) any person arrested or detained in accordance with the provisions of paragraph 1(c) must be produced promptly before a *'judge or other officer authorised by law to exercise judicial power'*. On the other hand, deprivation of liberty of persons under the provisions of paragraph 1(c) is permitted, as mentioned earlier[556], only if it is effected with the objective of bringing the person concerned before the competent legal authority. Since paragraph 1(c) forms a whole with paragraph 3, 'competent legal authority' is a synonym, of abbreviated form, for 'judge or other officer authorised by law to exercise judicial power'.[557]

Although the word 'judge' is not ambiguous the remainder of the sentence, i.e. 'other officer authorised by law to exercise judicial power', has given rise to controversies. On several occasions the Strasbourg authorities had to interpret the phrase in detail to elucidate imperative characteristics of such an officer. According to the Court in Schiesser v. Switzerland[558], the 'officer' is not identical with judge but must, nevertheless, have some of the latter's attributes, that is to say, he/she must satisfy certain conditions each of which constitutes a guarantee for the person arrested and/or detained.

The first of such conditions is the officer's independence of the executive and of the parties. A person would not be regarded as a 'judicial officer' for the purpose of Art.5(3), competent to determine the permissibility of pre-trial detention, if he/she is

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[555] Case of Brogan and Others, Judgment of 29th November 1988, Ser.A Vol.145-B (1989) pp.33-34 para.62. *c.f.* in the Case of Koster v. The Netherlands, Judgment of 28th November 1991, Ser.A Vol.221 (1992) p.10 para.24. Also see, the Case of Sakik and Others v. Turkey, Judgment of 26th November 1997, Report of Judgments and Decisions, No.58 (1997-VII) 2609 pp.2623-2624 para.41-46. Compare Aksoy v. Turkey, 23 EHRR (1997) 553 pp.586-591 para.65-87 with Brannigan and McBridge, Judgment of 23rd June 1993, Ser.A Vol.258-B (1993) 29 pp.47-57 para.36-74.

[556] See, *supra* 2.1.2.1

[557] See, Lawless v. Ireland (No.3) (Merits) 1 EHRR (1979/80) 15 pp.27-28 para.14; Ireland v. The United Kingdom, 2 EHRR (1979/80) 25 pp.87-89 para.196-199; Schiesser v. Switzerland, 2 EHRR (1979) 417 p.425 para.29; Case of De Jong, Baljet and Van den Brink, Judgment of 22nd May 1984, Ser.A Vol.77 (1984) pp.21-22 para.44; Ciulla Case, Judgement of 22nd February 1989, Ser.A Vol.148 (1989) p.16 para.38; B v. Austria, Judgment of 28th March 1990, Ser.A Vol.175 (1990) p.14 para.36.

[558] 2 EHRR (1979/80) 417 p.426 para.31.

entitled to intervene in the subsequent criminal proceedings as a representative of the prosecuting authority.[559] For, the potential for such an intervention, even if in fact did not intervene, may, in the light of the conflicting interests of the two functions, be detrimental, at the time of the preliminary investigation, to the interests of the suspect which Art.5 purports to protect.[560] Moreover, while such a person is certainly not independent of the parties as required by paragraph 3, his/her impartiality may arouse doubts which are to be held objectively justified.[561] Nonetheless, in order to conform with paragraph 3, the 'officer' need not necessarily be in the same calibre of judges. A person who is to some extent subordinate to judges could still be regarded as a 'judicial officer', provided he/she enjoys independence similar to that of judges which is essential for the exercise of judicial power contemplated by Art.5(3).[562]

The second condition a 'judicial officer' under Art.5(3) must satisfy consists of a procedural as well as a substantive requirement. While the procedural requirement places the 'officer' under the obligation of him/herself hearing the individual brought before him/her, the substantive requirement imposes the obligations of (i) reviewing the circumstances militating for and against detention, (ii) deciding, by reference to legal criteria, whether there are reasons to justify detention and, (iii) ordering release if there are no such reasons.[563] Thus, in Ireland v. The United Kingdom[564] an advisory committee on internment failed to meet the requirements of Art.5(3) since it did not have power to order release. Moreover, it is not sufficient that the recommendations of the 'officer' are invariably followed. For the purpose of Art.5(3) the 'officer' must be able to take a legally binding decision as to the permissibility of deprivation of personal liberty.[565]

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[559] See, the Case of De Jong, Baljet and Van den Brink, Judgment of 22nd May 1984, Ser.A Vol.77 (1984) p.24 para.49; the Case of Van der Sluijs, Zuiderveld and Klappe, Judgment of 22nd May 1984, Ser.A Vol.78 (1984) p.19 para.44; the Case of Duinhof and Duijf, Judgment of 22nd May 1984, Ser.A Vol.79 (1984) p.17 para.38; Huber Case, Judgment of 23 October 1990,Ser.A Vol.188 (1991) p.18 para.42; Brincat v. Italy, Judgment of 26th November 1992, Ser.A Vol.249-A (1993) p.12 para.21. Compare with, App.No.14292/88, J v. Belgium, 63 D & R (1989) 203.

[560] See, Brincat v. Italy, ibid..

[561] Ibid..

[562] Schiesser v. Switzerland, 2 EHRR (1979/80) 417 p.426 para.31. Also see, the Case of De Jong, Baljet and Van den Brink, Judgment of 22nd May 1984, Ser.A Vol.77 (1984) pp.22-23 para.47 - as long as the required conditions are fulfilled, even an official of the public prosecutor's department may be sufficient for the purpose of Art.5(3).

[563] Ibid..

[564] 2 EHRR (1979/80) 25 p.89 para.199.

[565] See, the Case of De Jong, Baljet and Van den Brink, Judgment of 22nd May 1984, Ser.A Vol.77 (1984) pp.23-24 para.48 ;the Case of Van der Sluijs, Zuiderveld and Klappe, Judgment of 22nd May 1984, Ser.A Vol.78 (1984) pp.18-20 para.42-48; the Case of Duinhof and Duijf, Judgment of 22nd May 1984, Ser.A Vol.79 (1984) pp.15-18 para.33-40.

With regard the procedural requirement, the Commission in Skoogstrom case found a breach of Art.5(3), since the alleged officer did not herself hear the detained person. A police officer who interrogated the Applicant informed her of the interrogation over the telephone. On the basis of this information she decided that the Applicant's provisional detention should continue. The Commission said,

> "...the essential character of the guarantees provided for in Art.5(3) requires that the powers envisaged by that provision must be exercised by the person authorised by the Article to do it. There can accordingly not be any total or partial delegation of these powers." [566]

However, as the Court observed in Schiesser v. Switzerland[567] the fact that the officer did not allow the suspect's lawyer to be present at the hearing does not affect the guarantee of Art.5(3).

As provided by Art.5(3) everyone arrested or detained is entitled to be tried within a reasonable time or to be released pending trial. However, a trial would be required only if the suspicion which grounded the arrest is reasonable. When such suspicion is not justified or the circumstances which justified the suspicion became unreasonable or ceased to exist, the judge or the judicial officer must, in line with the regime of Art.5, order the immediate, unconditional release of the person concerned. A "reasonable suspicion" that the person concerned has committed an offence is a fundamental pre-condition for the validity of the arrest as well as continued detention. As such, the questions from this part of paragraph 3, i.e. the questions of release pending trial or trial within a reasonable time, must arise only in connection with arrests and detentions effected on "reasonable suspicions".[568]

Further, it must be noted that the word 'or' between the phrases 'to trial within a reasonable time' and 'to release pending trial' does not give the authorities a choice. The fact that a person arrested on reasonable suspicion is going to be tried within a reasonable time does not justify the deprivation of that person's personal liberty beyond the time period absolutely required by the circumstances involved. Nor would the provisions of Art.5(3), read in conjunction with Art.6, permit the undue delay of the trial of such a person solely because he/she is released from provisional detention.[569]

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[566] See, the Opinion of the Commission, Skoogstrom Case, Ser.A Vol.83 (1984) 12 pp.16-17 para.80-81.

[567] 2 EHRR (1979/80) 417 p.428 para.36.

[568] On this point see, Frede Castberg, *The European Convention on Human Rights*, edited by Torkel Opsahl and Thomas Ouchterlony (New York: Oceana Publications Inc. 1974), p.102.

[569] However, note that a suspect who is released from provisional detention cannot avail him/herself of the rights guaranteed by Art.5(3). See, App.No.8233/78, X v. UK, 3 EHRR (1981) 271.

In the Case of Wemhoff v. Germany[570] the Court rejected a purely grammatical interpretation given to this part of Art.5(3), since it would leave the authorities with the option of either conducting the proceedings within a reasonable time or releasing the suspect pending trial. According to the Court such an interpretation does not conform to the intention of the Contracting Parties. Observing that, to understand the precise scope of the provision in question, it must be set in its context, the Court said,

> "Article 5, which begins with an affirmation of the right of everyone to liberty and security of person, goes on to specify the situations and conditions in which derogations from this principle may be made, in particular with a view to the maintenance of public order, which requires that offences shall be punished. It is thus mainly in the light of the fact of the detention of the person being prosecuted that national courts, possibly followed by the European Court, must determine whether the time that has elapsed, for whatever reason, before judgement is passed on the accused has at some stage exceeded a reasonable limit, that is to say imposed a greater sacrifice that could, in the circumstances of the case, reasonably be expected of a person presumed to be innocent. In other words it is the provisional detention of accused persons which must not, according to Article 5(3) be prolonged beyond a reasonable time."[571]

Accordingly, the period that a suspect spends in detention prior to his/her acquittal or conviction by a court of first instance must be reasonable.[572] If a suspect is detained for more than once in the course of the same proceedings, the duration of each deprivation of liberty will be cumulated in determining the reasonableness of the pre-trial detention.[573]

In line with Strasbourg jurisprudence Harris, O'Boyle and Warbrick have noted two instances where pre-trial detention can get prolonged contrary to Art.5(3). Firstly, it can happen when pre-trial detention is continued without having any good public interest reasons to do so. Secondly, even when there exist such reasons, the pre-trial detention may still get prolonged in breach of Art.5(3) if the investigation and trial are conducted less expeditiously than might reasonably expected.[574] In this connection it must be noted that, as the Court emphasised on numerous occasions, an accused person in detention is entitled to have his/her case given priority and conducted with

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[570] Judgment of 27th June 1968, Ser.A Vol.7 (1968) pp.21-22 para.4-5.
[571] Ibid..
[572] Deprivation of liberty of person after conviction by a court of first instance is subject to Art.5(1)(a), not Art.5(3). This is so even if under the domestic criminal justice system a person awaiting the decision of an appeal is considered, not as a convict but as a detainee. See Wemhoff Case, ibid., pp.23-24 para.9. *c.f.* in B v. Austria, Judgment of 28th March 1990, Ser.A Vol.175 (1990) pp.14-16 para.34-35.
[573] See, Kemmache v. France, Judgment of 27th November 1991, Ser.A Vol.218 (1992) p.23 para.44.
[574] See, D.J.Harris, M.O'Boyle, and C.Warbrick, *Law of the European Convention on Human Rights*, (London: Butterworths, 1995), p.136.

particular expedition.[575] This, nevertheless, must not stand in the way of the proper administration of justice.[576]

Although under Art.5 paragraph 1 (c) the persistence of a reasonable suspicion that the person arrested has committed an offence is a condition *sine qua non* for the validity of the continued detention, after a certain lapse of time, such suspicion alone becomes incapable of justifying any further interferences with the right to liberty of person.[577] In order to justify prolonged detentions, as Art.5(3) requires, there must exist, relevant, sufficient and genuine public interest reasons that necessitate serious departures from the rules of respect for individual liberty and presumption of innocence.[578] The existence of a strong suspicion of the involvement of the person concerned in serious offences would not be adequate for this purpose.[579]

According to Strasbourg jurisprudence the pre-trial detention of a person arrested on the suspicion of having committed an offence may be continued if there exist a danger of him/her absconding and thereby avoid facing trial.[580] However, as the Court

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[575] See, Wemhoff Case, Judgment of 27th June 1968, Ser.A Vol.7 (1968) p.26 para.17; Stogmuller Case Judgment of 10th November 1969, Ser.A Vol.9 (1969) p.40 para.5; Matznetter Case, Judgment of 10th November 1969, Ser.A Vol.10 (1969) p.34 para.12; B v. Austria, Judgment of 28th March 1990, Ser.A Vol.175 (1990) p.16 para.42; Letellier v. France, 14 EHRR (1992) 83 p.101 para.35; Kemmache v. France, Judgment of 27th November 1991, Ser.A Vol.218 (1992) p.23 para.45; Toth v. Austria, 14 EHRR (1992) 551 pp.574-75 para.67; Clooth v. Belgium, Judgment of 12th December 1991, Ser.A Vol.225 (1992) p.14 para.36; Tomasi v. France, Judgment of 27th August 1992, Ser.A Vol.241-A (1993) p.35 para.84; Herczegfalvy v. Austria, Judgment of 24th September 1992, Ser.A Vol.244 (1993) p.23 para.71;; Yagci And Sargin v. Turkey, 20 EHRR (1995) 505 pp.525-26 para.50; W v. Switzerland, 17 EHRR (1994) 60 p.79 para.30; Mansur v. Turkey, 20 EHRR (1995) 535 pp.551-552 para.52; Van der Tang v. Spain, 22 EHRR (1996) 363 p.382 para.55; Scott v. Spain, 24 EHRR (1997) 391 p.414 para.74. Also see, the Case of Muller v. France, Judgment of 17th June 1997, Report of Judgments and Decisions, No.32 (1997-II) 374 pp.388-391 para.33-49.

[576] See, Wemhoff Case, ibid.. *c.f.* in, *inter alia*, Matznetter Case, ibid.; Tomasi v. France, ibid., p.53 para.102; Toth v. Austria, ibid.,p.577 para.77; W v. Switzerland, ibid., p.83 para.42; Van der Tang v. Spain, ibid., p.385 para.72.

[577] See, Stogmuller Case, Judgment of 10th November 1969, Ser.A Vol.9 (1969) pp.39-40 para.4. *c.f.* in, *inter alia*, Yagci And Sargin v. Turkey, 20 EHRR (1995) 505 pp.525-26 para.50; Van der Tang v. Spain, 22 EHRR (1996) 363 p.382 para.55; Scott v. Spain, 24 EHRR (1997) 391 p.414 para.74. Also see, the Case of Muller v. France, Judgment of 17th June 1997, Report of Judgments and Decisions, No.32 (1997-II) 374 p.388 para.35.

[578] See, Wemhoff Case, Judgment of 27th June 1968, Ser.A Vol.7 (1968) p.24 para.12; Neumeister v. Austria (No.1), 1 EHRR (1979/80) 91 p.126 para.5. *c.f.* in, among other, Letellier v. France, 14 EHRR (1992) 83 p.101 para.35; Kemmache v. France, 14 EHRR (1992) 520 p.542 para.45; Herczegfalvy v. Austria, 15 EHRR (1993) 437 p.481 para.71; W v. Switzerland, 17 EHRR (1994) 60 p.79 para.30; Van der Tang v. Spain, ibid.; Scott v. Spain, ibid..

[579] See, Kemmache v. France, 14 EHRR (1992) 520 p.543 para.50. *c.f.* in, *inter alia*, Tomasi v. France, 15 EHRR (1993) 1 p.50 para.89; Yagci And Sargin v. Turkey, 20 EHRR (1995) 505 p.527 para.53; Van der Tang v. Spain, 22 EHRR (1996) 363 p.384 para.63; Scott v. Spain, 24 EHRR (1997) 391 p.415 para.78.

[580] However, a suspect must not be kept in continued detention solely on the danger that he/she will abscond and thereby avoid appearing for trial, if it is possible to obtain from him/her guarantees which

observed in the Stogmuller Case[581], a mere possibility of a suspect's leaving the country is not sufficient for the authorities to invoke this ground to prolong detention. There must be a whole set of circumstances, particularly, the heavy sentence to be expected or the accused person's particular distaste of detention, or the lack of well-established ties in the country, which give reasons to suppose that the consequences and hazards of flight will seem to him/her to be a lesser evil than continued imprisonment. In addition, other relevant factors, such as the suspect's character, morals, home, occupation, assets, family ties[582], his/her connections with other countries that would indicate the potentiality of flight[583], the threat of further charges[584], etc. may also be taken into consideration in assessing the danger of flight.

Nevertheless, it must be noted that, as the Court pointed out in the Case of Muller v. France[585], the danger of flight cannot be gauged solely on the basis of the severity of the sentence risked, albeit an important factor among many others which may either confirm or dispel the existence of such a danger. Moreover, when the punishment, in case of conviction, is imprisonment, the significance of its severity as an element influencing the suspect to flight, diminishes in parallel with the prolongations in pre-trial detention if under the domestic law the period already spent in custody is reduced from the sentence of imprisonment.[586] Furthermore, very little weight is given to the risk of flight as a factor requiring continued detention if the suspect has voluntarily returned to the country where the proceedings are taking place.[587]

Under Art.5(3) the continuation of pre-trial detention may also be ordered if there exists a danger of the person concerned, in case of release, committing further crimes.[588] Although this danger need not relate to any particular or identifiable offence, it must, among other conditions, be a plausible one. In addition, the

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will ensure such appearance. (See, Wemhoff V. Germany, 1 EHRR (1979/80) 55 p.77 para.15. *c.f.* in Letellier v. France, 14 EHRR (1992) 83 p.103 para.46

[581] Judgment of 10th November 1969, Ser.A Vol.9 (1969) pp.43-44 para.15.

[582] See, Neumeister Case, Judgment of 27th June 1968, Ser.A Vol.8 p.39 para.10.

[583] See, Matznetter Case, Judgment of 10th November 1969, Ser.A Vol.10 (1969) p.32 para.8. Also see, W v. Switzerland, 17 EHRR (1994) 60 pp.80-81 para.33; Van der Tang v. Spain, 22 EHRR (1996) 363 pp.384-85 para.64-67.

[584] See, App.No.8788/79, X v. Switzerland, 21 D & R (1981) 241 p.245 para.5.

[585] Judgment of 17th June 1997, Report of Judgments and Decisions, No.32 (1997-II) 374 pp.389-390 para.41-43.

[586] See, Wemhoff Case, Judgment of 27th June 1968, Ser.A Vol.7 (1968) p.25 para.14; Neumeister Case, Judgment of 27th June 1968, Ser.A Vol.8 p.37 para.6. Also see, B v. Austria, 13 EHRR (1991) 20 p.30 para.44; W v. Switzerland, 17 EHRR (1994) 60 pp.80-81 para.30.

[587] See, the Opinion of the Commission, Yagci and Sargin v. Turkey, 20 EHRR (1995) 505 p.515 at p.518 para.75.

[588] See, Matznetter Case, Judgment of 10th November 1969, Ser.A Vol.10 (1969) pp.32-33 para.9; Toth v. Austria, 14 EHRR (1992) 551 p.575 para.69; Clooth v. Belgium, 14 EHRR (1992) 717 p.734 para.38-40.

continuation of detention must be a measure appropriate, in the light of the circumstances of the case and in particular the past history of the personality of the person concerned.[589] Nonetheless, a reference to a person's antecedents *per se* is not sufficient to justify refusing release on the danger of reoffending.[590]

According to Strasbourg jurisprudence the risk of interfering with justice is another reason for the continuation of pre-trial detention. Thus, a person arrested on the suspicion of committing an offence may be continued in detention if there exists a danger of him/her, when set at large, suppressing or destroying evidence[591], or manufacturing or fabricating false evidence[592], or colluding with co-accused[593], or exerting pressure on the witnesses or/and co-accused[594]. However, in the normal course of events the risk of interfering with justice diminishes with the passing of time as the related investigations and proceedings are progressed[595]. Also, according to the Commission, the risk of collusion is reduced if the suspect has made a confession[596].

In addition to the grounds mentioned above, the requirement to preserve public order may also justify the continuation of pre-trial detention. As the Court accepted in Letellier v. France[597], by reason of their particular gravity and public reaction to them, certain offences may give rise to public disquiet capable of justifying pre-trial detention, at least for a time. However, this ground can be regarded as relevant and sufficient only provided that it is based on facts capable of showing that the accused person's release would actually disturb public order. Also, detention will continue to be legitimate only if public order remains actually threatened; its continuation cannot be used to anticipate a custodial sentence[598].

If there are no relevant and sufficient public interest reasons justifying the continuation of detention or, if such reasons which existed at the beginning became unreasonable or inapplicable at any time during the pre-trial detention, the judge or the

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[589] See, Clooth v. Belgium, ibid..
[590] See, Muller v. France, Judgment of 17th June 1997, Report of Judgments and Decisions, No.32 (1997-II) 374 p.390 para.44.
[591] See, *inter alia*, Wemhoff Case, Judgment of 27th June 1968, Ser.A Vol.7 (1968) p.25 para.14.
[592] See, *inter alia*, W v. Switzerland, 17 EHRR (1994) 60 pp.81-82 para.36.
[593] See, *inter alia*, Muller v. France, Judgment of 17th June 1997, Report of Judgments and Decisions, No.32 (1997-II) 374 p.389 para.39-40.
[594] See, *inter alia*, Kemmache v. France, 14 EHRR (1992) 520 pp.544-545 para.53-54; Tomasi v. France, 15 EHRR (1993) 1 p.52 para.53-54.
[595] See, Kemmache v. France, ibid.. *c.f.* in Muller v. France, Report of Judgments and Decisions, No.32 (1997-II) 374 p.389 para.40. Also see, W v. Switzerland, 17 EHRR (1994) 60 p.81 para.35.
[596] Referred from Muller v France, ibid. p.389 para.39.
[597] 14 EHRR (1992) 83 p.104 para.51. *c.f.* in Kemmache v. France, 14 EHRR (1992) 520 p.544 para.52; Tomasi v. France, 15 EHRR (1993) 1 p.50 para.91.
[598] Ibid..

judicial officer must, in conformity with Art.5(3), order the release of the suspect. The release, nevertheless, as long as a reasonable suspicion is focused on the person, may be conditioned by guarantees to appear for a trial. These guarantees may take the form of financial bails or securities[599]. Depending on the circumstances, even an act like surrendering the suspect's passport may be regarded as sufficient for this purpose[600].

According to the Court in Neumeister v. Austria (No.1)[601] the guarantee to be furnished by a detained person, in the case of financial bail, must not be assessed solely in relation to the amount of the loss imputed to him/her. Because, the guarantee provided for by Art.5(3) is designed to ensure, not the reparation of loss, but rather the presence of the accused at the hearing. As the Court said the amount must be

> "...assessed principally by reference to him, his assets and his relationship with the person who are to provide the security, in other words to the degree of confidence that is possible that the prospect of loss of the security or the action against the guarantors in case of his nonappearance at the trial will act as a sufficient deterrent to dispel any wish on his part to abscond."

On the other hand if the authorities are prepared to release the accused on bail, he/she must provide information about his/her resources. Failing this he/she cannot complain of his/her continuing detention on the basis that the amount fixed for bail is excessive.[602] This, nevertheless, does not exempt the authorities of their responsibility to fix an appropriate bail, if necessary through their own investigations about the suspect's assets and resources, and release the person without unreasonable delay. As the Commission has said, "...the authorities must take as much care in fixing appropriate bail as in deciding whether or not the accused person's continued detention is indispensable."[603]

Finally, the Strasbourg organs have as yet not set a ceiling limit for the length of pre-trial detention, notwithstanding the stipulation in Art.5(3) that such detention must not continue beyond a 'reasonable time'. According to the Court in the Stogmuller Case[604], it is not feasible to translate this concept into a fixed number of days, weeks, months or years or into various periods depending on the seriousness of the offence.[605] As the Art.5(3) jurisprudence reveals, the reasonableness of the length of pre-trial

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[599] See, Wemhoff Case, Judgment of 27th June 1968, Ser.A Vol.7 (1968) p.25 para.15.
[600] See, Stogmuller v. Austria, 1 EHRR (1979/80) 155 pp.194-195 para.15.
[601] 1 EHRR (1979/80) 91 p.129 para.14.
[602] See the Report adopted by the Commission on 5th December 1979, App.No.8224/78, Bonnechaux v. Switzerland, 18 D & R (1980) 100.
[603] See the Report adopted by the Commission on 11th December 1980, App.No.8339/78, Schertenleib v. Switzerland, 23 D & R (1981) 137 p.196 para.171.
[604] Judgment of 10th November 1969, Ser.A Vol.9 (1969) pp.39-40 para.4.
[605] For example, in W v. Switzerland [17 EHRR (1994) 60] a pre-trial detention that lasted for four years and three days did not breach Art.5(3). The Commission in Ferrari Bravo v. Italy came to the same conclusion in connection with a pre-trial detention that lasted for four years and eleven months.

detention has to be assessed, not in abstracto[606], but in each case according to its special features.[607] The factors which may be taken into consideration for this purpose are extremely diverse. Hence the possibility of wide differences in opinion in the assessment of the reasonableness of a given detention[608]. However, a breach of Art.5(3) cannot be alleged on the prolongation of pre-trial detention beyond a reasonable time if the responsibility for such prolongation is attributable to the detained person him/herself. As has been noted rightly, he/she must bear the consequences which his/her attitude may cause for the progress of the investigation[609].

2.3.2.2 - Article 5 Paragraph 4.

According to paragraph 4 of Article 5 of the European Convention on Human Rights "(e)veryone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful". This provision, which is inspired by the concept of habeas corpus in English law[610], has, unlike paragraph 3, which only imposes certain obligations upon the authorities to ensure that arrests and detentions in connection with criminal proceedings are kept within the rule of law, unequivocally assured the detained persons a right to recourse to a court to speedily determine the lawfulness of the measure to which they are being subjected. Although the initiative here must be taken by the detainee, the authorities are obliged to provide everything that is necessary for such judicial determinations. Thus, while making available to the detained persons under the domestic law a right of access to a court, the authorities of the contracting states must, in order to conform with the Convention, make sure that that court, in determining the lawfulness of the detention, follows, as required by paragraph 4 of Art.5, a procedure which has a judicial character and gives to the individual concerned guarantees appropriate to the kind of deprivation of liberty in question.

The object of Art.5(4) is to ensure that deprivations of liberty of person, particularly the deprivations based on decisions taken by administrative bodies, are subject to

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[606] See, W v. Switzerland, ibid. p.79 para.30.
[607] See, Scott v. Spain, 24 EHRR (1997) 391 p.414 para.74. *c.f.* from Wemhoff Case, judgment of 27th June 1968, Ser.A Vol.7 (1968) p.24 para.10. Also see, Stefan Trechsel, 'The Right to Liberty and Security of Person - Article 5 of the European Convention on Human Rights in Strasbourg Case Law', 1 *HRLJ* (1980) 88 p.132.
[608] See, Wemhoff Case, ibid..
[609] See, *inter alia*, W v. Switzerland, 17 EHRR (1994) 60 pp.83-84 para.42.
[610] See, *inter alia*, the Opinion of the Commission, the Case of Navarra v. France, Ser.A Vol.273-B (1994) 30 p.34 para.44.

judicial scrutiny.[611] This objective is deemed to have been fulfilled in cases where the detention has been effected as a result of a decision made by a court at the close of a judicial proceeding which provided the person concerned all the procedural guarantees contained in Art.5(4). In such cases, as the European Court has observed, the judicial supervision contemplated by paragraph 4 is "incorporated" in the decision to detain.[612] Accordingly, as far as criminal proceedings are concerned, Art.5(4) would become superfluous if the procedure followed by the "judge" or "other judicial officer", before whom the detainee is produced in compliance with paragraph 3, conforms to the required, comparatively stricter procedural standards of the earlier mentioned article.[613] However, if the procedure before the judicial officer does not assure the required procedural safeguards the authorities could not be dispensed from making available to the person concerned a second authority which does provide all the guarantees of Art.5(4).[614]

On the other hand, it must be submitted here that, although the procedure followed for bringing a person before the "competent legal authority" in accordance with paragraph 3, taken in conjunction with paragraph 1 (c), may have a certain incidence on compliance with paragraph 4, the guarantees assured by the latter paragraph are of a different order from, and additional to, that provided by paragraph 3. As such, the provisions of the two paragraphs must be given effect immediately after a person is arrested and apply concurrently.[615] However, for the purpose of the Convention it is sufficient that a remedy consistent with Art.5(4) exists in domestic law. The authorities are not obliged to advise or inform the detainees of the available remedy.

Albeit the court referred to in paragraph 4 does not necessarily have to be a court of law of the classic kind integrated within the standard judicial machinery of the country[616], it must, as in paragraph 3, be independent both of the executive and the parties to the case. In K v. Austria the Commission found a breach of Art.5(4) since the decision to detain the Applicant was taken by a judge who had already overruled the Applicant's request to remain silent and had imposed a fine upon him. Under these

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[611] See, the Case of Engel and Others, Judgment of 8th June 1976, Ser.A Vol.22 (1977) p.32 para.77.
[612] See, *inter alia*, the Case of Engel and Others, ibid.; the Case of De Jong, Baljet and Van den Brink, Judgment of 22nd May 1984, Ser.A Vol.77 (1984) pp.25-26 para.57; the Opinion of the Commission of Human Rights, the Case of K v. Austria, Ser.A Vol.255 B (1993) 34 p.41 para.63.
[613] See, the Case of De Jong, Baljet and Van den Brink, Judgment of 22nd May 1984, Ser.A Vol.77 (1984) pp.25-26 para.57.
[614] See, the Case of De Wilde, Ooms and Versyp, Judgment of 18th June 1971, Ser.A Vol.12 (1971) pp.40-41 para.76.
[615] Ibid., pp.25-26 para.57.
[616] See, Weeks Case, Judgment of 2nd March 1987, Ser.A Vol.114 (1987) p.30 para.61.

circumstances, in the Commission's opinion, the Applicant could hardly be expected to regard that judge as being unprejudiced and impartial.[617]

In addition to being independent and impartial, a court under Art.5(4) must also be able to order the release of the detainee if it finds the deprivation of personal liberty to be unlawful.[618] The notion of "lawfulness" here has the same meaning as in paragraph 1. Accordingly, the arrested or detained person is entitled to a review of the "lawfulness" of his/her detention in the light of not only the substantive and procedural requirements of domestic law but also the text of the Convention, the general principles embodied therein and the aim of the restrictions permitted by paragraph 1.[619]

As mentioned earlier a court under paragraph 4 must provide the detained persons the guarantees of judicial procedure which must always be appropriate to the kind of deprivation of personal liberty in question. This means, for example, if the detention, in terms of its length, resembles a penal sanction, the procedure followed must provide the person concerned guarantees not inferior to those applicable in a normal criminal trial. Also, in order to conform with paragraph 4, the proceedings must be of adversarial nature guaranteeing the equality of arms.[620]

A violation of this last mentioned requirement was recorded in the Lamy Case[621] when it was revealed that the defence was not permitted to inspect the documents in the Applicants case file, which in the context was essential to challenging the lawfulness of the detention, while the prosecution had the opportunity to present their submissions in full knowledge of the contents of the documents in question[622]. In Toth v. Austria[623] the Court again found a breach of the principle of equality of arms. In that case the prosecuting authorities were allowed to be present at the hearings whereas the Applicant was not. Hence the procedure adopted, in the Courts opinion, was not truly adversarial.

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[617] The Opinion of the Commission, Ser.A Vol.255 B (1993) 34 p.41 para.63.
[618] See, the Opinion of the European Commission of Human Rights, the Case of E v. Norway, Ser.A Vol.181 A (1990) 30 p.32 para.127.
[619] See, *inter alia*, the Case of Brogan and Others, Judgment of 29th November 1988, Ser.A Vol.145 B (1989) p.34 para.65; the Case of Herczegfalvy v. Austria, Judgment of 24th September 1992, Ser.A Vol.244 (1993) p.24 para.75; the Case of Navarra v. France, Judgment of 23rd November 1993, Ser.A Vol.273-B (1994) pp.27-28 para.26.
[620] See, *inter alia*, Toth v. Austria, 14 EHRR (1992) 551 p.579 para.84. *c.f.* from Sanchez-Reisse v. Switzerland, 9 EHRR (1987/88) 71 - this case concerned extradition proceedings.
[621] Judgment of 30th March 1989, Ser.A Vol.151 (1989) pp.16-17 para.29. *c.f.* from, Sanchez-Reisse Case, Judgment of 21st October 1986, Ser.A Vol.107 (1987) p.19 para.51.
[622] Also see, App.No.14545/89, Byloos v. Belgium, 69 D & R (1991) 252.
[623] 14 EHRR (1992) 551 p.579 para.84.

With regard to the question whether the hearings should be oral or not, the Commission and the Court have come to slightly different conclusions. While in the Commission's view it is not inconsistent with the requirements of Art.5(4) to have proceedings before a court exclusively in writing[624], according to the Court the case law of the Convention shows a tendency to acknowledge the need for a hearing before a judicial authority.[625] Such a hearing may particularly become essential if the detainee's appearance can be regarded as a means of ensuring respect for equality of arms.[626] Nevertheless, it must be noted that, Art.5(4) does not necessarily require the hearing to be a public one. In so far as all the other conditions are fulfilled, the fact that an investigating judge in a civil law system makes a decision as to the lawfulness of the deprivation of liberty privately from his/her office would not itself breach Art.5(4).[627]

In order to conform with the requirements of Art.5(4) the detained person must be given sufficient time and adequate facilities to prepare his/her defence.[628] If needed he/she must also be provided with legal assistance at the hearing, as well as before it.[629] Such assistance must be free of charge if that is necessary to effectively uphold the principle of equality of arms and make the proceedings truly adversarial. On the other hand, as the Commission observed in the Sanchez-Reisse Case, albeit according to Art.5(4) it is "'...essential that the person concerned should have access to a court and the opportunity to be heard either in person, or, where necessary, through some form of representation, failing which he will not have been afforded the fundamental guarantees of procedure applied in matters of deprivation of liberty'...", the judicial proceedings referred to in that paragraph "...need not always be attended by the same guarantees as those required under Article 6(1) for...criminal litigation...".[630]

Art.5(4) is designed to make sure that a person who is deprived of his/her liberty should have a remedy in order that a speedy release can be obtained if his/her detention is judged unlawful. This in other words means that the guarantees of

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[624] See, App.No.8485/79, X v. Switzerland, 22 D & R (1981) 131.
[625] See, the Case of Sanchez-Reisse v. Switzerland, 9 EHRR (1987/88) 71 pp.83-84 para.51.
[626] See, Kampanis v. Greece, 21 EHRR (1996) 43 pp.59-63 para.46-58.
[627] See, Bezicheri Case, Judgment of 25th October 1989, Ser.A Vol.164 (1990) p.10 para.20.
[628] See the Opinion of the Commission, the Case of K v. Austria, Ser.A Vol.255-B (1993) 34 p.41 para.64. Also see, App.No.8098/77, X v. Federal Republic of Germany, 16 D & R (1979) 111; the Opinion of the Commission, Sanchez-Reisse Case, Ser.A Vol.107 (1987) 27 p.29 para.90.
[629] See the Opinion of the Commission, Woukam Moudefo Case, Ser.A Vol.141-B (1989) 37 pp.41-43 para.85-92.
[630] See, the Opinion of the Commission, Sanchez-Reisse Case, Ser.A Vol.107 (1987) 27 p.29 para.89.

Art.5(4) are available to only those who are actually deprived of personal liberty.[631] Those who are at large cannot invoke Art.5(4) to obtain a declaration that a previous detention was unlawful.[632] Nonetheless, an absconding suspect, as can be inferred from the Court's observations in a case not relating to criminal process, may avail him/herself of the guarantees of Art.5(4) since such a person could technically be regarded as a person deprived of liberty and hence must be able to bring proceedings to review judicially the lawfulness of the orders issued against his/her liberty of person.[633]

Although paragraph 4 of Art.5 purports to ensure the speedy restoration of personal liberty of unlawfully detained persons, it does not in any way oblige the authorities of the Contracting States to set up a second level of jurisdiction, i.e. for example, an appeal procedure, for the examination of applications for release from pre-trial detention. However, a State Party which institutes such a second level of jurisdiction must in principle accord to the detainees the same guarantees on appeal as at first instance.[634] Moreover, albeit the remedy envisaged by paragraph 4 is required to be provided only at one level of domestic jurisdiction, it (the remedy) must be continued at reasonable intervals so as to leave the prospect open for the detainee to institute proceedings repeatedly to challenge the lawfulness of his/her continued detention.[635] For, as the time passes by the circumstances which warranted the refusal of bail may change in favour of the detainee's release and thus may render the continued detention unlawful. With regard to the length of intervals at which the remedy must be continued the Court in Bezicheri Case said: "...the nature of detention on remand calls for shorter intervals, there is an assumption in the Convention that detention on remand is to be of strictly limited duration (Article 5 paragraph 3), because its *raison d' etre* is essentially related to the requirement of an investigation which is to be conducted with expedition."[636] In that case an interval of one month was found to be not unreasonable.

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[631] However see Frede Castberg, *The European Convention on Human Rights*, edited by Torkel Opsahl and Thomas Ouchterlony (New York: Oceana Publications Inc. 1974), p.103.
[632] See, App.No.10230/82, X v. Sweden, 32 D & R (1983) 303.
[633] See, Van der Leer Case, Judgment of 21st February 1990, Ser.A Vol.170-A (1990) p.14 para.35.
[634] See, *inter alia*, Toth v Austria, 14 EHRR (1992) 551 p.579 para.84. *c.f.* in the Case of Navarra v. France, Judgment of 23rd November 1993, Ser.A Vol.273-B (1994) p.28 para.28.
[635] See, *inter alia*, Bezicheri Case, Judgment of 25th October 1989, Ser.A Vol.164 (1990) p.10 para.20; the Case of Herczegfalvy v. Austria , Judgment of 24th September 1992, Ser.A Vol.244 (1993) p.24 para.75; the Case of Navarra v. France, Judgment of 23rd November 1993, Ser.A Vol.273-B (1994) pp.27-28 para.26.
[636] Bezicheri Case, ibid., pp.10-11 para.21.

Art.5(4) entitles the detainees to a speedy remedy. As such a breach of the Convention's obligations could be alleged even when the detention is lawful and the conditions of all the other relevant paragraphs are complied with, if the remedy envisaged by Art.5(4) is not provided in accordance with the requirements of the notion of "speediness". It must, however, be noted that the requirements of speediness here are less strict than the requirements of promptness under Art.5(3) .[637] Moreover, according to the Court, the phrase "speedily" cannot be defined in the abstract. It must - as with the "reasonable time" stipulation in Art.5(3) - be determined in the light of the circumstances of each case.[638]

In order to conform with the requirements of "speediness" the authorities must firstly ensure that the guarantees contemplated in paragraph 4 are available at the detainees' disposal from soon after the deprivation of their personal liberty. In De Jong, Baljet and Van den Brink Case[639] the Court found a violation of Art.5(4) since the Applicants had to wait in custody for seven, eleven and six days respectively before being able to avail themselves of the remedy envisaged by that Article. Further, in cases where the procedural guarantees of paragraph 4 are not "incorporated" in Art.5(3) proceedings, the authorities must not wait until the judicial officer in accordance with the latter mentioned Article makes a decision about the lawfulness of the deprivation of liberty to make available to the detainees the remedy assured by the earlier mentioned Article.

Secondly, once Art.5(4) proceedings are instituted, the notion of speediness requires a decision as to the lawfulness of the deprivation of liberty to be reached without unreasonable delay. In this connection it must be noted that the Convention requires the Contracting States to organise their legal system so as to enable the courts to comply with its various requirements.[640] In the Bezicheri Case the fact that the investigating judge suffered from an excessive workload at the material time was not accepted as a valid reason for not complying with the requirements of speediness.[641]

The time period that would be taken into consideration in assessing the speediness usually begins with the submission of an application for release to the appropriate court. However, if the domestic law requires the recourse to an administrative body as

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[637] See, the Case of Brogan and Others, Judgment of 29th November 1988, Ser.A Vol.145-B (1989), p.32 para.59.
[638] See, Sanchez-Reisse Case, Judgment of 21st October 1986, Ser.A Vol.107 (1987) p.20 para.55.
[639] The Judgment of 22nd May 1984, Ser.A Vol.77 (1984) pp.26-27 para.58-59.
[640] See, Bezicheri Case, Judgment of 25th October 1989, Ser.A Vol.164 (1990) p.12 para.25.
[641] Ibid., para.25-26.

a pre-requisite for such submission, the time period would begin as soon as the relevant administrative body becomes seized of the matter.[642] Unless the domestic law provides for a system of appeal, this time period ends with the pronouncement of the decision as to the lawfulness of the deprivation of liberty by the appropriate court. Where an appeal procedure is available the end of the time period extends up to the date of the delivery of the decision on appeal.[643]

In Egue v. France[644] the Commission found a decision reached within five days of the submission of an application to release from detention to be sufficient for the purpose of Art.5(4). On the other hand, the Court in Bezicheri Case[645] regarded a period of approximately five and a half months, running from the lodging of the application to its dismissal, as incompatible with the notion of speediness. Nevertheless, a breach of Art.5(4) would not occur if the responsibility for the prolongation lies with the detainee. Thus in Navarra v. France[646], a delay of almost seven months did not fall foul of the Convention since the Applicant was partly responsible for it. Moreover, a breach of Art.5(4) on the ground of unreasonable delay could hardly be alleged if the detainee, instead of making use of a remedy at his/her disposal which conforms with the requirements of paragraph 4, of his/her own volition chooses to recourse to a more time consuming remedy available in domestic law.

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The Five South-Asian Constitutions under consideration as well as the European Convention on Human Rights have guaranteed to everyone arrested and detained, whether under a warrant or without warrant, that there will be judicial scrutiny to determine the lawfulness of the measure to which they are being subjected. In South-Asia this has been guaranteed by obliging the authorities to produce everyone arrested and detained before a judicial officer within twenty-four hours of arrest.[647] The European Convention, on the other hand, without prescribing any specific time period, requires everyone arrested or detained to be brought *promptly* before a judge or other officer authorised by law to exercise judicial power. Thus, while in the South-Asian

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[642] See, the Opinion of the Commission, Sanchez-Reisse Case, Ser.A Vol.107 (1987) 27 p.31 para.98-100.

[643] See, *inter alia*, the Case of Navarra v. France, Judgment of 23rd November 1993, Ser.A Vol.273-B (1994) p.28 para.28; the Opinion of the Commission, Letellier v. France, 14 EHRR (1992) 83 p.94 at p.98 para.68.

[644] App.No.11256/84, 57 D & R (1988) 47 pp.70-71 para.4.

[645] Judgment of 25th October 1989, Ser.A Vol.164 (1990) pp.11-12 para.22-26.

[646] Judgment of 23rd November 1993, Ser.A Vol.273-B (1994) pp.28-29 para.29.

[647] Note, in Sri Lanka production before a judge must be made without unnecessary delay, and in any case not later than twenty-four hours from arrest.

countries detention would become unlawful unless the arrestee is produced before a judicial officer within the first twenty-fours of arrest, as the Strasbourg jurisprudence stands at present, in ordinary criminal cases a delay of up to four days in bringing someone arrested before a judicial officer would not breach the guarantee of Art.5(3) of the European Convention on Human Rights.

Further, unlike under the European Convention, in the South-Asian countries the authorities are obliged to produce the arrested persons before the judicial officer *nearest* to the place where the arrest concerned was effected. Furthermore, the Constitutions of all the five South-Asian countries expressly guarantee that detention will continue after such production only if the judicial officer orders so. Albeit such a guarantee cannot be found in Paragraph 3 of Art.5 of the European Convention, detention cannot be continued if the judge or the officer before whom the arrested person is produced concluded that the deprivation of personal liberty of the arrestee is unlawful or orders the arrestee to be released from custody.[648]

Art.5(3) of the European Convention requires everyone arrested and/or detained to be tried within a reasonable time or to be released pending trial. Thus, it is guaranteed, firstly, that no person arrested will be deprived of personal liberty beyond the time period absolutely required by the circumstances involved, and secondly, that in cases where the circumstances involved do not warrant release from custody the person arrested would be tried within a reasonable time. Also, according to Strasbourg jurisprudence an accused person in custody is entitled to have his/her case given priority and conducted with particular expedition. Non of the South-Asian Constitutions has secured such guarantees to arrested persons. However, since the Constitutional guarantee of personal liberty in India, Pakistan, Bangladesh and Nepal includes the concept of due process, the lawfulness of any unreasonably prolonged detentions is open to challenge.[649]

Although the guarantee of Art.5(3) of the European Convention cannot be availed of by a person not in custody, the mere fact that he/she is at large does not deprive a person, who is the subject of a criminal investigation, of his/her right to be brought to

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[648] In the South-Asian countries detention after production before the nearest judge is unlawful unless the judge concerned has expressly ordered for continued detention. Therefore, at the least in theory, neither the fact that the arrest and detention was found, at the end of the judge's inquiry, to be compatible with law or the fact that release of the arrested person was not ordered does not *ipso facto* make continued detention lawful. (Note- the fact that the arrest and detention is compatible with law does not necessarily mean that continued detention is required).

[649] For the situation in India, see, Hussainara Khatoon v. Home Secretary, State of Bihar, 1979 Cr.L.J. 1134.

trial and tried within a reasonable time. Any conclusion to the contrary would be repugnant to the Convention's objectives and in particular to the scheme of Art.6(1). This last mentioned Article guarantees to everyone accused of a criminal offence a right to a fair trial within a reasonable time.[650] Under the pertinent jurisprudence a person is regarded as an accused from the moment suspicion of committing an offence is focused on him/her. There is no express guarantee under any of the South-Asian Constitutions that a person, whether in custody or at large, who is suspected of committing an offence would be brought to trial within a reasonable time. However, any inordinate delays in bringing to trial, or conducting the trial might be detrimental to the suspect's right to a fair trial which has been recognised either directly or indirectly by all the South-Asian Constitutions.[651]

Subject to certain restrictions, the Criminal Procedure Codes of India[652], Pakistan[653] and Bangladesh[654] have given the discretion to relevant police officers and courts to grant bail to persons who have been arrested in connection with non-bailable offences. In Sri Lanka that discretion has been given to the Magistrates and the Judges of the High Court.[655] Nonetheless, in all four countries persons who have not been granted bail and held in detention become entitled to be released from custody from the moment the reasonable suspicion which warranted continued detention disappears. Presumably, therefore, continuation of detention as long as the reasonable suspicion exists should not be unlawful in these countries. On the other hand, although under Art.5 paragraph 1 (c) of the European Convention the persistence of a reasonable suspicion that the person arrested has committed an offence is a condition *sine qua non* for the validity of the continued detention, after a certain lapse of time, such suspicion alone becomes incapable of justifying any further interferences with the right to liberty of person. In order to justify prolonged detentions Art.5(3) requires the existence of relevant, sufficient and genuine public interest reasons that necessitate serious departures from the rules of respect for individual liberty and presumption of innocence. However, it must be noted that in India, Pakistan and Bangladesh, continued detention may become unlawful unless the discretion to grant bail has been exercised in a just, fair and non-arbitrary manner.[656]

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[650] Art.6(1) of the European Convention on Human Rights is examined in detail in the next chapter under the right to a fair trial.

[651] The components of the right to a fair trial as guaranteed by the Constitutions of the South-Asian countries are discussed in detail in the next chapter.

[652] See, sec.437(1) of the Code of Criminal Procedure, Act II of 1974.

[653] See, sec.497(1) of the Code of Criminal procedure, Act V of 1898.

[654] See, sec.497(1) of the Code of Criminal procedure, Act V of 1898.

[655] See, Sec.403(1) of the Code of Criminal Procedure Act, No.15 of 1979.

[656] Note, the grounds for continued detention or for refusal of bail which have been laid down by the courts of these countries [see, *inter alia*, R.V.Kelkar, *Lectures on Criminal Procedure*, 2nd Edition,

Under the European Convention as well as the Constitutions of India, Sri Lanka, Pakistan and Bangladesh, it is unlawful to order continued detention unless the arrested person is actually produced before the judicial officer. However, unlike the corresponding provisions of the Constitutions of the four South-Asian countries mentioned above, Art.5(3) of the European Convention does not necessarily require the judge or other officer to follow a judicial procedure before ordering detention. On the other hand, if the procedure followed in ordering continued detention by the judge or other officer before whom the arrestee is produced in accordance with Art.5(3) is not judicial, Art5(4) of the European Convention obliges the authorities of the Contracting States to make available a remedy that follows a judicial procedure to which the arrestee could recourse to if he/she wants speedily and judicially to determine the lawfulness of his/her deprivation of personal liberty.[657]

Art.5(4), which is inspired by the English law concept of habeas corpus, is primarily designed to ensure that in civil law countries of the Member States to the European Convention whose system of administration of justice is mainly inquisitorial, the arrested persons are able to initiate proceedings of adversarial nature, guaranteeing equality of arms, before a court to challenge the lawfulness of the deprivation of their personal liberty. However, this guarantee becomes superfluous if the procedure followed by the "judge" or "other judicial officer", before whom the arrestee is produced in compliance with Art.5(3), conforms to the required, comparatively stricter procedural standards of Art.5(4). There is no provision similar to Art.5(4) of the European Convention in the fundamental rights chapters of any of the South-Asian Constitutions under consideration. But for several reasons whether that absence really affect the arrested persons' rights is some what doubtful. Firstly, all these countries belong to the common law family and have adversarial system of administration of justice. Secondly, when arrested persons are produced before them, the judicial officers in these countries are constitutionally bound to act in a judicial manner in determining the lawfulness of the deprivation of personal liberty. Thirdly, in all five

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revised by Dr.K.N.Chandrasekharan Pillai, (Lucknow: Eastern Book Company, 1990), p pp.122-123; Fakhar-ud-Din Siddiqui, *The Code of Criminal Procedure*(Lahore: Punjab Law House 1996), pp.490-564] are to some extent similar to the grounds recognised by the Strasbourg organs.

[657] Note, unlike under Art.5(3), which imposes an unconditional positive obligation upon the authorities of the Contracting States to bring everyone arrested before a judge or other officer authorised by law to exercise judicial power, in the case of Art.5(4) initiative to challenge the lawfulness of deprivation of personal liberty must be taken by the arrestee.

countries the Constitutions have recognised the competence of their higher courts to issue the writ of habeas corpus.[658]

2.4 - Right of Victims of Unlawful Arrest to Compensation.

The detrimental affects of unlawful arrest are indubitable. Making available to the victims of such arrests an enforceable right to compensation can have a twofold effect on the protection of personal liberty of the individuals. Firstly, any compensation awarded could contribute towards redressing the damages caused to the victim. Secondly, a right to compensation may also work as a deterrent against the arbitrary and capricious use of the power to arrest.

2.4.1 - South-Asia.

None of the South-Asian Constitutions involved in this research has expressly guaranteed to the victims of unlawful arrests, made in the course of criminal proceedings, a right to compensation. However, Art.126(4) of the Constitution of Sri Lanka has empowered the Supreme Court to grant such relief or make such directions as it may deem just and equitable in the circumstances in respect of any violation of fundamental rights. Relying on this provision, the Supreme Court of Sri Lanka has consistently awarded compensation for the victims of violations of fundamental rights.[659] While compensation has mainly been awarded against the State, in a few cases the officers of the executive who were responsible for the violations as well as individuals who have no executive status but either were proved to be guilty of impropriety or have connived with the officers of the executive in committing wrongful acts violative of fundamental rights have also been ordered to pay compensation to the victims.[660] According to Abdul Cader J. the purpose of such orders made in the form of a penalty against the officers of the executive is to deter them from any future abuse of fundamental rights of the citizens.[661]

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[658] See, Art.32 & 226(1) of the Constitution of India, Art.141 of the Constitution of Sri Lanka, Art.199(1)(b)(i) of the Constitution of Pakistan, Art.102(2)(b)(i) of the Constitution of Bangladesh, Art.88(2) of the Constitution of Nepal.

[659] In Premalal De Silva v. Inspector Rodrigo and Others [(1991) 2 Sri.L.R. 307], which concerned, *inter alia*, illegal arrest and detention, the Court awarded compensation to the legal representatives of the Petitioner as the Petitioner had disappeared

[660] See, for example, Mohamed Faiz v. Attorney General and others, S.C. App.No.89/91, S.C Minutes 19/11/93.

[661] See, the Judgement of Abdul Cader J. in Daramitipola Ratanasara Thero v. P.Udugampola and others, [FRD (2) 364 p.365 at p.372. For a different view see the judgement of Amerasinghe J. in the case of Saman v. Leeladasa, (1989) 1 Sri.L.R. 1 p.27.

In India too, the Supreme Court has acknowledged its competence to award compensation to the victims of violations of fundamental rights, even though there is no express provision in the Constitution entitling such victims for compensation.[662] According to the Court a claim for compensation against violation of fundamental rights is a public law remedy, based on the concept of strict liability, available to the victims.[663] This remedy is distinct from, and in addition to the remedies available in private law for damages for the tort resulted from the contravention of the fundamental right.

2.4.2 - Europe.

As paragraph 5 of Art.5 of the European Convention on Human Rights has provided "(e)veryone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation". On the one hand this provision has obliged the Contracting States to make provisions at national level so as to compensate everyone who has been the victim of an unlawful deprivation of liberty of person. On the other hand by virtue of this provision any suspect who suffered damages as a result of a breach of Art.5 is able to claim compensation as of a right from national authorities, even if the breach is not found in municipal law.[664]

Paragraph 5 deals with arrests or detentions that are effected in contravention of Art.5. On the first sight this seems to suggest that compensation is feasible only if the arrest or detention is found to be contrary to any one or more paragraphs of Art.5, i.e. paragraphs 1 to 4. It must, however, be noted that the phrase "lawfulness" mentioned in each sub-paragraph of Art.5(1), which exhaustively lays down the exclusive instances where a person could be arrested or detained, refers in the first place to the domestic law, both substantive and procedural.[665] Thus, it may reasonably be argued that any violation of domestic law applicable to arrests and detentions, even in an area not covered by any of the paragraphs of Art.5, would constitute a breach of Art.5 requiring compensation under paragraph 5. For example, albeit Art.5 does not expressly govern the modalities of arrest, any violation in this connection of municipal

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[662] See, *inter alia*, Rudul Shah v. State of Bihar, (1983) 3 SCR 508; M.C.Metha and another v. Union of India and others, A.I.R. 1987 SC 1086. Also see, Sec.358 of the Code of Criminal Procedure, Act II of 1974.

[663] See, *inter alia*, Smt. Nilabati Behera v. State of Orissa and others, A.I.R. 1993 SC 1960.

[664] See, the Case of Brogan and Others, Judgment of 29th November 1988, Ser.A Vol.145-B (1989), p.35 para.66-67.

[665] See, supra 2.1.2

law occurred while executing an arrest might constitute a breach of the Convention's obligations arising under Art.5.

Nonetheless, in order to claim compensation the person concerned may under domestic law be required to show the damages he/she suffered as a result of the alleged breach. The Convention does not prohibit the Contracting States from making the award of compensation dependent upon the claimant's ability to prove damages. It must be noted, as the Court observed in a case not relating to criminal process, that the status of "victim" may exist even where there is no damage, but there can be no question of "compensation" where there is no pecuniary or non-pecuniary damage to compensate.[666]

The right guaranteed by paragraph 5 entitles the victims of unlawful arrests or detentions to an enforceable claim for compensation before the domestic courts.[667] As such a breach of Art.5(5) would be found if the domestic law does not contain provisions to compensate damages resulted from infringes of paragraphs 1 to 4 of Art.5.[668] In this connection, as the Commission has observed, even if paragraph 5 may be of broader scope than mere financial compensation, the termination of deprivation of liberty would not be regarded as a sufficient compensation for the purpose of the paragraph under consideration since a right to release in case of unlawful detention is secured by Art.5(4).[669]

Breach of one or more paragraphs from paragraph 1-4 of Art.5 is a condition *sine qua non* for bringing an application under paragraph 5. For the purpose of the Convention such a breach must be found either by the domestic courts - directly if the Convention is incorporated into domestic law or, if not, indirectly by finding a breach in the applicable municipal laws, inclusive of both substantive and procedural laws - or by the Convention's organs. If the victim is denied compensation for the breach he/she may bring an application under paragraph 5 after exhaustion of domestic remedies in this respect. In this connection it must be noted that someone who has obtained compensation on the basis of the facts about which he/she complains to the

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[666] See, Wassinik Case, Judgment of 27th September 1990, Ser.A Vol.185-A (1991) p.14 para.38. Also see, App.No.6821/74, Huber v. Austria, 6 D & R (1977) 65.

[667] See, the Case of Brogan and Others, Judgment of 29th November 1988, Ser.A Vol.145-B (1989) p.35 para.67.

[668] Ibid..

[669] See, App.No.11256/84, Egue v. France, 57 D & R (1988) 47 p.66-67 para.1. *c.f.* from App.No.10868/84, Woukam Moudefo v. France, 51 D & R (1987) 62 p.79-81 para.1.

Convention's organs does not lose the status of "victim" when the national authorities have not recognised or provided redress for the alleged violation.[670]

Where a joint violation of paragraph 5 and another paragraph of Art.5 is alleged before the Convention's organs in the same application, all claims will be examined in one proceeding. If a violation of one of the paragraphs from 1 to 4 is found the Strasbourg authorities would not require the applicant to go back and exhaust domestic remedies to see if compensation at national level is feasible. Instead, the defendant State will be asked to show, with a sufficient degree of certainty, the existence of a remedy compatible with what is envisaged by paragraph 5, and to comply with it. In joint applications a breach would be found only if the defendant State failed to show this and the right guaranteed in paragraph 5 is not ensured at national level.[671]

[670] See, App.No.10868/84, Woukam Moudefo v. France, 51 D & R (1987) 62 p.79-80 para.1a. Also see, App.No.11256/84, Egue v. France, 57 D & R (1988) 47 p.66-67 para.1.

[671] See, Ciulla Case, Judgement of 22nd February 1989, Ser.A Vol.148 (1989) p.18-19 para.43-45; the Case of Brogan and Others, Judgment of 29th November 1988, Ser.A Vol.145-B (1989) p.35 para.66-67.

Part II

Chapter 3 - Right to a Fair Trial.

Indisputably, the right to a fair trial is the most important feature of a civilised system of criminal justice administration. It makes a crucial difference between rule by law and rule by caprice. All the other guarantees pertinent to criminal process would be of little or no use if the degree of the accused person's criminal liability is determined without a fair trial.

A fair trial contains some elements which are fundamental to the administration of justice. These include, *inter alia*, reasonable notification of the charge(s) or of proceedings to the parties whose liberty or property would be effected by those charge(s) or proceedings, opportunity for all parties to be heard by an independent and impartial tribunal established by law, equality of arms, i.e., the opportunity of presenting one's case under conditions which do not place him/her at a substantial disadvantage vis-à-vis his/her opponent, right of defendants not to be compelled to testify against themselves or to confess guilt, i.e., right against self incrimination, right to examine witnesses both against and in favour of one self, the commencement and completion of proceedings without undue delay, right to counsel and legal aid, etc. Commenting on fair trial the US Supreme Court once said

> "(a) fair trial in a fair tribunal is a basic requirement of due process. Fairness of-course requires an absence of actual bias in the trial of cases. But our system of law has always endeavoured to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome...'every procedure which would offer a possible temptation to the average man as a judge...not to hold the balance nice, clear and true between the state and the accused, denies the latter due process of law.'...'justice must justify the appearance of justice.'"[672]

[672] In re Murchison 349 US 133 at 136.

3.1 - South-Asia.

3.1.1 - India.

The Constitution of India does not expressly guarantee to accused persons a right to a fair trial. Under the present constitutional framework, elements of the right to a fair trial in criminal proceedings have to be deduced from Art.20(3), Art.21 and Art.22(1) of the Constitution. The fundamental rights guaranteed by these Articles have incorporated some of the constituent elements of the general notion of a "fair trial". Art.20(3) embodies the rule against self incrimination. As the Article provides "(n)o person accused of an offence shall be compelled to be a witness against himself." Art.21, as mentioned earlier in 2.1.1.1, requires every deprivation of life or personal liberty to be in accordance with procedure established by law. According to Art.22(1) no person arrested must be denied the right to consult and to be defended by a legal practitioner of his/her choice.

It must also be noted that the criminal trials in India are based on the Anglo-American adversary system which adopts the accusatorial method. Under this system of administration of justice, a court that determines the criminal liability of an accused person acts more or less like an umpire and does not take a side or show favour or disfavour to any party. A fair, adequate and equal opportunity is given to the parties involved in the trial to present their respective cases before the court. After having a proper perspective of the issue(s) in question, the court pronounces a verdict in favour of the party who has succeeded in proving its case according to law.[673]

Further, the law contemplated by Art.21 of the Constitution of India is not confined to statutory or written laws.[674] Although not mentioned specifically, the doctrine of natural justice, which is a legacy India has inherited from English common law, is an integral part of the guarantee of Art.21.[675] Thus, in order for a penal punishment amounting to deprivation of life or personal liberty of a convict to be lawful, it is necessary not only that a valid law must have authorised such punishment, but also the proceedings which ordered such punishment must have been conducted in consonance with both, the principles of natural justice as well as the rules of applicable enacted laws.[676] In other words, since criminal trials, as well as quasi-judicial inquiries which

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[673] See, R.V.Kelkar, *Lectures on Criminal Procedure*, 2nd Edition, revised by Dr.K.N.Chandrasekharan Pillai, (Lucknow: Eastern Book Company, 1990), p.134.

[674] See, *supra*, Chapter 2.1.1.1.

[675] See, D.D.Basu, *Human Rights in Constitutional Law* (New Delhi: Prentice-Hall of India Pvt. Ltd. 1994), p.416.

[676] Note, the requirements of natural justice apply to penal as well as disciplinary proceedings (see, Basu, ibid., pp.413-414).

adjudicate the culpability of offenders, might at the end impose sentences amounting to deprivation of life[677] or personal liberty[678], those trials and quasi-judicial inquiries must, in addition to being in accordance with the applicable statutory laws, which as far as criminal proceedings are concerned are mainly the law laid down in the Criminal Procedure Code, Act II of 1974[679], comply with the requirements of "natural justice", i.e., they must be just, fair and reasonable, in order not to offend Art.21.[680]

No trial would be just, fair and reasonable unless the accused person is given an opportunity to present his/her case properly and effectively.[681] To make a proper and effective defence, firstly, the person concerned must know what offence he/she stands accused of.[682] It is a right of every accused to be informed with certainty and accuracy the exact nature of the charge made against him/her.[683] Otherwise the accused will not

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[677] Within the context of Art.21 of the Indian Constitution, the meaning of the word "life" is not restricted to mere physical survival. According to the Supreme Court "(i)t includes the right to live with human dignity and all that goes along with it, namely, the bare necessaries of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings." (See, Francis v. Administrator, A.I.R. 1981 S.C. 746 para.7). Also, as the Court held in the case of Board of Trustees of the Port of Bombay v. Dilip Kumar Raghavendranath Nadkarni [(1983) 1 S.C.C 124 pp.132-134 para.13], "(t)he expression 'life' does not merely connote animal existence or a continued drudgery through life. The expression 'life' has much wider meaning. Where therefore the outcome of a departmental inquiry is likely to adversely affect reputation or livelihood of a person, some of the finer graces of human civilisation which make life worth living would be jeopardised and the same can be put in jeopardy only by law which inheres fair procedures." Also see, B.L.Hansaria, *Right to Life and Liberty Under the Constitution* (Bombay: N.M.Tripathi Private Ltd. 1993).

[678] As the Indian Supreme Court held in the case of Maneka Gandhi v. Union of India [(1978) 2 S.C.R. 621 at p.670], "(t)he expression 'personal liberty' in Article 21 is of the widest amplitude and it covers a variety of rights which go to constitute the personal liberty of man and some of them have been raised to the status of distinct fundamental rights and given additional protection under Article 19." Also see, S.N.Sharma, *Personal Liberty Under Indian Constitution* (New Delhi: Deep & Deep Publications 1991).

[679] However, a violation of a procedural law might not attract Art.21 of the Constitution unless a failure of justice has transpired as a result of such violation - See, R.R.Chari v. State, 1959 Cr.L.J. 268 pp.273-274 para.22; Lakshmandas Chaganlal Bhatia and others v. The State, 1968 Cr.L.J. 1584 pp.1597-98 para.35. Also see, Chapter XXXV Sec.460- Sec.466 of the Code of Criminal Procedure, Act II of 1974.

[680] See, Madheshwardhari Singh v. State, A.I.R. 1986 (Patna) 324.

[681] See, Sunil Kumar Ghosh v. Ajit Kumar Das, 1969 Cr.L.J. 1234.

[682] Note, this requirement is different from that of Art.22(1). The requirement under Art.22(1) is to inform only the grounds of arrest to the arrested persons (see, *supra*, 2.2.1.1).

[683] See, Sec.228, 240(2), 246(2) & 251 of the Code of Criminal Procedure, Act II of 1974. As provided in these provisions it is mandatory to read out the charge framed to the accused and explain it to him/her. A mere reading of the charge is not sufficient compliance with the requirements of the Criminal Procedure Code. It must be explained sufficiently to enable the accused to understand the nature of the charge [See, Ratanlal Ranchhoddas and Dhirajlal Keshavlal Thakore, *Ratanlal & Dhirajlal's The Code of Criminal Procedure*, 15th edition (New Delhi: Wadhwa and Co. 1997), p.389]. As enjoined by Sec.211 of the Code, (i) every charge must state the offence with which the accused is charged, (ii) if the law which creates the offence gives it any specific name; the offence may be described in the charge by that name only, (iii) if the law which creates the offence does not give it any specific name, so much of the definition of the offence must be stated as to give the accused notice of the matter with which he/she is charged, (iv) the law and the section of the law against which the offence is said to have been committed must be mentioned in the charge, (v) if the accused, having been

have a clear idea about what he/she is called upon to defend or answer.[684] However, the trial would be vitiated for not properly informing the charge(s) to the accused, only if that defect has actually prejudiced, or caused substantial injustice to, the accused person.[685]

A proper and effective defence cannot also be made unless the accused person is given adequate time and facilities for preparation.[686] In this connection several provisions of the Criminal Procedure Code, Act II of 1974, have ensured that the accused gets free of charge copies of documents necessary to prepare his/her defence. As provided by Sec.207 of the Code;

> In any case where the proceeding has been instituted on a police report, the Magistrate shall without delay furnish to the accused, free of cost, a copy of each of the following;
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> (i) the police report;
> (ii) the first information report recorded under section 154;
> (iii) the statements recorded under sub-section (3) of section 161 of all persons whom the prosecution proposes to examine as its witnesses, excluding therefrom any part in regard to which a request for such exclusion has been made by the police officer under sub-section (6) of section 173;
> (iv) the confessions and statements; if any recorded under section 164;
> (v) any other document or relevant extract thereof forwarded to the Magistrate with the police report under sub-section (5) of section 173:
> Provided that the Magistrate may, after perusing any such part of a statement as is referred to in clause (iii) and considering the reasons given by the police officer for the request, direct that a copy of that part of the statement or of such portion thereof as the Magistrate thinks proper, shall be furnished to the accused:
> Provided further that if the Magistrate is satisfied that any document referred to in clause (v) is voluminous, he shall, instead of furnishing the accused with a copy thereof, direct that he will only be allowed to inspect it either personally or through pleader in Court.

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previously convicted of any offence, is liable by reason of such previous conviction, to enhanced punishment, or to punishment of a different kind, for a subsequent offence, and it is intended to prove such previous conviction for the purpose of affecting the punishment which the court may think fit to award for the subsequent offence, the fact, date and place of the previous conviction shall be stated in the charge; and if such statement has been omitted, the court may add it at any time before sentence is passed. The charge must further contain such particulars as to the time and place of the alleged offence, and the person (if any) against whom, or the thing (if any) in respect of which, it was committed, as are reasonably sufficient to give the accused notice of the matter with which he is charged (see, Sec.212). However, if the nature of the case is such that the particulars mentioned in Sec.211 & 212 do not give the accused sufficient notice of the matter with which he/she is charged, then the charge must also contained such particulars of the manner in which the alleged offence was committed as will be sufficient for that purpose (see, Sec.213).

[684] See, Chittaranjan Das, A.I.R. 1963 SC 1696; S Chinnaswamy, 1973 Cr.L.J. 358.

[685] See, Sec.215 & 464 of the Code of Criminal Procedure, Act II of 1974. As provided by Sec.215, "No error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars, shall be regarded at any stage of the case as material, unless the accused was in fact misled by such error or omission, and it has occasioned a failure of justice." Also see, Ashok Kumar v. State (Delhi Administration), 1993 Cr.L.J. 3629 (Delhi).

[686] See, Chellapan, 1971 Cr.L.J 1021. Also see, Bashira, 1968 Cr.L.J. 1495.

In connection with cases triable by court of session, it is the duty of the Magistrate issuing process to furnish without delay to the accused, free of cost, a copy of, (i) the statements recorded under Sec.200 or 202 of the Criminal Procedure Code, from the persons examined by the Magistrate, (ii) the statements and confessions, if any, recorded under Sec.161 or 164 of the Code and, (iii) any document produced before the Magistrate on which the prosecution proposes to rely.[687] Non-supply of these materials may result in the judgement being set aside by the higher courts on appeal.[688]

Further, according to Sec.273 of the Code, "(e)xcept as otherwise expressly provided, all evidence taken in the course of the trial or other proceeding shall be taken in the presence of the accused, or, when his personal attendance is dispensed with, in the presence of his pleader."[689] Failure to examine witnesses in the presence of the accused renders a trial void.[690] This requirement may, however, be ignored if the accused person's own conduct makes the recording of evidence in his/her presence impossible.[691] In cases where evidence is given, while the accused is present in court in person, in a language other than that which he/she understands, it is the duty of the court to get such evidence interpreted in open court in a language understood by the accused.[692] However, when documents are put in for the purpose of formal proof, they are interpreted only on the discretion of the Court.[693]

In order for the trial to be fair, the accused person must be given an opportunity to cross examine the prosecution witnesses who testified in support of the charge.[694] It is

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[687] See, Sec.208 of the Code of Criminal Procedure, Act II of 1974. Also see, Sec.238.

[688] See, Gayadhar v. State, 1985 Cr.L.J. NOC 108 (Orissa).

[689] Note, as provided by Sec.253 of the Criminal Procedure Code, conviction on plea of guilty in absence of accused in petty cases is not unlawful.

[690] See, B.Singh v. State of Orissa, 1990 Cr.L.J. 397 (Orissa).

[691] See, State v. Anant Singh, 1972 Cr.L.J 1327. Also see, Sec.299 and 317 of the Code of Criminal Procedure, Act II of 1974. According to Sec.299 "If it is proved that an accused person has absconded, and that there is no immediate prospect of arresting him, the Court competent to try or commit for trial, such person for the offence complained of may, in his absence, examine the witnesses (if any) produced on behalf of the prosecution, and record their depositions and any such deposition may, on the arrest of such person, be given in evidence against him on the inquiry into, or trial for, the offence with which he is charged, if the deponent is dead or incapable of giving evidence or cannot be found or his presence cannot be procured without an amount of delay, expense or inconvenience which, under the circumstances of the case, would be unreasonable."

[692] See, Sec.279(1) of the Code of Criminal Procedure, Act II of 1974. As provided by Sec.318 of the Code, "If the accused, though not of unsound mind, cannot be made to understand the proceedings, the Court may proceed with the inquiry or trial, and, in the case of a Court other than a High Court, if such proceedings result in a conviction, the proceedings shall be forwarded to the High Court with a report of the circumstances of the case, and the High Court shall pass thereon such order as it thinks fit."

[693] See, Sec.279(3) of the Code of Criminal Procedure, Act II of 1974.

[694] See, Sukanraj v. State of Rajasthan, 1967 Cr.L.J.1702. Also see, Sec.246(4) & (5). [However, as provided by Sec.232 of the Criminal Procedure Code, "If after taking the evidence for the prosecution,

also essential that the accused be allowed to produce evidence and call witnesses to refute the prosecution's case.[695] As provided by Sec.233(3) of the Criminal Procedure Code, Act II of 1974, if the accused applies for the issue of any process for compelling the attendance of any witness or the production of any document or thing, the judge shall issue such process unless he/she considers, for reasons to be recorded, that such application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice.[696] An application to issue process on behalf of an accused person to compel a witness to attend proceedings *may* also be refused if the accused had, prior to entering upon his/her defence, either cross-examined or had the opportunity of cross examining the witness in question.[697] Nonetheless, refusal to issue process would vitiate the trial if such refusal has no legal justification or has denied the accused person a fair trial.[698]

When an offender is brought to trial it is commonplace under most, if not all, legal systems for the State as the prosecutor, utilising its might and the resources at its disposal, to employ competent prosecutors to obtain a conviction. In order to ensure a fair trial, the adversary system, under the principle of equality of arms, which is an intrinsic component of that system of administration of justice, requires that the accused too be given an opportunity to present and conduct his/her defence through a legal practitioner of his/her choice. In India this has been guaranteed to the accused persons by Art.22(1) of the Constitution and Sec.303 of the Code of Criminal Procedure, Act II of 1974.

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examining the accused and hearing the prosecution and the defence on the point, the Judge considers that there is no evidence that the accused committed the offence, the Judge shall record an order of acquittal." (Also see, Sec.239 & Sec. 245)]

[695] As enjoined by Sec.233(1) of the Criminal Procedure Code "Where the accused is not acquitted under section 232 (see previous *footnote*), he shall be called upon to enter on his defence and adduce any evidence he may have in support thereof." [Also see, Sec.243(1) & 247] Further, it must be noted that, according to Sec.315 of the Code "Any person accused of an offence before a Criminal Court shall be a competent witness for the defence and may give evidence on oath in disproof of the charges made against him or any person charged together with him at the same trial..." However, the accused must not be called as a witness except on his own request in writing. Also, the accused person's failure to give evidence must not be made the subject of any comment by any of the parties or the court or give rise any presumption against him/herself or any person charged together with him at the same trial.

[696] Also see, Sec.243(2) of the Code of Criminal Procedure, Act II of 1974; T.N.Janardhanan Pillai v. State of Kerala, 1992 Cr.L.J. 436 (Kerala). According to Sec.312 of the Code "Subject to any rules made by the State Government, any Criminal Court may, if it thinks fit, order payment, on the part of government, of the reasonable expenses of any...witness attending for the purpose of any inquiry, trial or other proceeding before such Court under this Code."

[697] See, Ratanlal Ranchhoddas and Dhirajlal Keshavlal Thakore, *Ratanlal & Dhirajlal's The Code of Criminal Procedure*, 15th edition (New Delhi: Wadhwa and Co. 1997), p.401.

[698] See, Habeeb Mohammad v. State of Hyderabad, 1954 Cr.L.J. 338.

The right to be defended by a legal practitioner of one's choice, guaranteed by Art.22(1) of the Constitution, accrues from the moment the person concerned is arrested, and continues until the conviction or acquittal becomes final.[699] According to the Indian Supreme Court, a failure of justice transpires if the legal practitioner, chosen by the accused, is not allowed to conduct the defence or, if the defence is represented, against the wishes of the accused person, by a legal practitioner not chosen by him/her (the accused).[700] A fair hearing would also be denied if the trial is conducted after court hours leaving no opportunity for the accused to avail of legal assistance.[701]

If for reasons of poverty or indigence a legal practitioner cannot be engaged for the defence, the State is constitutionally bound[702] to provided the accused legal aid free of charge.[703] As Medgavkar J. of the Bombay High Court observed in *In re* Llewelyn,

> "(i)f the ends of justice is justice and the spirit of justice is fairness, then each side should have equal opportunity to prepare its own case, and to lay its evidence fully, freely and fairly before the court. This necessarily involves preparation. Such preparation is far more effective from the point of view of justice, if it is made with the aid of skilled legal advice - advice so valuable that in the gravest of criminal trials when life or death hangs in the balance, the very state which undertakes the prosecution of the prisoner also provides him, if poor, with such legal assistance."[704]

It is the duty of the Magistrate or the Sessions Judge to inform the accused that if he/she is unable to engage the services of a legal practitioner on account of poverty or indigence, he/she is entitled to obtain free legal services at the cost of the State.[705] The courts of appeal or revision have the power to interfere "...if it is found that the accused was so handicapped for want of legal aid that the proceedings against him may be said to amount to negation of a fair trial."[706] Also, when counsel is appointed, attention should be paid to appoint competent advocates, capable of handling the issues involved in the case.[707]

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[699] See, Tika v. State of Uttar Pradesh, 1975 Cr.L.J. 337.
[700] See, Tara Singh v. State, A.I.R. 1951 S.C. 441.
[701] See, Saiyad Afjal Hussain v. State, 1962 (2) Cr.L.J. 496.
[702] According to Art.39(4) of the Constitution, which appears in Part IV under the heading "Directive Principles of State Policy", "The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or 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."
[703] See, *inter alia*, Khatri and others (II) v. State of Bihar and others, (1981) S.C.C. 627; Hussainara Khatoon (IV) v. Home Secretary, State of Bihar, 1979 Cr.L.J. 1045.
[704] A.I.R. 1926 Bombay 551.
[705] See, Khatri and others (II) v. State of Bihar and others, (1981) S.C.C. 627 p.632 para.6; Suk Das V. Union Territory of Arunachal Pradesh, (1986) 2 S.C.C. 401.
[706] See, R.V.Kelkar, *Lectures on Criminal Procedure*, 2nd Edition, revised by Dr.K.N.Chandrasekharan Pillai, (Lucknow: Eastern Book Company, 1990), p.138.
[707] See the judgement of Krishna Iyre J. in R.M.Wasawa, A.I.R. 1974 S.C. 1143.

The right to be defended by a legal practitioner includes the right to free interaction between the accused and the chosen or appointed counsel. The accused, whether in custody or at large, should be able to communicate with his/her counsel, for the purpose of preparing the defence, in private without being monitored by the authorities.[708] Further, in order to serve the cause of justice, the counsel must be given sufficient time and, documents necessary to prepare the defence.[709] If the evidence is given in a language other than the language of the court, and not understood by the defence counsel, such evidence should be interpreted in the language of the court.[710] Also, a trial would be vitiated if it is continued without the presence of the accused person's counsel, who is absent due to sickness.[711]

Under the adversary system of administration of justice, which adopt the accusatorial method, the onus of proving the case lies with the prosecution. In India this has been recognised by the Evidence Act of 1872. According to Sec.102 of the said Act "(t)he burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."[712] As the Allahabad High Court held in Parbhoo v. Emperor,

> "...a criminal case is a 'proceeding' within the meaning of S.102, and that the burden of proof in such a proceeding lies on the prosecution, for the simple reason that if neither the prosecution nor the defence leads evidence the accused is entitled to be acquitted."[713]

The degree of proof required to establish criminal responsibility is the traditional "proof beyond reasonable doubt".[714]

Moreover, according to the Indian Supreme Court, every criminal trial begins with the presumption of innocence in favour of the accused.[715] He/she does not have to prove his/her innocence[716] and is entitled to remain silent until the prosecution proves

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[708] See, *In re* Llewelyn, A.I.R. 1926 Bombay 551.
[709] See, the judgement of Krishna Iyre J. in R.M.Wasawa, A.I.R. 1974 S.C. 1143; Bashira, 1968 Cr.L.J. 1495.
[710] See, Sec.279(2) of the Code of Criminal Procedure, Act II of 1974.
[711] See, Raj Kishore Rabidas v. State, A.I.R. 1969 Calcutta 321.
[712] According to Sec.101 "Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist."
[713] (28) A.I.R. 1941 Allahabad 402 at p.408.
[714] See, Monir, *Principles and digest of the Law of Evidence* (The University Book Agency 1967), p.259.
[715] See, T.H.Hussain v. M.P.Mondkar, A.I.R. 1958 S.C. 376 p.379 para.6. According to the Assam and Nagland High Court, the presumption of innocence must continue even in an appeal against acquittal (see, Sate of Assam v. Bhabananda Sarma and others, 1972 Cr.L.J. 1552).
[716] See, Sate of Assam v. Bhabananda Sarma and others, ibid..

his/her guilt beyond reasonable doubt by legally admissible evidence.[717] The silence of the accused can never be substituted for proof by the prosecution.[718]

Further, as guaranteed by Art.20(3) of the Indian Constitution "(n)o person accused of an offence shall be compelled to be a witness against himself."[719] The prohibitive sweep of this Article does not commence in court only, but goes back to the police investigation.[720] As the Allahabad High Court observed in Subedra v. State[721], the guarantee against self-incrimination becomes available to a person as soon as he/she is named as an accused either in a first information report or in a complaint instituted against him/her in court.[722] If there is any mode of pressure, subtle or crude, mental or physical, direct or indirect, but sufficiently substantial, applied for obtaining information from an accused strongly suggestive of guilt, it becomes a compelled testimony, violative of Art.20(3).[723] However, the mere questioning of an accused person by a police officer, resulting in a voluntary statement which may ultimately turn out to be incriminatory, does not amount to compulsion.[724] Similarly, the mere fact that the accused was in police custody at the time when the statement in question was made, *per se*, is not sufficient to conclude that the accused was compelled to make the statement.[725] Also, legal perils following upon refusal to answer, or answer truthfully, cannot be regarded as compulsion within the meaning of Art.20(3).[726]

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[717] See, Bala Majhl v. State, 1953 Orissa 163. Also see, Nandini Satpathy v. P.L.Dani, A.I.R. 1978 S.C. 1025.

[718] See, Zwinglee Aril v. State, 1954 S.C.R. 15.

[719] Also see, Sec.24, 25 and 26 of the Indian Evidence Act, 1872. As stipulated by Sec.24 "A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the court to have been caused by any inducement, threat or promise, having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the court, to give the accused person grounds, which would appear to him reasonable, for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him." As provided by Sec.25 "No confession made to a police officer, shall be proved as against a person accused of any offence." According to Sec.26 "No confession made by any person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person."

[720] See, Nandini Satpathy v. P.L.Dani, A.I.R. 1978 S.C. 1025 p.1046 para.53.

[721] 1957 Cr.L.J. 698.

[722] However, a person becomes an accused from the moment suspicion of committing an offence is focused on him/her - see, Amin v. State, 1958 Cr.L.J. 462. Therefore, presumably, even if the name of the person is not specifically mentioned in the First Information Report (FIR), he/she can still claim the privilege against self-incrimination if he/she is taken into custody and interrogated with regard to offence mentioned in the FIR. Also see, V.G.Ramachandran, *Fundamental Rights and Constitutional Remedies*, Vol.II, second edition (Lucknow: Eastern Book Company 1982), p.144.

[723] See, Nandini Satpathy v. P.L.Dani, A.I.R. 1978 S.C. 1025 p.1046 para.53.

[724] See, Matthew Zacharia v. State of Kerala, A.I.R. 1960 S.C. 1808.

[725] See, State of Bombay v. Kathi Kalu Oghad, 1961 (2) Cr.L.J. 856.

[726] See, Nandini Satpathy v. P.L.Dani, A.I.R. 1978 S.C. 1025 p.1046 para.53.

Although the phrase "to be a witness" ordinarily means giving oral evidence, for the purpose of Art.20(3) its meaning has been extended to include also testimonies given in writing by persons accused of an offence.[727] Thus, the right against self-incrimination would be violated if the accused person is compelled to produce any document that is reasonably likely to support the prosecution's case.[728] However, the prohibition in Art.20(3) is no bar to the production as evidence an incriminatory document or a thing[729] recovered by police on search of the accused person's premises. For, in such an instance the incriminatory document or thing is not obtained by applying pressure on the accused but recovered in the course of a search.[730]

The guarantee of Art.20(3) is offended only if the accused person is compelled to be a witness against him/herself, i.e., only if he/she is compelled to disclose something within his/her personal knowledge[731], or if he/she is compelled to produce a document or a thing, as evidence in court or otherwise which establishes his/her guilt.[732] Thus, compelling an accused person to give evidence such as a specimen handwriting or an impression of his/her finger, palm or foot is not violative of the right against self-incrimination. For, by themselves, these impressions or the handwritings do not incriminate the accused person. They will incriminate him/her only if on comparison of these evidence with certain other impressions or handwritings, identity between the two sets is established.[733]

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[727] See, Sharma v. Satish Chandra, 1954 Cr.L.J. 865; State of Bombay v. Kathi Kalu Oghad, 1961 (2) Cr.L.J. 856. Also see, U.N.Gupta, *Constitutional Protection of Personal Liberty in India - A Comparative and Case Law Study* (University of Allahabad 1970), p.216.

[728] See, Swarnalingam Chettiar v. Assistant Labour Inspector, 1955 Cr.L.J. 1602; Babu Ram v. State, 1961 (2) Cr.L.J. 55. However, this prohibition does not apply to public documents in possession of the accused - see, Madan Lal Jojodia v. State, 1958 Cr.L.J. 59.

[729] Note, compelling an accused to produce a thing in his/her possession amounts to a violation of Art.20(3) if the thing to be produced will, by it self, be sufficient to establish his/her guilt. [see, *Chaudhari & Chaturvedi's Law of Fundamental Rights*, 4th edition [Allahabad: Law Publishers (India) Pvt. Ltd. 1995], p.651].

[730] See, Sharma v. Satish Chandra, 1954 Cr.L.J. 865.

[731] Also see Sec.316 of the Code of Criminal Procedure, Act II of 1974.

[732] According to Sec.27 of the Indian Evidence Act, 1872 "...when any fact is deposed to as discovered in consequence of information received from a person accused of any offence in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved." Nevertheless, after the enactment of the Constitution, only voluntary confessional statements, leading to discoveries of facts, are admissible under Sec.27 of the Evidence Act., for otherwise, in effect the accused would be compelled, contrary to the provisions of Art.20(3) of the Constitution to be a witness against him/herself [see, Mudugula v. Jermaiah, A.I.R. 1957 Andhra Pradesh 611; Amin v. The State, A.I.R. 1958 Allahabad 293; Amrut v. State of Bombay, A.I.R. 1960 Bombay 488; State of Gujrat v. Shyamlal Mohanlal Choksi, A.I.R. 1965 S.C. 1251; Public Prosecutor (Andhra Pradesh) v. Haribabu, 1975(1) Andhra Weekly Report 304]. Also see, *A.S.Chaudhari's Constitutional Rights & Limitations*, second edition, edited by Dr.D.S.Arora, [Allahabad: Law Book Company (P) Ltd. (1990)], p.221.

[733] See, State of Bombay v. Kathi Kalu Oghad, 1961 (2) Cr.L.J. 856 p.867 para.32-33.

As U.N.Gupta has noted, "(n)o system of criminal justice, with all the constitutional guarantees can by any means be worthwhile unless it also guarantees a system of impartial tribunals and courts which may be called upon to punish the offenders of law."[734] The Indian Constitution has made provisions to have a Supreme Court of India and a High Courts for each of the State.[735] According to Art.124(2) every Judge of the Supreme Court is appointed by the President after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose. However, in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of India must always be consulted. The High Courts of States consist of a Chief Justice and such other Judges as the President may from time to time deem it necessary to appoint.[736] As provided by Art.217 of the Constitution,

> "(e)very judge of a High Court shall be appointed by the President...after consultation with the Chief Justice of India, the Governor of the State, and, in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court..."

A Judge of the Supreme Court or the High Court must not be removed from his/her office except by an order of the President passed after an address by each house of Parliament supported by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting has been presented to the President in the same session for such removal on the ground of proved misbehaviour or incapacity.[737] Although these provision, together with other provisions pertinent to the functioning of the higher courts, have to a certain degree made the judiciary independent of the executive, there is no express requirement under the Constitution of India for the courts or the tribunals or the judicial officers to act impartially when determining the criminal responsibility of accused persons. Nor does the Constitution expressly guarantee to the accused persons a right to be tried by an impartial and independent tribunal or court established by law.[738]

Nevertheless, several provisions of the Indian Criminal Procedure Code, Act II of 1974 have ensured that the courts and judicial officers subject to the Code's regime

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[734] See, U.N.Gupta, *Constitutional Protection of Personal Liberty in India - A Comparative and Case Law Study* (University of Allahabad 1970), p.217.
[735] See, Art.124 and Art.214.
[736] See, Art.216 of the Constitution.
[737] See, Art.124(2) and Art.217, ibid..
[738] Note, as required by Art.50 of the Constitution, which appears in Part IV under the heading "Directive Principles of State Policy", the State must take steps to separate judiciary from the executive in the public service of the State. However, since this Article appears outside of the Bill of Rights, it cannot be invoked before the Supreme Court or the High Courts under the fundamental rights jurisdiction.

function independently and impartially in determining criminal matters.[739] As provided in the Code, at the lower level of the criminal process, judicial matters are dealt by Judicial and Metropolitan Magistrates who are appointed by, and function under the direct supervision and control of, the High Court in each State.[740] Although according to Sec.9 of the Code the power to establish Court of Session for every session is vested in the State Government, the power of appointment of Sessions Judges, the power to make arrangements for disposal of urgent applications before a Court of Sessions when the office of the Sessions Judge is vacant and the power to notify places where Court of Sessions will ordinarily hold their sittings, are all vested in the High Court.[741] It is deemed that this separation of powers will ensure that no Judge or Magistrate, judicial or metropolitan, would be influenced or controlled, directly or indirectly, by, or would be in direct administrative subordination to anyone connected with, the executive which usually is the prosecuting party in criminal cases.[742]

According to Sec.479 of the Code no Judge or Magistrate should, except with the permission of the Court to which an appeal lies from his/her court, try or commit for trial any case to or in which he/she is a party, or personally interested. Also, no Judge or Magistrate should hear an appeal from any judgement or order passed or made by him/herself.[743] However, a Judge or a Magistrate should not be deemed to be a party to, or personally interested in, any case by reason only that he/she is concerned therein in a public capacity, or by reason only that he/she has viewed the place in which an offence is alleged to have been committed or any other place in which any other transaction material to the case is alleged to have occurred and made an inquiry in connection with the case.[744] Further, as provided by Sec.352 of the Code, no Magistrate or Judge of a criminal court, other than a Judge of a High Court, should try

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[739] Any violation of these provisions during a penal hearing may give rise to a breach of the right guaranteed by Art.21 of the Constitution if a punishment amounting to deprivation of personal liberty is imposed upon the offender at the end of such hearing.

[740] See, Sec.11-19 of the Code of Criminal Procedure, Act II of 1974. As provided by Art.214 of the Constitution each State will have a High Court which stands at the head of the judiciary in the State. Every High Court consists of a Chief Justice and such other Judges as the President may, from time to time, deem it necessary to appoint (Art.216). The Judges of the High Courts are appointed by the President after consultation with the Chief-Justice of India and the Governor of the State concerned. In case of appointment of a Judge other than the Chief Justice he/she may consult even the Chief Justice of the High Court concerned.

[741] See, Ratanlal Ranchhoddas and Dhirajlal Keshavlal Thakore, *Ratanlal & Dhirajlal's The Code of Criminal Procedure*, 15th edition (New Delhi: Wadhwa and Co. 1997), p.21.

[742] See, R.V.Kelkar, *Lectures on Criminal Procedure*, 2nd Edition, revised by Dr.K.N.Chandrasekharan Pillai, (Lucknow: Eastern Book Company, 1990), p.135.

[743] See, Nistarini Debi v. Ghose, (1985) 23 Calcutta 44.

[744] Also, the mere fact that a Magistrate gave permission does not make him/her personally interested in the case - see, Rameshwar Bhartia, 1953 Cr.L.J. 163.

any person who is being prosecuted for, (i) contempt of lawful authority of public servants, (ii) an offence committed against public justice, or (iii) an offence relating to documents given in evidence, if the offence concerned was committed before him/herself or in contempt of his/her authority, or is brought under his/her notice as such Judge or Magistrate in the course of a judicial proceeding.[745]

Under Sec.190(1)(c) the Magistrates are empowered to take cognizance of any offence upon their own knowledge that such offence has been committed. However, when a Magistrate takes such cognizance, the accused must be informed, before admitting any evidence in the case, that he/she is entitled to have the case inquired into or tried by another Magistrate. If the accused objects to further proceedings, the case should be transferred to such other Magistrate as may be specified by the Chief-Judicial Magistrate.[746] This provision entitles an accused person to have his/her case tried by another Magistrate. It does not give any right to the accused to select or determine for him/herself by what other court the case should be tried.[747] Also, under Sec.407 of the Code, if it appears to a High Court that a fair and impartial inquiry or trial cannot be held in any criminal court subordinate to it, that High Court may, subject to the provisions of Sec.407, order that, (i) any offence be inquired into or tried by any other competent court, or (ii) that any particular case or appeal, or class of cases or appeals, be transferred from a criminal court subordinate to its authority to any other criminal court of equal or superior jurisdiction.[748]

A public trial in an open court is also important for the securing of a fair hearing. As Kelkar has noted "(p)ublic trial in an open court acts as a check against judicial caprice or vagaries and serves as a powerful instrument for creating confidence of public in fairness, objectivity and impartiality of the administration of criminal justice."[749] According to Sec.327 of the Criminal Procedure Code, Act II of 1974, the place in which any criminal court is held for the purpose of inquiring into or trying

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[745] However, exceptions to this prohibition can be found in Sec.344, 345, 349 and 350 of the Code.

[746] See, Sec.191 of the Code of Criminal Procedure, Act II of 1974.

[747] See, Ratanlal Ranchhoddas and Dhirajlal Keshavlal Thakore, *Ratanlal & Dhirajlal's The Code of Criminal Procedure*, 15th edition (New Delhi: Wadhwa and Co. 1997), p.300.

[748] Also see, Sec.406 and 408 of the Code. Sec.406 of the Criminal Procedure Code empowers the Supreme Court to order transfer of cases and appeals from one court to another if such transfer is expedient for the ends of justice. But a mere apprehension in the mind of the accused that he/she will not get a fair trial is not sufficient to invoke this power of the Supreme Court. No transfer under this section will be ordered unless the apprehension alleged is reasonable - Gurcharan Das, 1966 Cr.L.J. 1071.

[749] See, R.V.Kelkar, *Lectures on Criminal Procedure*, 2nd Edition, revised by Dr.K.N.Chandrasekharan Pillai, (Lucknow: Eastern Book Company, 1990), p.135. Also see, Manjula Batra, *Protection of Human Rights in Criminal Justice Administration : A Study of the Rights of Accused in Indian and Soviet Legal Systems* (New Delhi: Deep & Deep Publication 1989), p.116.

any offence shall be deemed to be an open court, to which the public generally may have access, so far as the same can conveniently contain them. In Chatisgarh Mukti Morcha v. State of Madhya Pradesh[750], which concerned the murder of a trade union leader, the Sessions Judge decided to hold the trial *in camera* because of the inconvenience caused by the presence of a large number of observers, whom the court room was unable to accommodate. Notwithstanding the discretion which the trial judge has to regulate public access to the court, the decision to conduct proceedings *in camera* was held to be unsustainable since the court room is a temple of justice to which everybody has a right of access. However, according to the proviso to Sec.327(1), the presiding Judge or Magistrate may, if he/she thinks fit, order at any stage of any inquiry into, or trial of, any particular case, that the public generally, or any particular person, shall not have access to, or be or remain in, the room or building used by the court.[751] In particular, holding a trial *in camera* would be justified if that is necessary for the protection and confidence of the witnesses, as well as for finding the truth.[752] In other words, a trial would not be vitiated for excluding public from the court, if such exclusion was necessary for the proper administration of justice.

A trial can hardly be fair if it drags on for an unreasonably longer period of time. As the Indian Supreme Court has conceded a speedy trial is a fundamental right implicit in the guarantee of Art.21 of the Constitution.[753] Right to expeditious conclusion of proceedings applies not only to trial stages but also to appellate proceedings.[754] Failure to comply with this right, especially when the accused is in remand, is repugnant to the guarantee against unlawful deprivation of personal liberty. Any accused person who has been denied a speedy trial can as of right invoke Art.21 for redress[755]. If any inordinate delay in proceedings is proved the court, *inter alia*, may quash the trial or, if the accused has been sentenced to imprisonment at the end of the impugned proceedings, may reduce the length of that imprisonment.[756]

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[750] 1996 Cr.L.J. 2239 (M.P.).

[751] Also, as provided by Sec.327(2), inquiry into and trial of certain offence specified therein can be conducted *in camera*.

[752] See, Naresh v. State of Maharashtra, A.I.R. 1976 S.C. 1.

[753] See, Hussainara Khatoon (IV) v. Home Secretary, State of Bihar, 1979 Cr.L.J. 1045; State of Maharashtra v. Champalal, A.I.R. 1981 S.C. 1675; Kadre Pahadiya v. State of Bihar, A.I.R. 1982 S.C. 1167; Sher Singh v. State of Punjab, A.I.R. 1983 S.C. 465; Madheshwardhari Singh v. State, A.I.R. 1986 (Patna) 324. Also see, Sec.309 of the Criminal Procedure Code, Act II of 1974.

[754] See, Anurag Baithar v. State, A.I.R. 1987 Patna 274.

[755] See, Hussainara Khatoon (IV) v. Home Secretary, State of Bihar, 1979 Cr.L.J. 1045..

[756] See, Antulay v. Nayak (1992) 1 S.C.C. 225. Also, in case where there has been inordinate delay in conducting investigation or framing charges, the High Court would quash the prosecution as an abuse of process, or if the accused is in custody order his her release [see, Kmaladevi v. State of Punjab, A.I.R. 1984 S.C. 1895; State of Uttar Pradesh v. Parshottam, (1991) Supp. (2) S.C.C. 124].

What is an inordinate delay depends on the circumstances of each case. No fixed period has been set to determine what time is reasonable.[757] The factors courts take into consideration for the purpose of determining whether a particular time period is an unreasonable delay include, among other things, the length of the alleged time period, the nature of the offence and the charge, the nature and complexity of the evidence involved in the case, and whether the alleged delay has caused any prejudice to the accused person and if so the gravity of that prejudice.[758] However, no decision in favour of the accused on the ground of unreasonable delay would be recorded unless the responsibility for the delay is attributable to the prosecution.[759] In particular, no redress can be sought if the accused person him/herself is responsible for the alleged delay.[760]

As required by Sec.353(1) of the Criminal Procedure Code, the judgement in every trial in any Criminal Court should be pronounced, in open court immediately after the termination of the trial or at some subsequent time, of which notice should be given to the parties or their pleaders, by delivering the whole of the judgement or, by reading out the whole of the judgement or, by reading out the operative part of the judgement and explaining the substance of the judgement in a language which is understood by the accused or his/her pleader. If the accused is in custody, he/she should be brought up to hear the judgement pronounced.[761] Unless expressly provided for otherwise, the judgement should be written in the language of the court and must contain the point(s) for consideration, the decision thereon and the reasons for the decision.[762]

Further, the judgement must specify the offence (if any) of which, and the section of the Indian Penal Code, or other law under which, the accused is convicted and the punishment to which he/she is sentenced.[763] On the other hand, if it be a judgement of acquittal, it must state the offence of which the accused is acquitted and direct that he/she be set at liberty. When the conviction is for an offence punishable with death

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[757] However, in Anurag Baithar v. State (A.I.R. 1987 Patna 274), a period of one year was considered to be reasonable for hearing an appeal in the High Court.

[758] See, State of Maharashtra v. Champalal, A.I.R. 1981 S.C. 1675; Sher Singh v. State of Punjab, A.I.R. 1983 S.C. 465; Triveniben v. State of Gujrat, A.I.R. 1989 S.C. 1335; Antulay v. Nayak, (1992) 1 S.C.C. 225.

[759] See, State of Maharashtra v. Champalal, ibid..

[760] See, State of Maharashtra v. Champalal, ibid.; Antulay v. Nayak (1992) 1 S.C.C. 225.

[761] On the other hand, if the accused is not in custody, he/she shall be required by the court to attend to hear the judgement pronounced, unless his/her personal attendance during the trial has been dispensed with and the sentence is one of fine only or he/she is acquitted [see, Sec.353(6) of the Code of Criminal Procedure, Act II of 1974].

[762] See, Sec.354 of the Code of Criminal Procedure, Act II of 1974.

[763] See, Palekanda Karumbaiah v. State of Karnataka, 1989 Cr.L.J. (NOC) 73 (Karnataka).

or, in the alternative, with imprisonment for life or imprisonment for a term of years, the judgement must state the reasons for the sentence awarded, and, in the case of sentence of death, the special reasons for such sentence. Whatever the decision and the sentence, the judgement must show that the Judge or the Magistrate had applied his/her mind to all the facts and evidence presented by the parties concerned.[764] Also, the particulars in the judgement must be sufficient to enable a court of appeal to know what facts are proved and how.[765]

As the Indian Supreme Court observed in the case of T.H.Hussain v. M.P.Mondkar[766], the primary object of criminal procedure is to ensure a fair trial of the accused persons. However, for a trial to be fair justice must not only be done, but it must also be seen to all the parties concerned to be done. In particular, the accused person must "...always be given, as far as that is humanly possible, a feeling of confidence that he will receive a fair, just and impartial trial..."[767]

3.1.2 - Sri Lanka.

According to Art.13(3) of the Constitution of Sri Lanka "(a)ny person charged with an offence shall be entitled to be heard, in person or by an attorney-at-law, at a fair trial by a competent court." Further, as enjoined by Art.13(5) every person must be presumed innocent until he/she is proved guilty. Nonetheless, the burden of proving particular facts may, by law, be placed on an accused person. A prohibition against arbitrary punishment is laid down in Art.13(4). As provided therein, no person must be punished with death or imprisonment except by order of a competent court, made in accordance with procedure established by law. However, the Article qualifies the meaning of the word "punishment" by providing "(t)he arrest, holding in custody, detention or other deprivation of personal liberty of a person, pending investigation or trial, shall not constitute punishment."

Also, according to Art.134(2) of the Constitution, "(a)ny party to any proceedings in the Supreme Court in the exercise of its jurisdiction shall have the right to be heard in such proceedings either in person or by representation by an attorney-at-law." In addition, as required by Art.106, the sitting of every court, tribunal or other institution

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[764] See, Niranjan Mandal, 1978 Cr.L.J. 636 (Calcutta); Gulzari Lal v. State of Uttar Pradesh, 1994 Cr.L.J. 3537 (Allahabad).
[765] See, Ratanlal Ranchhoddas and Dhirajlal Keshavlal Thakore, *Ratanlal & Dhirajlal's The Code of Criminal Procedure*, 15th edition (New Delhi: Wadhwa and Co. 1997), p.538.
[766] A.I.R. 1958 S.C. 376 p.379 para.6.
[767] See, Sukhdev Singh v. Hon'ble Judges of Pepsu High Court, A.I.R. 1954 S.C. 186 at p.190.

established under the Constitution or ordained and established by Parliament, is to be held in public. All persons should be entitled freely to attend such sittings. However, a Judge or presiding officer of any such court, tribunal or other institution may, in his/her discretion, whenever he/she considers it desirable,

(a) in proceedings relating to family relations,

(b) in proceedings relating to sexual matters,

(c) in the interest of national security or public safety, or

(d) in the interest of order and security within the precincts of such court, tribunal or other institution,

exclude therefrom such persons as are not directly interested in the proceedings therein.

The Constitution has also incorporated a separate section to ensure the independence of the judiciary. As provided therein, the Chief Justice, the President of the Court of Appeal and every other Judge of the Supreme Court and Court of Appeal is appointed by the President of the Republic.[768] The judges so appointed cannot be removed except by an order of the President made after an address of Parliament, supported by a majority of the total number of Members of Parliament (including those not present) has been presented to the President for such removal on the ground of proved misbehaviour or incapacity. However, no resolution for the presentation of such an address should be entertained by the Speaker or placed on the Order Paper of Parliament, unless notice of such resolution is signed by not less than one-third of the total number of Members of Parliament and sets out full particulars of the alleged misbehaviour or incapacity.[769]

The Judges of the High Court, which according to Art.111(1) of the Constitution is the highest Court of first instance exercising criminal jurisdiction, are also appointed by the President of the Republic. They are removable and are subject to the disciplinary control by the President on the recommendation of the Judicial Service Commission which consists of the Chief Justice and two Judges of the Supreme Court.[770] The powers to appoint, transfer, dismiss and exercise disciplinary control over, judicial officers are vested in the Judicial Service Commission. According to Art.115 every person who, otherwise than in the course of his/her duty, directly or indirectly, by him/herself or by any other person, in any manner whatsoever, influences or attempts

[768] See, Art.107 of the Constitution of the Democratic Socialist Republic of Sri Lanka, 1978.
[769] Ibid., para.2.
[770] See, Art.111(2) and 112(1) of the Constitution of the Democratic Socialist Republic of Sri Lanka, 1978.

to influence any decision of the Commission or of any member thereof, shall be guilty of an offence. Further, as required by Art.116(1),

> "(e)very judge, presiding officer, public officer or other person entrusted by law with judicial powers or functions...shall exercise and perform such powers or functions without being subject to any direction or other interference proceeding from any other person except a superior court, tribunal, institution or other person entitled under law to direct or supervise such judge, presiding officer, public officer or such other person in the exercise or performance of such powers or functions."

Anyone who, without legal authority, interferes or attempts to interfere with the exercise or performance of the judicial powers or functions of any judge, presiding officer, public officer or such other person referred to in Art.116(1) is guilty of an offence punishable by the High Court.[771]

Although the incorporation of a separate section in the Constitution itself to ensure the independence of the judiciary is highly commendable, the above mentioned provisions of the Sri Lankan Constitution do not appear as part of the Bill of Rights. Further, Art.106, which requires the sitting of every court, tribunal or other institution to be held in public, and Art.134(2), which confers a right to the parties to any proceeding in the Supreme Court to be heard either in person or through an attorney-at-law, also appear outside the Bill of Rights. As such none of these provisions accord any fundamental right to the accused persons. Presumably, they only lay down guide lines for the administration of justice in the country. With regard to Art.13 para.3, 4 and 5, which do appear in the Bill of Rights, it must be noted that they can be invoked only against those violations caused by executive or administrative action.[772]

The Petitioner in Kapugeekiyana v. Hettiarachchi[773] was a suspect in a murder case. While in the dock he had handed to his counsel a note of instruction. The first Respondent, an Assistant Superintendent of Police, had then demanded that he be shown this note which the counsel had refused to do. According to the Supreme Court communication between counsel and client are privileged and no person has a right to pry to them. However, albeit the Court agreed that the conduct of the first Respondent was reprehensible, no violation of the right to a fair trial was recorded since the attempt to see the note was not successful.

As the Former Chief Justice of Sri Lanka, S.Sharvananda has noted, "(f)air trial envisages a reasonable procedure; i.e. the person charged should have a fair right of

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[771] See, Art.116(2), ibid..
[772] See, *supra,* Chapter 2.3.1.2.
[773] (1984) 2 Sri.L.R. 153.

hearing (a) notice of charge, (b) opportunity to be heard by himself or by his attorney-at-law, (c) impartial tribunal and (d) public trial."[774] He further observes,

> "(f)airness is an essential component of the concept of justice, Procedural fairness requires:-
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> (i) that the accused shall have real notice of the charge against him for which he is tried. Conviction upon a charge not made would be denial of justice;
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> (ii) that the accused is made aware of the charge sufficiently in advance of the trial so as to enable him to prepare his defence;
>
> (iii) that the accused is presumed to be innocent until he is found to be guilty. The onus of establishing the guilt of the accused lies entirely on the prosecution. The accused has the right to remain completely silent, requiring the prosecution to prove the case against the accused, without ant assistance from the accused himself;
>
> (iv) that the accused shall have the opportunity of confronting the prosecution witnesses and of cross-examining them;
>
> (v) that the accused shall have sufficient opportunity to establish his defence;
>
> (vi) that the accused shall not be convicted upon involuntary confession;
>
> (vii) that the accused's entitlement to be defended by an attorney-at-law of his choice is recognised;
>
> (viii) that the accused is not to be compelled to testify against himself or to incriminate himself."[775]

Most of the above mentioned elements of the general notion of a "fair trial", essentially relate to the composition of courts and tribunals, and to the manner in which the proceedings are conducted.[776] The instances where those elements could be violated by executive or administrative action, compared with the violations that may potentially transpire at the hands of the courts and the tribunal while conducting proceedings, are extremely limited. Hence, a Constitutional guarantee of a fair trial or, a Constitutional guarantee that no person will be punished with death or imprisonment except by order of a competent court *made in accordance with procedure established by law*, is of very little importance for the accused persons if those guarantees can be invoked only against violations caused by executive and/or administrative actions.[777] Under these circumstances it would not be incorrect to conclude that the guarantees of para.3, 4 and 5 of Art.13 of the Constitution of Sri Lanka are to a greater extent illusory.

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[774] See, S.Sharvananda, *Fundamental Rights in Sri Lanka - A Commentary* (1993), p.149.

[775] Ibid., pp.148-149.

[776] While some of these elements have been given the status of fundamental rights by the 1978 Constitution of Sri Lanka, most of them have been recognised and given effect by the Code of Criminal Procedure Act, No.15 of 1979 [see, for example, Sections 146, 148, 150, 152, 155, 158, 162, 165, 166, 164, 182(2), 184, 196, 199, 201, 204, 221, 222, 260, 271, 272, 275, 279, 283, 391, 436, 443, 444]. Also see Sec.101-102 of the Evidence Ordinance.

[777] Since the acts of judges are conceived to be neither executive nor administrative, the Supreme Court has, notwithstanding the explicit provisions in the Constitution that no person will be punished with death or imprisonment except by order of a competent court *made in accordance with procedure established by law*, consistently refused to assume jurisdiction to remedy even the blatantly obvious breaches, which have given rise to serious miscarriages of justice, of the *procedure established by law* made by judges at lower levels. See, for example, Peter Leo Fernando v. The Attorney General and two others, (1985) 2 Sri.L.R. 341; Kumarasinghe v. Attorney General and others, SC App.54/82, SC Minutes of 6 September 1982.

3.1.3 - Pakistan.

Like the Indian Constitution, the Constitution of the Islamic Republic of Pakistan too does not expressly guarantee to accused persons a right to a fair trial. However, some constituent elements of the notion of a "fair trial" have been incorporated in the guarantees of Art.9, 10(1) and Art.13(b) of the present Pakistani Constitution. As mentioned earlier in 2.1.1.3, Art.9 requires every deprivation of life or personal liberty to be in accordance with law. Art.10(1) guarantees to everyone arrested a right to be defended by a legal practitioner of his/her choice. According to Art.13(b), no person must, when accused of an offence, be compelled to be a witness against him/herself. Additionally, under Art.4 of the Constitution everyone has an inalienable right to enjoy the protection of law and to be treated in accordance with law. In particular, as enjoined by this Article, no action detrimental to life, liberty, body, reputation or property of any person should be taken except in accordance with "law", which includes not only enacted law but also the principles of natural justice.[778]

Further, it must be noted that criminal justice administration in Pakistan is based on rules adopted from both Islamic principles[779] as well as the Anglo-American adversary method. Under the Islamic principles, justice must be impartial to everyone, whether "...high or low, prince or peasant, white or black, Muslim or non-Muslim...", and cases must be decided on the basis of equity, justice and upright testimony.[780] It also prohibits the condemnation of individuals without being heard.[781] In particular, the Islamic principles forbid the treatment of accused persons as criminals before their guilt has been proved and the case against them has been confirmed.[782] The onus of proof is on the person who makes the allegation.[783] The Islamic principles of justice also requires the adjudicators to regard the disputants to a case as equals.[784]

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[778] See, Mumtaz Ali Bhutto and another v. The Deputy Martial Law Administrator, Sector 1, Karachi and 2 others, P.L.D. 1979 Karachi 307.

[779] See the Preamble to the 1973 Constitution of the Islamic Republic of Pakistan. Further, as provided by Art.227(1) of the Constitution, "All existing laws shall be brought in conformity with the injunctions of Islam as laid down in the Holy Quran and Sunnah, in this Part referred to as the Injunctions of Islam, and no law shall be enacted which is repugnant to such injunctions." Also, as Muhammad Afzal Zullah J. observed in the case of Nizam Khan v. Additional District Judge, Lyallapur (P.L.D. 1976 Lahore 930), in coming to decisions it is not unlawful for the courts to recourse to accepted judicial norms and philosophy of Islam in so far as there is no contrary statutory indication in that behalf.

[780] See the Foreword of Mr. Justice Dr. Nasim Hasan Shah in *Judicial System of Islam,* by Ghulam Murtaza Azad (Islamabad: Islamic Research Institute, International Islamic University 1987).

[781] See, Ghulam Murtaza Azad, *Judicial System of Islam*, ibid., pp.66-71.

[782] See, Dr. Mohammad Khoder, *Human Rights in Islam*, edited and translated by Dr. Zaid A. Al-Husain (1988), p.70.

[783] See, Rizwan v. The State, P.L.D. 1986 Lahore 222.

[784] See, Ghulam Murtaza Azad, *Judicial System of Islam* (Islamabad: Islamic Research Institute, International Islamic University 1987), p.65; Al Haj Mahomed Ullah, *The Administration of Justice in Islam : An Introduction to the Muslim Conception of the State*, (Lahore: Law Publishing Company), pp.20-21. Note, these principles feature in the adversary system of administration of justice too.

Art.4 of the Pakistani Constitution would be breached unless penal proceedings are conducted in accordance with law. As mentioned earlier, the word "law" within the context of Art.4 includes not only enacted law but also the principles of natural justice. Accordingly, in order to conform with the requirements of Art.4, penal proceedings have to be conducted in consonance with the principles of natural justice as well as the enacted law. However, because Art.4 appears outside of the Bill of Rights, any violation of its requirements would not result in the breach of a fundamental right.[785]

On the other hand, since the word "law" within the context of Art.9, which, unlike Art.4, appears within the Bill of Rights, includes enacted law[786], any breach thereof, i.e., enacted law, during proceedings which culminate in verdicts that impose sentences amounting to deprivation of life[787] or personal liberty[788], will give rise to a violation of a fundamental right. In other words, depriving a convict of his/her life or liberty in pursuance of the findings of a tribunal would infringe the guarantee of Art.9, unless the findings in question have been reached in a manner sanctioned by the enacted law. As far as criminal proceedings are concerned the main applicable enacted law that must be complied with for the purpose of Art.9, is the law laid down in the Criminal Procedure Code of 1898, which in some of its provisions has incorporated a number of elements pertinent to the notion of a "fair trial". Strict compliance of these provisions of the Code by the criminal courts is important for the validity of punishments that deprive the convicts of their life or liberty.[789]

It is imperative under the Code that in all cases instituted upon police report, except those which can be tried summarily or which entail punishments of fines or

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[785] However, as the Lahore High Court has admitted in the case of Bazal Ahmad Ayyubi v. West Pakistan Province [P.L.D. 1957 (W.P.) Lahore 388 at p.398], the concept of natural justice is an integral part of administration of criminal justice in Pakistan.

[786] See, *supra* 2.1.1.3.

[787] According to Munir, the word "life" has been used in Art.9 in a much wider sense and right to life connotes much more than right to mere animal existence. It includes the right to live with human dignity as well as all those aspects of life which go to make a man's life meaningful, complete and worth living [see, Justice Muhammad Munir, *Constitution of the Islamic Republic of Pakistan*, Vol. I (Lahore: P.L.D. Publishers 1996), p.246].

[788] As Sharifuddin Pirzada has observed, the word "liberty" in Art.9 is used in *simpliciter* and bears a large and liberal meaning [see, S.Sharifuddin Pirzada, *Fundamental Rights and Constitutional Remedies in Pakistan*, (Lahore: All Pakistani Legal Decisions, 1966), p.166]. However, according to Muhammad Gul J. of Lahore High Court, Art.9 affords protection only against physical restraint or incarceration (see the judgement of Muhammad Gul J. in Syed Abual A'Ala Maududi v. The State Bank of Pakistan and The Central Government of Pakistan, P.L.D. 1969 Lahore 908 p.944 at p.946).

[789] However, a violation of a procedural law might not attract Art.9 of the Constitution unless a failure of justice has transpired as a result of such violation - See Chapter XLV Sec.529-Sec.538 of the Code of Criminal Procedure, Act V of 1898.

imprisonments not exceeding six months, copies of statements of all witnesses recorded under Sections 161[790] and 164[791] of the Code and of the inspection note recorded by an investigation officer on his/her first visit to the place of occurrence of the offence involved, be supplied free of cost to the accused not less than seven days before the commencement of the trial. If the case is a trial before High Court or Court of Session, in addition to the above documents, the accused must also be supplied with, (a) the first information report, (b) the police report and (c) the note recorded on recoveries made, if any, by the investigation officer on his/her first visit to the place of occurrence of the offence. However, if the disclosure, in the case of trials before Magistrates, of any part of the statement recorded under Sec.161 and, in the case of trials before High Courts and Courts of Sessions, of any part of a statement recorded under Sec.161 or Sec.164, to the accused is in-expedient in the public interest, that part of the statement may be excluded from the copy of the statement furnished to the accused.[792]

According to Sec.191 of the Code, when a Magistrate takes cognizance of any offence upon information received from any person other than a police officer, or upon his/her own knowledge or suspicion that such offence has been committed, the Magistrate must, before any evidence is taken, inform the accused that he/she, i.e., the accused, is entitled to have the case tried by another court. If the accused, or any of the accused if there be more than one, objects to being tried by such Magistrate, the case must be sent to a court enjoined by the above mentioned Section of the Code. Also, if the High Court is of the opinion that a fair and impartial inquiry or trial cannot be had in any criminal court subordinate thereto, it may try the case itself or order it to be transferred to an appropriate court.[793] In particular, as Fakhar-ud-Din Siddiqui has observed, the High Court will transfer a case if circumstances do exist or events have happened which are calculated to create in the mind of the accused a reasonable apprehension that he/she will not be fairly treated at the trial.[794]

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[790] According to Sec.161 any police officer making an investigation under Chapter XIV or any police officer not below such rank as the Provincial Government may, by general or special order, prescribe in this behalf, acting on the requisition of such officer may examine orally any person supposed to be acquainted with the facts and circumstances of the case.

[791] As provided by Sec.164 any Magistrate of the first class and any Magistrate of the second class specially empowered in this behalf by the Provincial Government may, if he/she is not a police officer, record any statement or confession made to him her in the course of an investigation under this Chapter XIV or at any time afterwards before the commencement of the inquiry or trial.

[792] See, Sec.241A and Sec.265C of the Code of Criminal Procedure 1898.

[793] See, Sec.526, ibid.. Also see, Sec.561A of the Code.

[794] See, Fakhar-ud-Din Siddiqui, *The Code of Criminal Procedure*(Lahore: Punjab Law House 1996), p.604.

At the commencement of proceedings, the charge[795] must be read and explained to the accused.[796] Any error in stating either the offence or the particulars required to be stated in the charge, and any omission to state the offence or those particulars, would vitiate proceedings, if the accused has been misled by such error or omission and it has occasioned a failure of justice.[797] If the accused pleads guilty, the court must record the plea, and may in its discretion convict him/her thereon.[798] On the other hand if the accused does not plead guilty or is not convicted on his/her plea, the court must proceed to admit evidence.

When the examination of the witnesses for the prosecution and the examination of the accused are concluded, the accused must be asked whether he/she means to adduce evidence. If he/she means so, the court must call on the accused to enter on his/her defence and produce evidence. It must be noted that under Sec.340 of the Code the accused person is entitled to address the arguments brought against him/her by the prosecution.[799] Also, the court must, if the accused applies, issue any process for compelling the attendance of any witness for examination or the production of any document or other thing, unless it considers that the application is made for the purpose of vexation or delay or defeating the ends of justice.[800]

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[795] As required by Sec.221 of the Criminal Procedure Code, (i) every charge must state the offence with which the accused is charged, (ii) if the law which creates the offence gives it any specific name; the offence may be described in the charge by that name only, (iii) if the law which creates the offence does not give it any specific name, so much of the definition of the offence must be stated as to give the accused notice of the matter with which he/she is charged, (iv) the law and the section of the law against which the offence is said to have been committed must be mentioned in the charge, (v) if the accused, having been previously convicted of any offence, is liable by reason of such previous conviction, to enhanced punishment, or to punishment of a different kind, for a subsequent offence, and it is intended to prove such previous conviction for the purpose of affecting the punishment which the court may think fit to award for the subsequent offence, the fact, date and place of the previous conviction shall be stated in the charge. If such statement has been omitted, the court may add it at any time before sentence is passed. The charge must further contain such particulars as to the time and place of the alleged offence, and the person (if any) against whom, or the thing (if any) in respect of which, it was committed, as are reasonably sufficient to give the accused notice of the matter with which he is charged (see, Sec.222). However, if the nature of the case is such that the particulars mentioned in Sec.221 & 222 do not give the accused sufficient notice of the matter with which he/she is charged, then the charge must also contained such particulars of the manner in which the alleged offence was committed as will be sufficient for the purpose (see, Sec.223).

[796] See, Sec.242 and Sec.265E, ibid..

[797] See, Sec.225 and Sec.535, ibid.. According to the explanatory note of Sec.537, in determining at the appeal stage whether any omission or irregularity in any proceeding has occasioned a failure of justice, the court must have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings. Also see, Rizwan v. The State, P.L.D. 1986 Lahore 222.

[798] See,Sec.265E(2), ibid..

[799] See, Abdul Mannan, P.L.D.1962 Dacca 334.

[800] See, Sec.244 & Sec.265F, of the Criminal Procedure Code .. In the case of trials before Magistrates, the Magistrate may, before summoning any witness on such application, require that his/her reasonable expenses, incurred in attending for the purpose of trial, be deposited in court. This, however, is not necessary if the accused is charged with an offence punishable with imprisonment exceeding six months [see, Sec.244(3) of the Code].

As required by Sec.353 of the Code, all evidence must be taken in the presence of the accused, or, when his/her personal attendance is dispensed with[801], in the presence of his/her pleader. However, if it is proved that an accused person has absconded, and that there is no immediate prospect of arresting him/her, the court competent to try or send for trial to the Court of Session or High Court such person for the offence complained of may, in his/her absence, examine the witnesses (if any) produced on behalf of the prosecution, and record their depositions. Any such depositions may, on the arrest of such person, be given in evidence against him/her on the inquiry into, or trial for, the offence with which he/she is charged, if the deponent is dead or incapable of giving evidence or, if the deponent's attendance cannot be procured without an amount of delay, expense or inconvenience which, under the circumstances of the case, would be unreasonable.[802]

Whenever any evidence is given in a language not understood by the accused, and he/she is present in person, it must be interpreted to the accused in open Court in a language understood by him/her. If the accused appears by pleader and the evidence is given in a language other than the language of the court, and not understood by the pleader, the evidence must be interpreted to such pleader in the language of the Court. However, when documents are put in for the purpose of formal proof, they are interpreted only on the discretion of the Court.[803] Further, if the accused cannot be made to understand the proceedings, the court may proceed with the trial and in the case of a court other than a High Court or if such trial results in a conviction, the proceedings must be forwarded to the High Court with a report of the circumstances of the case, and the High Court must pass thereon such orders as it thinks fit.[804]

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[801] According to Sec.205(1) of the Code "(w)henever a Magistrate issues a summons, he may, if he sees reason so to do, dispense with the personal attendance of the accused, and permit him to appear by his pleader." As provided by Sec.540A "(a)t any stage of an inquiry or trial under this Code, where two or more accused are before the Court, if the Judge or Magistrate is satisfied, for reasons to be recorded, that any one or more of such accused is or are incapable of remaining before the Court, he may, if such accused is represented by a pleader, dispense with his attendance and proceed with such inquiry or trial in his absence, and may, at any subsequent stage of the proceedings, direct the personal attendance of such accused." On the other hand, if the accused in any such case is not represented by a pleader, or if the Judge or Magistrate considers his/her personal attendance necessary, he/she, i.e., the Judge, may, if he thinks fit, and for reasons to be recorded by him/her, either adjourn such inquiry or trial, or order that the case of such accused be taken up or tried separately [see, Sec.540A(2) of the Code].

[802] See, Sec.512(1) of the Code of Criminal Procedure, 1898.

[803] See, Sec.361, ibid..

[804] See, Sec.341, ibid..

Art.10(1) of the Constitution of Pakistan guarantees to everyone arrested a right to be defended by a legal practitioner of his/her choice.[805] This right, which accrues from the moment of arrest, continues until a final decision as to the guilt of the person concerned is reached by the courts, including the appeal courts.[806] Right to be defended by a legal practitioner would be violated unless the accused person is given a reasonable opportunity to engage a counsel of his/her choice and the counsel engaged is given a reasonable opportunity to defend the accused.[807] In the case of Bazal Ahmad Ayyubi v. West Pakistan Province[808], the compatibility of certain Sections of the Punjab Control of Goondas Act (XIV of 1951) with Art.7 of the 1956 Constitution, the equivalent of Art.10(1) of the present Constitution, came under the scrutiny of the Lahore High Court. The Sections in question of the above Act permitted a District Tribunal to keep certain portions of information received against the person complained of at the instance of the officer laying the information. They also authorised the exclusion of the person concerned and his/her counsel and the recording of evidence of some witnesses in their absence. Delivering the judgement for the Court, S.A.Rahman, CJ said,

> "(i)t will be noticed that the fundamental right guaranteed by Article 7 extends not merely to defence by a legal practitioner of one's choice but also to the right to consult him at the proper stage. How such a right can be exercised when the person concerned is kept in the dark about the evidence against him and the character, antecedents and demeanour of a witness, is difficult to understand...Such a secret procedure would not be in consonance with the principles of natural justice, apart from the question of its repugnance to Article 7 of the Constitution."[809]

In Khair Muhammad Khan v. Government of West Pakistan, the validity of trials under the Frontier Crimes Regulation (III of 1901), which denied the right of consulting and engaging a counsel, was challenged. Although the Court did not find the Frontier Crimes Regulation to be unlawful, it said,

> "(f)rom now on, we should treat Article 7 as a part of every law relating to trial for an offence. We shall, therefore, issue a direction that no evidence shall be heard or recorded against the accused before they have been given an opportunity of defending themselves by a pleader, and this shall be the rule in future."

Thus, a constitutional infirmity would transpire if a trial is conducted in a manner and under circumstances which amount to a denial of the right to be defended by a legal practitioner of one's choice.[810]

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[805] Also see Sec.340 of the Code of Criminal Procedure, 1898. As provided therein "(a)ny person accused of an offence before a Criminal Court, or against whom proceedings are instituted under this Code in any such Court, may of right be defended by a pleader."

[806] See, Justice Muhammad Munir, *Constitution of the Islamic Republic of Pakistan*, Vol. I (Lahore: P.L.D. Publishers 1996), p.260.

[807] See, Moslemuddin Sikdar v. Chief Secretary, P.L.D. 1957 Dacca 101.

[808] P.L.D. 1957 (W.P.) Lahore 388.

[809] Ibid. pp.395-398. Also see, Muhammad Usman v. The State, P.L.D. 1965 (W.P.) Lahore 229.

[810] See, Moslemuddin Sikdar v. Chief Secretary, P.L.D. 1957 Dacca 101.

It must be noted that the right to be defended by a legal practitioner, guaranteed by Art.10(1) of the Constitution of Pakistan, does not impose an obligation upon the State to provide free legal assistance to indigent defendants.[811] However, under High Court Rules and Orders no trial of an accused for a capital sentence can proceed without providing legal assistance to him/her and in absence of arrangement of a defence counsel by accused, a defence counsel has to be appointed by Government as its expenses.[812] Any counsel so appointed must be given adequate time to prepare for the case.[813] But if the accused is not satisfied with counsel appointed by the Court, he/she is entitled to object to such counsel conducting the defence.[814] In *Ch.* Zahoor Illahi v. The State[815], a request made by a prisoner from jail to engage an advocate remained unattended. Although the Court admitted that the State was under no legal duty to arrange a counsel for the prisoner, a breach of the right guaranteed by Art.10(1) was observed, since the facility of engaging a lawyer should not have been denied to the prisoner.

As enjoined by Art.13(b) of the Constitution of Pakistan, no person must, when accused of an offence, be compelled to be a witness against him/herself.[816] This guarantee is available to anyone against whom a formal accusation relating to the commission of an offence has been made, which may, in the normal course, result in his/her prosecution. Even if his/her name is not mentioned in the first information report, a person could still claim the privilege of Art.13(b), if he/she is taken into custody and interrogated with regard to the offence mentioned in the report. The actual trial need not have begun for Art.13(b) to become operative. It can be availed of from the moment suspicion is focused on the person concerned.[817] However, admittance as evidence any confession made voluntarily by the accused is not against the guarantee of Art.13(b).[818] Only those confessions made under compulsion are hit by the prohibition against self-incrimination.[819]

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[811] See, Hakim Khan v. The State, 1975 S.C.M.R. 1.

[812] See, Fakhar-ud-Din Siddiqui, *The Code of Criminal Procedure*(Lahore: Punjab Law House 1996), p.306. Also see, Muhammad Waqar v. The State, 1991 P.Cr.L.J.197.

[813] See, Khadim v. The Crown, P.L.D.1954 Lahore 69.

[814] See, Hakim Khan v. The State, 1975 S.C.M.R. 1.

[815] 1975 P.Cr.L.J. 14.

[816] Also see, Sec.343 of the Criminal Procedure Code of 1898. As provided therein "...no influence, by means of any promise or threat or otherwise, shall be used to an accused person to induce him to disclose or withhold any matter within his knowledge."

[817] See, Justice Muhammad Munir, *Constitution of the Islamic Republic of Pakistan*, Vol. I (Lahore: P.L.D. Publishers 1996), p.299.

[818] Also see, Sections 37, 38 and 39 of Qanun-e-Shahadat (these Sections are equivalent to Sections 24, 25 and 26 of the former Evidence Act of 1872). As stipulated by Sec.37 "A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the court to have been caused by any inducement, threat or promise, having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the court, to

Further, under Sections 117, 118, 119 and 120 of Qanun-e-Shahadat, 1984,[820] the burden of proof in criminal cases lies on the prosecution. Accordingly, until such time the prosecution proves its case, the accused must be presumed to be innocent and must not be asked to prove his/her innocence to the court. Proof that the prosecution has failed to establish his/her guilt beyond reasonable doubt is sufficient to rebut the case against the accused.[821] It must be noted that the accused has a right to remain silent and his/her silence 'must never be allowed, to any degree, to become a substitute for proof by the prosecution of its case.'[822]

According to Sec.340(2) of the Criminal Procedure Code,

> "(a)ny person accused of an offence before a Criminal Court or against whom proceedings are instituted under this Code in any such Court shall, if he does not plead guilty, give evidence on oath in disproof of the charges or allegations made against him or any person charged or tried together with him at the same trial.
>
> Provided that he shall not be asked, and if asked, shall not be required to answer, any question tending to show that he has committed or been convicted of any offence other than the offence with which he is charged or for which he is being tried...unless
>
> (i) the proof that he has committed or been convicted of such offence is admissible in evidence to show that he is guilty of the offence with which he is charged or for which he is being tried; or...
>
> (iii) he has given evidence against any other person charged with or tried for the same offence."[823]

When the accused person makes a statement on oath as required by the above provision, he/she will obviously be cross-examined by the prosecutor.[824] In such

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give the accused person grounds, which would appear to him reasonable, for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him." As provided by Sec.38 "No confession made to a police officer, shall be proved as against a person accused of any offence." According to Sec.39 "Subject Article 10, no confession made by any person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person."

[819] However, according to Sec.40 of Qanun-e-Shahadat 1984, "When any fact is deposed to as discovered in consequence of information received from a person accused of any offence in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved."

[820] These Sections are equivalent to Sections 101-104 of the former Evidence Act of 1872.

[821] See, Rizwan v. The State, P.L.D. 1986 Lahore 222.

[822] See, Fakhar-ud-Din Siddiqui, *The Code of Criminal Procedure*(Lahore: Punjab Law House 1996), pp.313-314.

[823] Also, as provided by Sec.15 of Qanun-e-Shahadat, 1984, "A witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any suit or in any...criminal proceedings, upon the ground that the answer to such question will criminate, or may tend directly or indirectly to criminate, such witness, or that it will expose, or tend directly or indirectly to expose, such witness to a penalty or forfeiture of any kind;

Provided that no such answer, which a witness shall be compelled to give, shall subject him to any arrest or prosecution, or be proved against him any criminal proceeding, except a prosecution for giving false evidence by such answer."

[824] See, Rizwan v. The State, P.L.D. 1986 Lahore 222.

cross-examination, the accused is bound to be asked questions which may incriminate him/her in the commission of the impugned offence. Moreover, from the wording of Sec.340(2) it is clear that the accused cannot refuse to answer, or give false answers to, such questions.[825] This apparent conflict between Art.13(b) of the Constitution and Sec.340(2) of the Criminal Procedure Code came under judicial scrutiny in the case of Muhammad Yousuf Zai v. The State.[826] There the Court said,

> "(w)e may observe that if an accused person makes a statement on oath under Sec.340(2), Cr.P.C. he is to be cross-examined by the prosecutor and in the cross-examination he is bound to ask him questions which may incriminate in the commission of the offence, which will in fact amount to compelling him to be a witness against himself, which is prohibited by ...clause (b) of Article 13 of the Constitution. It is, therefore, evident that the above section 340(2), Cr.P.C. is inconsistent with clause (b) of Article 13 of the Constitution. We are inclined to hold that in case of any inconsistency between a provision of a Statute and an Article of the Constitution, particularly relating to Fundamental Rights, the latter shall prevail."[827]

The question whether compelling an accused person to produce a document or a thing in his/her possession which might be incriminatory, is against the guarantee of Art.13(b) was examined in the case of *Syed* Ikram Gardezi v. The State[828]. In this case a Magistrate had issued summons under Sec.94 of the Criminal Procedure Code, compelling the Petitioner to produce some documents which were in his possession. In the opinion of the Court the case did not involve the enforcement of any fundamental right. The Court said,

> "Article 13 of the Constitution has only guaranteed that no person shall, when accused of any offence be compelled to be a witness against himself. As embodied in section 94 Cr.P.C., if he is called upon to produce documents and other things in his possession, it does not follow that he is thus compelled to be a witness against himself. He can refuse to be examined as a witness...Any rule laid down by the Indian Courts, *albeit* the Supreme Court of India is not binding on this Court; it may have some persuasive value...Calling upon an accused to produce document is one thing and to compel him to be a witness against himself, quite another; both cannot be equated."[829]

As was held in the case of Sharaf Faridi v. Federation of Islamic Republic of Pakistan[830], Art.9 of the Constitution would be offended if the State, as defined by Art.7 of the Constitution, fails to establish independent and impartial courts. The drafters have incorporated certain provisions in the 1973 Constitution in order to ensure the independence of the judiciary.[831] As provided by Art.177, the Chief Justice

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[825] See, Faqir Hussain v. The State, P.L.D. 1985 Lahore 434.
[826] P.L.D. 1988 Karachi 539.
[827] Ibid. p.545. Also see, Rizwan v. The State, P.L.D. 1986 Lahore 222.
[828] 1980 P.Cr.L.J. 941.
[829] Ibid., pp.946-948.
[830] P.L.D. 1989 Karachchi 404 at p.448.
[831] According to 175 of the Constitution "(t)here shall be a Supreme Court for Pakistan, a High Court for each Province and such other courts as may be established by law."

of the Supreme Court is appointed by the President of Pakistan. Although the other Judges of the Supreme Court too are appointed by the President, he/she must do so only after consultation with the Chief Justice.[832] As stipulated by Art.193 of the Constitution,

> "(a) Judge of a High Court shall be appointed by the President after consultation -
> (a) with the Chief Justice of Pakistan;
> (b) with the Governor concerned; and
> (c) except where the appointment is that of Chief Justice, with the Chief Justice of the High Court."

The Judges of the Supreme Court and High Court so appointed can be removed from office only by the Supreme Judicial Council in accordance with the procedure laid down in Art.209 of the Constitution. The Supreme Judicial Council consists of, (a) the Chief Justice, (b) the two next most senior Judges of the Supreme Court, and (c) the two most senior Chief Justices of High Courts. However, the Criminal Procedure Code has bestowed the power of appointing Sessions Judges and Magistrates on the Provincial Governments.[833]

As enjoined by Sec.556 of the Code, no Judge or Magistrate must, except with the permission of the court to which an appeal lies from his/her court, try any case to or in which he/she is a party, or personally interested. Also, no Judge or Magistrate must hear an appeal from any judgement or order passed or made by him/herself. However, a Judge or a Magistrate must not be deemed a party, or personally interested to or in any case by reason only that he/she is concerned therein in a public capacity, or by reason only that he/she has viewed the place in which the offence concerned is alleged to have been committed, or any other place in which any other transaction material to the case is alleged to have occurred, and made an inquiry in connection with the case. Further, as stipulated by Sec.487 of the Code, no Magistrate or Judge of a criminal court, other than a Judge of a High Court, should try any person for any offence concerning contempt of lawful authority of public servants, referred to in Sec.195 of the Code, if the offence concerned was committed before him/herself or in contempt of his/her authority, or is brought under his/her notice as such Judge or Magistrate in the course of a judicial proceeding.[834]

The Code also requires the criminal trials and inquiries to be held in public. According to Sec.352 of the Code, "(t)he place in which any Criminal Court is held for the purpose of inquiring into or trying any offence shall be deemed an open Court, to which the public generally may have access, so far as the same can conveniently

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[832] See, Art.177 of the Constitution of the Islamic Republic of Pakistan.
[833] See, Sec.9-14.
[834] However, exceptions to this restriction can be found in Sec.476, 480 and 485 of the Code.

contain them." Nonetheless, the presiding Judge or Magistrate may, if he thinks fit, order at any stage of any inquiry into, or trial of, any particular case, that the public generally, or any particular person, shall not have access to, or be or remain in, the room or building used by the court.

The judgement in every trial in any criminal court must be pronounced, or the substance of such judgement must be explained, in open court either immediately after the termination of the trial or at some subsequent time of which notice shall be given to the parties or their pleaders. This must be done in the language of the court, or in some other language which the accused or his/her pleader understands. If he/she is requested to do so either by the prosecution or the defence, the whole judgement must be read out by the presiding judge. The accused must, if in custody, be brought up, or, if not in custody, be required by the court to attend, to hear judgement delivered, except where his/her personal attendance during the trial has been dispensed with and the sentence is one of fine only or he/she is acquitted, either of which case it may be delivered in the presence of his/her pleader.[835]

Further, the judgement must contain the point or points for determination, the decision thereon and the reasons for the decision. It must also specify the offence (if any) of which, and the section of the Pakistani Penal Code or other law under which, the accused is convicted, and the punishment to which he/she is sentenced. If it be a judgement of acquittal, it must state the offence of which the accused is acquitted, and direct that he/she be set at liberty.[836] Furthermore, in every case where the accused is convicted, a copy of the judgement must be given to him/her at the time of pronouncing the judgement or, when the accused so desires, a translation of the judgement in his/her own language, if practicable, or in the language of the court, must be given to him/her without delay, and without charge. In cases where the death sentenced is imposed by a Sessions Judge, such Judge must inform the accused of the period within which, if he/she wishes to appeal, his/her appeal should be preferred.[837]

3.1.4 - Bangladesh.

Art.35(3) of the Constitution of People's Republic of Bangladesh guarantees to everyone accused of a criminal offence a right to a speedy and public trial by an independent and impartial court or tribunal established by law. According to

[835] See, Sec.366 of the Code of Criminal Procedure, 1898.
[836] See, Sec.367, ibid..
[837] See, Sec.371, ibid..

Art.33(1), everyone arrested has a right to consult and be defended by a legal practitioner of his/her choice. As enjoined by Art.35(4), no person accused of any offence must be compelled to be a witness against him/herself.

Further, while Art.31 of the Constitution of People's Republic of Bangladesh confers an inalienable right upon every citizen and resident of Bangladesh to be treated in accordance with law, Art.32 forbids the deprivation of life or personal liberty of any person, except in accordance with law. Within the context of these two Articles, the word "law" encompasses all that is treated as law in the country, including, *inter alia*, statutory law as well as the principles of natural justice, non-compliance of which during penal proceedings would result in the accused being denied the rights guaranteed by Art.31 and Art.32.[838] In addition, it must be mentioned here that in Bangladesh too the administration of criminal justice is based on the Anglo-American adversary system that adopts the accusatorial method.

The main statutory law, criminal proceedings must comply with for the purpose of Art.31 and Art.32, is laid down in the Code of Criminal Procedure, Act V of 1898, which contains some elements of the notion of a fair hearing.[839] As provided by Sec.191 of the Code, when a Magistrate take cognizance of any offence upon information received from any person other than a police officer, or upon his/her own knowledge or suspicion that such offence has been committed, the Magistrate must, before any evidence is taken, inform the accused that he/she, i.e., the accused, is entitled to have the case tried by another court. If the accused, or any of the accused if there be more than one, objects to being tried by such Magistrate, the case must be sent to the Court of Session or transferred to another Magistrate. Similarly, if the High Court is of the opinion that a fair and impartial inquiry or trial cannot be had in any criminal court subordinate thereto, it may try the case itself or order it to be transferred to an appropriate court.[840]

The charge[841] must be read and explained to the accused at the outset of penal proceedings.[842] Any error in stating either the offence or the particulars required to be

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[838] Note, however, Art.32 would be violated only if the accused is deprived of life or liberty as a result of such a proceeding.

[839] However, a violation of a procedural law might not attract Art.31 or Art.32 of the Constitution unless a failure of justice has transpired as a result of such violation - See Chapter XLIVA Sec.529-Sec.538 of the Code of Criminal Procedure, Act V of 1898.

[840] See, Sec.526(1) of the Code of Criminal Procedure, Act V of 1898. (Also see, Sec.561A).

[841] According to Sec.221 of the Criminal Procedure Code, (i) every charge must state the offence with which the accused is charged, (ii) if the law which creates the offence gives it any specific name; the offence may be described in the charge by that name only, (iii) if the law which creates the offence does not give it any specific name, so much of the definition of the offence must be stated as to give the

stated in the charge, and any omission to state the offence or those particulars, would vitiate proceedings, if the accused has been misled by such error or omission and it has occasioned a failure of justice.[843] If the accused pleads guilty, the court must record the plea, and may in its discretion convict him/her thereon.[844] On the other hand if the accused does not plead guilty or is not convicted on his/her plea, the court must proceed to admit evidence.

If, after taking evidence for the prosecution, examining the accused and hearing the prosecution and the defence on the point, the court considers that there is no evidence that the accused committed the offence, the court must record an order of acquittal.[845] On the other hand, if not acquitted, then the accused must be called upon to enter on his/her defence and adduce any evidence he/she may have in support thereof.[846] It must be noted that, in his/her defence, the accused person is entitled to cross-examine the prosecution witnesses[847] and address the arguments put forward by the prosecution against him/her.[848] Also, the court must, if the accused applies, issue any process for compelling the attendance of any witness for examination or the production of any document or other thing, unless it considers that the application is made for the purpose of vexation or delay or defeating the ends of justice.[849]

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accused notice of the matter with which he/she is charged, (iv) the law and the section of the law against which the offence is said to have been committed must be mentioned in the charge, (v) if the accused, having been previously convicted of any offence, is liable by reason of such previous conviction, to enhanced punishment, or to punishment of a different kind, for a subsequent offence, and it is intended to prove such previous conviction for the purpose of affecting the punishment which the court may think fit to award for the subsequent offence, the fact, date and place of the previous conviction shall be stated in the charge. If such statement has been omitted, the court may add it at any time before sentence is passed. The charge must further contain such particulars as to the time and place of the alleged offence, and the person (if any) against whom, or the thing (if any) in respect of which, it was committed, as are reasonably sufficient to give the accused notice of the matter with which he is charged (see, Sec.222). However, if the nature of the case is such that the particulars mentioned in Sec.221 & 222 do not give the accused sufficient notice of the matter with which he/she is charged, then the charge must also contained such particulars of the manner in which the alleged offence was committed as will be sufficient for the purpose (see, Sec.223).

[842] See, Sec.265D(2), of the Code of Criminal Procedure, Act V of 1898. (Also see, Sec.242).

[843] See, Sec.225 and Sec.535, ibid.. According to the explanatory note of Sec.537, in determining at the appeal stage whether any omission or irregularity in any proceeding has occasioned a failure of justice, the court must have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings.

[844] See,Sec.265E, of the Code of Criminal Procedure, Act V of 1898. (Also see, Sec.243).

[845] See, Sec.265H, ibid..

[846] See, Sec.265I, ibid..

[847] See, Muslimuddin v. The State, 38 D.L.R. (A.D.) 1986 p.311. Also, according to Sec.265J of the Code, "When the examination of the witnesses (if any) for the defence is complete, the prosecution shall sum up its case and the accused or his pleader shall be entitled to reply."

[848] See, Sec.340 of the Code of Criminal Procedure, Act V of 1898. Also see, Abdul Mannan v. The State, P.L.D. 1962 Dacca 334.

[849] See, Sec.244 & Sec.265I(3), ibid.. In the case of trials before Magistrates, the Magistrate may, before summoning any witness on such application, require that his/her reasonable expenses, incurred in attending for the purpose of trial, be deposited in court. [see, Sec.244(3) of the Code].

As required by Sec.353 of the Code, all evidence must be taken in the presence of the accused, or, when his/her personal attendance is dispensed with[850], in the presence of his/her pleader. However, if it is proved that an accused person has absconded, and that there is no immediate prospect of arresting him/her, the court competent to try such person for the offence complained of may, in his/her absence, examine the witnesses (if any) produced on behalf of the prosecution, and record their depositions.[851] Any such depositions may, as provided by Sec.512(1) of the Code,

> "...be given in evidence against him on the inquiry into, or trial for, the offence with which he is charged, if the deponent is dead or incapable of giving evidence or if the deponents attendance cannot be procured without an amount of delay, expense or inconvenience which, under the circumstances of the case, would be unreasonable."

Whenever any evidence is given in a language not understood by the accused, and he/she is present in person, it must be interpreted to the accused in open Court in a language understood by him/her. If the accused appears by pleader and the evidence is given in a language other than the language of the court, and not understood by the pleader, the evidence must be interpreted to such pleader in the language of the Court. However, when documents are put in for the purpose of formal proof, they are interpreted only on the discretion of the Court.[852] Further, if the accused cannot be made to understand the proceedings, the court may proceed with the inquiry or trial and in the case of a court other than High Court Division, if such proceedings results in a conviction, the proceedings must be forwarded to the High Court Division with a

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[850] According to Sec.205(1) of the Code "(w)henever a Magistrate issues a summons, he may, if he sees reason so to do, dispense with the personal attendance of the accused, and permit him to appear by his pleader." As provided by Sec.540A "(a)t any stage of an inquiry or trial under this Code, where two or more accused are before the Court, if the Judge or Magistrate is satisfied, for reasons to be recorded, that any one or more of such accused is or are incapable of remaining before the Court, he may, if such accused is represented by an advocate, dispense with his attendance and proceed with such inquiry or trial in his absence, and may, at any subsequent stage of the proceedings, direct the personal attendance of such accused." On the other hand, if the accused in any such case is not represented by an advocate, or if the Judge or Magistrate considers his/her personal attendance necessary, he/she, i.e., the Judge, may, if he thinks fit, and for reasons to be recorded by him/her, either adjourn such inquiry or trial, or order that the case of such accused be taken up or tried separately [see, Sec.540A(2) of the Code].

[851] Note, as provided by Sec.339B, "(1) Where after the compliance with the requirements of section 87 and section 88, the Court has reason to believe that an accused person has absconded or concealing himself so that he cannot be arrested and produced for trial and there is no immediate prospect of arresting him, the Court taking cognizance of the offence complained of shall, by order published in at least two national daily Bengali newspapers having wide circulation direct such person to appear before it within such period as may be specified in the order, and if such person fails to comply with such direction, he shall be tried in his absence. (2) Where in a case after production or appearance of an accused before the Court or his release on bail, the accused person absconds or fails to appear, the procedure as laid down in sub-section 1 shall not apply and the Court competent to try such person for the offence complained of shall , after recording its decision so to do, try such person in his absence."

[852] See, Sec.361, ibid..

report of the circumstances of the case, and the High Court Division must pass thereon such orders as it thinks fit.[853]

Art.33(1) of the Constitution of the Peoples Republic of Bangladesh guarantees to everyone arrested a right to be represented by a legal practitioner of his/her choice. As was held in the case of Rowshan Bijaya Shaukat Ali Khan v. East Pakistan[854], the right to be defended by a lawyer is a necessary part of every law, irrespective of whether the law gives or denies the right. Sufficient compliance with this requirement contemplates reasonable opportunities being given both, to the arrested person to engage a counsel, and to the counsel to defend the arrestee.[855] Besides, unless the arrestee is given a reasonable opportunity to be represented by a legal practitioner, the proceedings might, by not being fair and reasonable, offend the guarantees of both Art.31 as well as Art.32. If for reasons of indigence the arrestee cannot engage a legal practitioner, he/she must be provided with legal aid.[856] According to Mahmudul Islam an indigent accused is entitled to legal aid even in cases of offences not punishable with death.[857] Additionally it must be noted that, Sec.340 of the Criminal Procedure Code, Act V of 1898, confers upon everyone who is accused of an offence before a criminal court, or everyone against whom proceedings are instituted under the Code, a right to be defended by a pleader.[858]

As enjoined by Art.35(4) of the Constitution, no person accused of any offence must be compelled to be a witness against him/herself.[859] This guarantee can be availed by anyone against whom a First Information Report is lodged before an officer competent to investigate, or when a complaint is made before a Magistrate competent to try or

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[853] See, Sec.341, ibid..

[854] 17 D.L.R. 1.

[855] See, Moslemuddin Sikdar v. Chief Secretary, 8 D.L.R. 526. In State v. Munna alias Ismail [27 D.L.R. (1975) 28 at pp.31-32], Fazle Munim J. of the High Court Division of the Supreme Court found a one day's time given to a counsel appointed by the court for preparation in a capital punishment case as insufficient to make an effective defence.

[856] As per Ruhul Islam J. in The State v. Abdur Rahman and Hakim [27 D.L.R. (1975) 77 at pp.83-84] "(a) court of appeal or revision is not powerless to interfere, if it is found that the accused was so handicapped for want of legal aid that the proceedings against him may be said to amount to negation of a fair trial."

[857] See, Mahmudul Islam, *Constitutional law of Bangladesh* (Dacca: Bangladesh Institute of Law and International Affairs 1995), p.173.

[858] Note, even an absconding accused who is being tried under Sec.339B of the Criminal Procedure Code is entitled to a counsel at the State's expense if the offence alleged entails death sentence [see, Muhammed Sohul Hussain, *Cr.P.C Today*, third edition (1996), pp.217-218.]

[859] Also see, Sec.343 of the Criminal Procedure Code, Act V of 1898. As provided therein "...no influence, by means of any promise or threat or otherwise, shall be used to an accused person to induce him to disclose or withhold any matter within his knowledge." See further, Sec.24, 25 and 26 of the Evidence Act, 1872 (these Sections are identical to Sec.24, 25 and 26 of the Indian Evidence Act,1872. Note, albeit separate amendments have been introduced from time to time, Bangladesh and India still use the same Evidence Act introduced during the British colonial period).

send to another Magistrate for trial of the offence.[860] The guarantee against self-incrimination covers oral as well as written statements made in or out of court by the accused person. As Mahmudul Islam has observed "(s)uch statements are not confined to confessions but also to cover statements which have a reasonable tendency to point to the guilt of the accused."[861] However, according to Munim, not only statements, but also incriminatory things, obtained from the accused by exerting physical pressure on him/her, come within the prohibitive sweep of Art.35(4).[862]

The compulsion need not amount to torture for the Guarantee of Art.35(4) to be breached. According to Munim, all forms of compulsions resorted to for making a person convict him/herself come within the mischief of Art.35(4).[863] No adverse inferences against the accused must be drawn from invocation of this privilege.[864] However, Art.35(4) is no bar to admittance as evidence any confession made by the accused without any inducement being applied.[865]

According to the Supreme Court of Bangladesh, the entire burden of proof of the accused person's guilt lies with the prosecution.[866] The accused must not be required to prove his/her innocence. He/she must be presumed innocent until his/her guilt is established on evidence adduced by the prosecution. However, it is not unlawful to require the accused to prove the existence of any particular fact which he/she wants the court to believe to exist.[867] But the failure of the defence to establish its case must never be regarded as proof of the prosecution's case.[868]

Under Clause 3 of Art.35 of the Constitution of the People's Republic of Bangladesh everyone accused of a criminal offence is entitled to trial by an independent and impartial court or tribunal established by law. As stipulated by Art.22 of the

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[860] See, F.K.M.A.Munim, *Rights of the Citizens Under the Constitution and Law* (Dacca: Bangladesh Institute of Law and International Affairs 1975), p.76.
[861] See, Mahmudul Islam, *Constitutional law of Bangladesh* (Dacca: Bangladesh Institute of Law and International Affairs 1995), pp.190-191.
[862] See, F.K.M.A.Munim, *Rights of the Citizens Under the Constitution and Law* (Dacca: Bangladesh Institute of Law and International Affairs 1975), pp.77-78.
[863] Ibid., p.77.
[864] Ibid..
[865] See, Mahmudul Islam, *Constitutional law of Bangladesh* (Dacca: Bangladesh Institute of Law and International Affairs 1995), p.191.
[866] See, Muslimuddin v. The State, 38 D.L.R. (A.D.) 1986 p.311. As provided by Sec.102 of the Evidence Act, "The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side." According to Sec.101 "(w)hoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist."
[867] See, Sec.103 of the Evidence Act.
[868] See, Shadat Ali v. The State, 44 D.L.R. (1992) 217.

Constitution, it is the duty of the State to ensure that the judiciary is separated from the executive organs of the State. The Supreme Court of Bangladesh, which is established under Art.94 of the Constitution, comprise of an Appellate and High Court Division, and consists of a Chief Justice and such number of other Judges as the President may deem it necessary to appoint to each Division. The Chief-Justice and the Judges appointed to the appellate Division must sit only in that Division, and the other Judges must sit only in the High Court Division. Although these Judges, including the Chief-Justice, are appointed by the President, they must be independent in the exercise of their judicial functions.[869] The Judges of the Supreme Court can be removed from office only in accordance with the procedure laid down in Art.96 of the Constitution by the President in pursuance of the recommendations of the Supreme Judicial Council.[870]

In addition, Art.114 of the Constitution has sanctioned the establishment by law of courts subordinate to the Supreme Court.[871] The appointment of persons to offices in the judicial services or as Magistrates exercising judicial functions to such courts is made by the President. Although the control, including the power of posting, promotion and grant of leave, and the discipline of Magistrates and other persons so appointed, vests in the President, as enjoined by Art.116A, they must be independent in the exercise of their judicial functions.

According to Sec.556 of the Code, no Judge or Magistrate must, except with the permission of the court to which an appeal lies from his/her court, try any case to or in which he/she is a party, or personally interested. Also, no Judge or Magistrate must hear an appeal from any judgement or order passed or made by him/herself. Nevertheless, a Judge or a Magistrate must not be deemed a party to, or personally interested in any case by reason only that he/she is concerned therein in a public capacity, or by reason only that he/she has viewed the place in which the offence concerned is alleged to have been committed, or any other place in which any other transaction material to the case is alleged to have occurred, and made an inquiry in connection with the case. Further, as stipulated by Sec.487 of the Code, no Magistrate

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[869] See, Clause 4 of Art.94 of the Constitution.

[870] The Supreme Judicial Council, which is constituted under Art.96(3) of the Constitution, consists of the Chief Justice and two next senior Judges.

[871] Also, as provided by Art.117(1) "...Parliament may by law establish one or more administrative tribunals to exercise jurisdiction in respect of matters relating to or arising out of - (a) the terms and conditions of persons in the service of the Republic, including the matters provided for in Part IX and the award of penalties or punishments...". The Criminal Procedure Code has made provisions to establish Sessions Courts for districts (Sec.7), District Magistrates (Sec.10), Subordinate Magistrates (Sec.12), Special Magistrates (Sec.14) and Metropolitan Magistrates (Sec.18).

or Judge of a criminal court, other than a Judge of a High Court, should try any person for any offence concerning contempt of lawful authority of public servants, referred to in Sec.195 of the Code, if the offence concerned was committed before him/herself or in contempt of his/her authority, or is brought under his/her notice as such Judge or Magistrate in the course of a judicial proceeding.[872]

Art.35(4) of the Constitution also requires the criminal proceedings to be held in public. According to Sec.352 of the Criminal Procedure Code, "(t)he place in which any Criminal Court is held for the purpose of inquiring into or trying any offence shall be deemed an open Court, to which the public generally may have access, so far as the same can conveniently contain them." However, the presiding Judge or Magistrate may, if he thinks fit, order at any stage of any inquiry into, or trial of, any particular case, that the public generally, or any particular person, shall not have access to, or be or remain in, the room or building used by the court. Thus, as was held in the case of Abdul Rashid v. The State[873], holding a proceeding *in camera* or debarring the public as well as lawyers (not engaged in the particular proceeding) from witnessing the proceeding cannot be objected.

Further, under Art.35(4) the accused persons are also entitled to a speedy trial. In this connection Sec.339C of the Criminal Procedure Code has laid down time periods for the conclusion of penal proceedings. As stipulated therein, the Courts of Session must conclude every trial within three hundred and sixty days from the date on which the case is received for trial. In the case of trial by Magistrates, the cases must be concluded within one hundred and eighty days. If a trial cannot be concluded within the specified time, the accused, if he/she is accused of a non-bailable offence, may be released on bail to the satisfaction of the court, unless for reasons to be recorded in writing, the court otherwise directs. However, it must be noted that these time limits are only directory and not mandatory provisions. As such any failure to comply with them will not give rise to any judicial consequences.[874] But according to Mahmudul Islam, a proceeding which has been dragged on for an unreasonably longer period of time may be quashed by the High Court under Sec.561A of the Criminal Procedure Code for abuse of process.[875]

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[872] However, exceptions to this restriction can be found in Sec.480, 485 and 485A of the Code.
[873] 18 D.L.R. (W.P.) (1966) 154.
[874] See, Muhammed Sohul Hussain, *Cr.P.C Today*, third edition (1996), p.221.
[875] See, Mahmudul Islam, *Constitutional law of Bangladesh* (Dacca: Bangladesh Institute of Law and International Affairs 1995), p.184. Here the author refers to the propositions laid down by the Indian Supreme Court in the case of Antulay v. Nayak [(1992) 1 S.C.C. 225] that should be taken in to consideration when determining whether a delay in proceedings has resulted in the accused being denied a fair hearing.

As required by Sec.366 of the Criminal Procedure Code, the judgement in every trial in any criminal court must be pronounced, or the substance of such judgement must be explained, in open court either immediately after the termination of the trial or at some subsequent time of which notice shall be given to the parties or their pleaders. This must be done in the language of the court, or in some other language which the accused or his/her pleader understands. If he/she is requested to do so either by the prosecution or the defence, the whole judgement must be read out by the presiding judge. The accused must, if in custody, be brought up, or, if not in custody, be required by the court to attend, to hear judgement delivered, except where his/her personal attendance during the trial has been dispensed with and the sentence is one of fine only or he/she is acquitted, either of which case it may be delivered in the presence of his/her pleader.

Further, the judgement must contain the point or points for determination, the decision thereon and the reasons for the decision.[876] It must also specify the offence (if any) of which, and the section of the Penal Code or other law under which, the accused is convicted, and the punishment to which he/she is sentenced.[877] If it be a judgement of acquittal, it must state the offence of which the accused is acquitted, and direct that he be set at liberty. Furthermore, in every case where the accused is convicted, a copy of the judgement must be given to him/her at the time of pronouncing the judgement or, when the accused so desires, a translation of the judgement in his/her own language, if practicable, or in the language of the court, must be given to him/her without delay, and without charge. In cases where the death sentenced is imposed by a Sessions Judge, such Judge must inform the accused of the period within which, if he/she wishes to appeal, his/her appeal should be preferred.[878]

3.1.5 - Nepal.

Like the Constitutions of India and Pakistan, the present Constitution of the Kingdom of Nepal too does not expressly guarantee to the accused persons a right to a fair trial. However, some elements of the notion of a "fair trial" have been incorporated in Art.12 paragraph 1 and Art.14 paragraphs 3 and 5 of the 1990 Constitution. According to Art.12 para.1 "(n)o person shall be deprived of his personal liberty save in

[876] See, Sec.367 of the Code of Criminal Procedure, Act V of 1898.
[877] As required by Sec.367(5) of the Code, if the accused is convicted of an offence punishable with death or, in the alternative, with imprisonment for life or imprisonment for a term of ten years, the court shall in its judgement state the reasons for the sentence awarded.
[878] See, Sec.371, ibid..

accordance with law..." As stipulated by para.3 of Art.14, no person accused of any offence must be compelled to be a witness against him/herself. Art.14 para.5 guarantees to accused persons, *inter alia,* a right to be defended by a legal practitioner of his/her choice.

In addition, it must be noted that, *albeit* in the past the administration of justice in Nepal was based on the inquisitorial method, since 1960, the Government Cases Act has introduced the accusatorial method. Consequently the courts were relieved from crime investigation and prosecution, which the above Act assigned upon the police. Two other important pieces of legislation, namely, (a) The Muluki Ain[879], 1963, which consists of, *inter alia*, laws applicable to criminal proceedings, and, (b) The Evidence Act, 1974, were also enacted to underpin the accusatorial method of administration of justice.[880]

Personal liberty, guaranteed by Art.12(1), can be curtailed only in accordance with "law". As Ravi Sharma Aryal argues, the word "law", within the context of the Nepali Constitution, includes not only enacted law, but also the principles of natural justice.[881] Thus, subjecting a convict to a punishment amounting to deprivation of personal liberty[882] as a result of a sentence imposed by a tribunal would be unlawful, if the proceedings before the tribunal which ordered such punishment has not been conducted in consonance with the principles of natural justice as well as enacted law.

According to Dr.Amir Ratna Shrestha[883], right to a fair and open[884] trial is an integral part of the guarantee of Art.12(1). Also, as he further observes, under Art.12(1) the accused has an inalienable right to be present at the trial. In particular, the accused must be present in court during the examination of witnesses.[885] If so desired, he/she must be allowed to cross examine the witnesses.

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[879] i.e., The National Code.

[880] See, Dr.Amir Ratna Shrestha, 'Constitutional Rights Relating to Criminal Justice in Constitutional System of Nepal' in *Essays on Constitutional Law,* Vol.18 (1994), Nepal Law Society, Kathmandu, p.47.

[881] See, Ravi Sharma Aryal, 'Remedial Right Under the Constitution of the Kingdom of Nepal', *Essays on Constitutional Law*, Vol.18 (1994), Nepal Law Society, Kathmandu, p.97. Also, it must be noted that, according to Art.84 of the Constitution the powers relating to justice must be exercised by courts and other judicial institutions in accordance with the provisions of the Constitution, the law and the recognised principles of justice.

[882] As stipulated by Art.12(1) of the 1990 Constitution of the Kingdom of Nepal, "...no law shall be made which provides for capital punishment."

[883] See, Dr.Amir Ratna Shrestha, 'An Overview of the Fundamental Rights Relating to Criminal Justice in the Constitutional Law of Nepal', *Essays on Constitutional Law*, Vol.22 (1996), Nepal Law Society, Kathmandu, 57 at p.66.

[884] Also see, Sec.6 of the Court Procedure of the Muluki Ain, 1963.

[885] See, H.M.G. v. Asee Lal Tharu, Criminal Appeal No.426 of 1990, decided on 29th Dec. 1991.

No trial would be fair unless the accused is given an effective opportunity to defend his/her case.[886] As the Supreme Court of Nepal noted in the case of Yagyan Murti Banjade v. Durga Das Shrestha[887], in order to make an effective defence, the accused must be properly informed of the charge and the grounds of the charge. Also, Art.12(1) might be offended, if a trial is not concluded within a reasonable period of time.[888]

Under Art.14(5) of the 1990 Nepali Constitution every arrested person is entitled to consult and be defended by a legal practitioner of his/her choice. For the purpose of this provision "...the words 'legal practitioner' shall mean any person who is authorised by law to represent any person in any court."[889] The guarantee of Art.14(5) becomes available to the accused persons from the moment of their arrest.[890] It is the duty of the authorities to inform the accused person about this right. He/she need not ask permission from the court to engage a legal practitioner.[891] If for reasons of poverty or indigence the accused is unable to engage a legal practitioner, the State is obliged to provide legal aid free of charge.[892]

As stipulated by Art.14(3) of the Nepali Constitution no person accused of any offence must be compelled to be witness against him/herself. The aim of this guarantee against self-incrimination is to protect the accused persons from third degree interrogation methods.[893] In Jhameli Miya v. H.M.G.[894], the Supreme Court of Nepal refused to accept a confession made while in police custody as reliable evidence. Further, as was held in the case of Rajendra Birahee Adhikari v. H.M.G.[895] it is not safe to convict a person solely on a confession made while in police custody,

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[886] See, Dr.Amir Ratna Shrestha, 'An Over View of the Fundamental Rights Relating to Criminal Justice in the Constitutional Law of Nepal' in *Essays on Constitutional Law,* Vol.22 (1996), Nepal Law Society, Kathmandu, 57 p.66.
[887] 2027 Nep.L.Rep. 157.
[888] See, Dr.Amir Ratna Shrestha, 'An Over View of the Fundamental Rights Relating to Criminal Justice in the Constitutional Law of Nepal' in *Essays on Constitutional Law,* Vol.22 (1996), Nepal Law Society, Kathmandu, 57 p.68.
[889] See the explanatory clause of Art.14(5) of the Constitution of the Kingdom of Nepal.
[890] See, Prem Prasad Pande v. Bagmati Special Court, Habeas Corpus Writ No.498/026, Decided on 2026/7/22.
[891] Yagyan Murti Banjade v. Durga Das Shrestha, 2027 Nep.L.Rep. 157.
[892] According to Art.26(14) of the Constitution of the Kingdom of Nepal, 1990, "(t)he State shall, in order to secure justice for all, pursue a policy of providing free legal aid to indigent persons for their legal representation in keeping with the principle of the rule of law."
[893] See, Dr.Amir Ratna Shrestha, 'An Over View of the Fundamental Rights Relating to Criminal Justice in the Constitutional Law of Nepal' in *Essays on Constitutional Law,* Vol.22 (1996), Nepal Law Society, Kathmandu, 57 p.62.
[894] 2032 Nep.L.Rep. 178.
[895] 2031 Nep.L.Rep. 263.

unless it, i.e., the confession, has been corroborated by some other independent evidence. [896] Also, the Evidence Act 1964 has attributed the burden of proof in criminal cases upon the prosecution. Thus, according to the Supreme Court of Nepal, it is the onus of the prosecution to establish the guilt of the accused without relying on involuntary self-incriminatory statements made by the accused; and until such time his/her guilt is proved the accused has a right to remain silent.[897]

For the purpose of administration of justice, the Constitution of Nepal has made provision for the establishment of a Supreme Court, an Appellate Court and District Courts.[898] As required by Art.84, the powers relating to justice must be exercised by these courts and other judicial institutions in accordance with the provisions of the Constitution, the law and the recognised principles of justice. The Supreme Court consists of a Chief -Justice, who is appointed by His Majesty on the recommendation of the Constitutional Council, and up to a maximum of fourteen other Judges who are also appointed by His Majesty but on the recommendation of the Judicial council.[899] A Judge so appointed can be removed from office only if, for reasons of incompetence, misbehaviour or failure to discharge the duties of his/her office in good faith, the House of Representatives, by a two thirds majority of the total number of its members, passes a resolution for his/her removal and the resolution is passed by His Majesty.[900]

The Judges of the Appellate Courts, including Chief Judge, and the Judges of District Courts are also appointed by His Majesty on the recommendation of the Judicial Council.[901] If the Judicial Council recommends that a Chief Judge or any other Judge of an Appellate Court or any Judge of a District Court be removed from his/her office for reasons of incompetence, misbehaviour or failure to carry out the duties of his/her office in good faith, or if it recommends that it is necessary and expedient to initiate proceedings against such Judge in accordance with law for reasons of misbehaviour, and if such recommendation is accepted by His Majesty, such Chief Judge or Judge shall be so removed from his/her office or proceedings will be initiated against him/her in accordance with law.[902] The Judicial Council, which makes

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[896] Also see, Hirapashi v. HMG, 12 N.K.P. 705 (2045).
[897] Chandra Bhadur v. Cabinet Secretariat, 3:15 Supreme Court Bulletin 1 (2051).
[898] See Art.85. Although this Article has also sanctioned the establishment of special types of courts or tribunals for the purpose of hearing special types of cases, no such court or tribunal must be established for the purpose of hearing a particular case.
[899] See, Art.86(3) and 87(1) of the Constitution of the Kingdom of Nepal.
[900] See, Art.87(7).
[901] See, Art.91.
[902] Ibid., para.3.

recommendations and gives advice in accordance with the Constitution concerning the appointment of, transfer of, disciplinary action against, and dismissal of Judges, and other matters relating to judicial administration, consists of, (a) the Chief Justice, *ex officio* Chairman, (b) the Minister of Justice, *ex officio* member, (c) the two senior most Judges of the Supreme Court, *ex officio* members, and (d) one distinguished jurist nominated by His Majesty.[903] According to Art.93 of the Constitution,. Although these above mentioned provisions of the Constitution concerning the appointment and removal of Judges of various courts do not confer any right upon the accused persons, it is deemed that those provisions would make the judiciary independent of the executive, which is crucial for fair trials.

3.2 - European Convention on Human Rights.

3.2.1 - Article 6 Paragraph 1.

As provided by Article 6 paragraph 1 of the European Convention on Human Rights;

> "(i)n the determination...of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interest of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."[904]

The provisions here directly relate to proceedings that determine the degree of culpability or criminal liability of accused persons. As has been stipulated, any decision on merits in criminal proceedings must be preceded by, and result from, a fair and public trial within a reasonable time by an independent and impartial court established by law.

In addition to the expressed guarantees relating to a fair trial, Art.6(1) has been interpreted by the Convention's supervisory organs to include also a "right of access to a court", which is one of the most important elements of the concept of "rule of law".[905] This has reinforced the right of everyone who has been accused of committing an offence that entails punitive sanctions to be tried by a court of law.[906]

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[903] See, Art.93.

[904] For a comprehensive discussion about this Article see Stephanos Stavros, *The Guarantees for Accused Persons Under Article 6 of the European Convention on Human Rights* (hereinafter cited as Stavros)), (London: Matinus Nijhoff Publishers 1993).

[905] See, Deweer Case, Judgment of 27th February 1980, Ser.A Vol.35 (1980) p.25 para.49.

[906] See, *inter alia*, Ozturk Case, Judgment of 21st February 1984, Ser.A.73 (1984) pp.21-22 para.56; the Case of Mauer v. Austria, Judgment of 18th February 1997, Reports of Judgments and Decisions, No.28 (1997-I) 76 and the other cases cited therein on p.83 para.30.

Nevertheless, the right of access to a court, which is an incidence of the right to a fair trial, is, as the Court noted in the Deweer Case[907], subject to implied limitations such as a decision not to prosecute or an order for discontinuance of proceedings.[908] In this last mentioned instance, however, the denial of access to a court may constitute a breach of Art.6 if the discontinuation of proceedings has given rise to unfavourable implications as regard the accused person's guilt.[909]

The right of access to a court does not include a right to have criminal proceedings instituted against a third person[910]. Nor does it guarantee a right to institute private criminal proceedings.[911] For, Art.6(1) is primarily designed to guarantee a fair hearing to persons charged with criminal offences.[912] Further, a breach of this right could not be alleged if the person concerned has negligently missed the available opportunities to access a court.[913] Furthermore, provided that there exist safeguards to avoid the possibility of abuse, it would not be inconsistent with the requirements of Art.6(1) to confine proceedings only to the question of sentence in cases where the accused person has pleaded guilty.[914] In addition, a person may also waive his/her right to access a court, for example by agreeing to pay a fine. Such waivers, which have undeniable advantages for the individuals as well as for the administration of justice, do not in principle offend against the Convention.[915] Nonetheless, in order to be valid, the waiver, which will be subject to careful review[916], must have been established in an unequivocal manner.[917]

The prosecution and punishment of minor offences by quasi-judicial tribunals are not prohibited by the European Convention.[918] Adopting such a practice for

[907] Judgment of 27th February 1980, Ser.A Vol.35 (1980) p.25 para.49.
[908] Also see, App.No.4550/70, Soltikow v. The Federal Republic of Germany, 38 CD (1972) 123; App.No.7950/77, X, Y and Z v. Austria, 19 D & R (1980) 213; App.No.8233/78, X v. UK, 3 EHRR (1981) 271.
[909] See, Adolf Case, Judgment of 26th March 1982, Ser.A Vol.49 (1982); the Minelli Case, Judgment of 25th March 1983, Ser.A Vol.62 (1983).
[910] See, App.No.9777/82, T v. Belgium, 34 D & R (1983) 158. *c.f.* from App.No.7116/75, X v. Federal Republic of Germany, 7 D & R (1977) 91.
[911] See, the Case of Helmers v. Sweden, Judgment of 29th October 1991, Ser.A Vol.212-A (1992) p.14 para.28.
[912] Note the guarantees provided by Art.6(1) for litigants in civil proceedings which have not been discussed here as they do not relate to the present research.
[913] See, the Case of Hennings v. Germany, Judgment of 16th December 1992, Ser.A Vol.251-A (1993) pp.11-12 para.24-27.
[914] See, App.No.5076/71, X v. The United Kingdom, 40 CD (1972) 64 pp.66-67 para.2.
[915] See, Deweer Case, Judgment of 27th February 1980, Ser.A Vol.35 (1980) p.25 para.49.
[916] Ibid..
[917] See, *inter alia*, the Case of Colozza and Rubinat, Judgment of 12th February 1985, A.89 (1985) p.14 para.28. *c.f.* from Neumeister Case, Judgment of 7th May 1974, Ser.A Vol.17 (1974) p.16 para.36.
[918] However, it must be noted that the accused persons are entitled to first instance tribunals which fully meet the requirements of Art.6 if the hearings are concerned with serious charges. See the Case of

administrative convenience does not offend the notion of a 'fair hearing' as long as the person concerned, if he/she so desires, is able to take any decision thus made against him/her before a tribunal that offers the guarantees provided by Art.6(1).[919] For, those guarantees apply equally to minor offences, even if a punishment is not imposed, as well as they do to serious crimes.[920] As the Court observed in the Ozturk Case[921];

> "(t)here is in fact nothing to suggest that the criminal offence referred to in the Convention necessarily implies a certain degree of seriousness...it would be contrary to the object and purpose of Art.6, which guarantees to 'everyone charged with a criminal offence' the right to a court and to a fair trial, if the States were allowed to remove from the scope of this Article a whole category of offences merely on the ground of regarding them as petty."

The guarantees of Art.6(1) become applicable whenever a person is "charged" with a "criminal" offence.[922] Here the words "charged" and "criminal" have their own autonomous Convention meanings and the definitions given to them at national levels are, although considered to some extent by the Strasbourg authorities in arriving at decisions, not regarded as conclusive.[923] This approach has surmounted the various differences that exist with regard to the meaning of these words among the systems of criminal procedure of the Contracting States, which otherwise would have watered down the whole regime of Art.6.

According to Strasbourg jurisprudence the word "charge" must be understood within the meaning of the Convention.[924] In this connection the prominent place held in a democratic society by the right to a fair trial has prompted the Convention's supervisory organs to prefer a "substantive", rather than a "formal", conception of the "charge" contemplated by Art.6(1). As such when arriving at a decision, the

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Findlay v. The United Kingdom, Judgment of 25th February 1997, Reports of Judgments and Decisions, No.30 (1997-I) 263 p.282 para.79.

[919] See, Ozturk Case, Judgment of 21st February 1984, Ser.A Vol.73 (1984) pp.21-22 para.56. *c.f.* in, *inter alia*, Lutz Case, Judgment of 25th August 1987, Ser.A Vol.123 (1987) 4 p.24 para.57; Belilos Case, Judgment of 29th April 1988, Ser.A Vol.132 (1988) p.30 para.68. Also see, the Case of Hennings v. Germany, Judgment of 16th December 1992, Ser.A Vol.251-A (1993).

[920] See, Adolf Case, Judgment of 26th March 1982, Ser.A Vol.49 (1982) p.16 para.33.

[921] Judgment of 21st February 1984, Ser.A Vol.73 (1984) pp.20-21 para.53.

[922] See, Adolf Case, Judgment of 26th March 1982, Ser.A Vol.49 (1982) p.16 para.33.

[923] See, *inter alia*, Deweer Case, Judgment of 27th February 1980, Ser.A Vol.35 (1980) p.22 para.42; Adolf Case, Judgment of 26th March 1982, Ser.A Vol.49 (1982) p.15 para.30; Serves v. France, Judgement of 20th October 1997, Report of Judgements and Decisions, No.53 (1997-VI) 2159 p.2172 para.42; Tejedor Garcia v. Spain, Judgement of 16th December 1997, Report of Judgements and Decisions, No.60 (1997-VIII) 2782 pp.2794-95 para.27.

[924] See, *inter alia*, Neumeister Case, Judgment of 27th June 1968, Ser.A Vol.8 (1968) p.41 para.18; Serves v. France, Judgement of 20th October 1997, Report of Judgements and Decisions, No.53 (1997-VI) 2159 p.2172 para.42 ; Tejedor Garcia v. Spain, Judgement of 16th December 1997, Report of Judgements and Decisions, No.60 (1997-VIII) 2782 pp.2794-95 para.27.

Strasbourg organs look behind the appearances and investigate the realities of the procedure in question.[925]

At present the word "charge" has been defined for the purpose of Art.6(1) as "the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence".[926] It may in some instances, however, take the form of other measures which carry the implication of such an allegation and which likewise substantially affect the situation of the suspect.[927] For examples, according to Strasbourg jurisprudence, even if there is no official notification to that effect, a criminal charge is deemed to be in existence if, an order to arrest has been issued against a person[928]; the prosecuting authorities proposed a friendly settlement and requested the person concerned to pay a sum of money as a substitute for a penalty to avoid future prosecution[929]; primary investigation has been begun and the person concerned, albeit at liberty, has 'officially learnt of the investigation or begun to be effected by it'[930]; the person concerned appointed defence counsel subsequent to the opening of a file against him/her by the public prosecutors office on the grounds of a police report[931]; the public prosecutors office requested inquiries against the person concerned in connection with his/her involvement in a criminal offence[932]. On the other hand, it must be mentioned here, that the conduct of police investigations against a person *per se* would not be sufficient to consider him/her as being subject to a charge within the meaning of Art.6(1).[933] The situation remains the same also with regard to interrogation of suspects or witnesses.[934]

Under Art.6 an accused person remains subjected to a charge until his/her acquittal or conviction becomes final.[935] In this connection it must also be noted that the

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[925] See, Deweer Case, Judgment of 27th February 1980, Ser.A Vol.35 (1980) p.23 para.44.
[926] See, *inter alia*, Deweer Case, Judgment of 27th February 1980, Ser.A Vol.35 (1980) p.24 para.46; Serves v. France, Judgement of 20th October 1997, Report of Judgements and Decisions, No.53 (1997-VI) 2159 p.2172 para.42 ; Tejedor Garcia v. Spain, Judgement of 16th December 1997, Report of Judgements and Decisions, No.60 (1997-VIII) 2782 pp.2794-95 para.27.
[927] See, *inter alia*, the Case of Foti and Others, Judgment of 10th December 1982, Ser.A Vol.56 (1983) p.18 para.52; Corigliano Case, Judgment of Judgment of 10th December 1982, Ser.A Vol.57 (1983) p.13 para.34; Ozturk Case, Judgment of 21st February 1984, Ser.A Vol.73 (1984) p.21 para.55.
[928] See, Wemhoff Case, Judgment of 27th June 1968, Ser.A Vol.7 (1968) pp.26-27 para.19; Boddaert v. Belgium, Judgment of 12th October 1992, Ser.A Vol.235-D (1993) 70 p.81 para.35.
[929] See, Deweer Case, Judgment of 27th February 1980, Ser.A Vol.35 (1980) pp.21-24 para.41-47.
[930] See, Eckle Case, Judgment of 15th July 1982, Ser.A Vol.51 (1982) pp.33-34 para.73-74.
[931] See, Angelucci v. Italy, Judgment of 19th February 1991, Ser.A Vol.196-C (1991) 26 p.31 para.13.
[932] See, App.No.13017/87, P v. Austria, 71 D & R (1991) 52 p.60 para.57.
[933] See, App.No.4483/70, X v. The Federal Republic of Germany, 38 CD (1972) 77.
[934] See, App.No.4649/70, X v. The Federal Republic of Germany, 46 CD (1974) 1.
[935] See, the Case of Monnell and Morris, Judgment of 2nd March 1987, Ser.A Vol.115 (1987) p.21 para.54. *c.f.* from Delcourt Case, Judgment of 17th January 1970, Ser.A Vol.11 (1970) pp.13-15 para.25.

determination of a criminal charge, within the meaning of Art.6(1), means not only the determination of guilt or innocence of the accused, but also in principle the determination of his/her sentence.[936] For, the expression "everyone charged with a criminal offence" includes persons who, although already convicted, have not been sentenced.[937] This in other words means that the guarantees provided in Art.6 continue to apply to the whole of the proceedings, including appeal proceedings[938], which are determinative of the charge in question as well as the sentence to be imposed.

Although Art.6 does not compel the contracting States to set up courts of appeal, a State which does institute such courts is required to ensure that persons amenable to the law shall enjoy before these courts the fundamental guarantees contained in that Article.[939] This requirement applies equally to applications for leave to appeal[940] as well as to appeals on the law or the facts.[941] Nevertheless, the manner in which Art.6(1) is to be applied in relation to appeal courts depends upon the special features of the proceedings involved. In particular, account must be taken of the role of those courts in criminal justice administration in the domestic legal order.[942]

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[936] See, *inter alia*, the Case of Findlay v. The United Kingdom, Judgment of 25th February 1997, Reports of Judgments and Decisions, No.30 (1997-I) 263 p.279 para.69.

[937] See, App.No.4623/70, X v. The United Kingdom, 39 CD (1972) 66 p.74. *c.f.* in App.No.8289/78, X v. Austria, 18 D & R (1980) 160 p.166 para.1. Nonetheless, it must be noted here that the guarantees of Art.6 do not apply to requests for conditional release, revision, pardon or mitigation of penalties as proceedings in these instances involve persons who have already been convicted of an offense and sentenced (See, for example, App.No.1760/63, X v. Austria, 9 YBECHR (1966) 166 p.174). On the other hand they do apply to proceedings involving revocation of a conditional. For such proceedings may result in a renewed imposition of a penalty and thus amount to a determination of a criminal charge (See, App.No.4036/69, X v. The United Kingdom, 32 CD (1970) 73 p.75).

[938] See, Eckle Case, Judgment of 15th July 1982, Ser.A Vol.51 (1982) p.34 para.76.

[939] See, Delcourt Case, Judgment of 17th January 1970, Ser.A Vol.11 (1970) pp.13-15 para.25. *c.f.* in, *inter alia*, the Case of Monnell and Morris, Judgment of 2nd March 1987, Ser.A Vol.115 (1987) p.21 para.54; App.No.14739/89, Callaghan and Others v. The United Kingdom, 60 D & R (1989) 296 pp.299-301 para.1. Also see, App.No.9315/81, J v. Austria, 34 D & R (1983) 96 p.97.

[940] See, the Case of Monnell and Morris, Judgment of 2nd March 1987, Ser.A Vol.115 (1987). Also see, App.No.3075/67, X v. The United Kingdom, 11 YBECHR (1968) 466 pp.486-492; App.No.5871/72, X v. The United Kingdom, 1 D & R (1975) 54 para.2; App.No.7413/76, x v. The United Kingdom, 9 D & R (1978) 100; App.No.9818/82, Morris v. The United Kingdom, 35 D & R (1984) 117 pp.121-122 para.2.

[941] See, Delcourt Case, Judgment of 17th January 1970, Ser.A Vol.11 (1970).

[942] See, Delcourt Case, Judgment of 17th January 1970, Ser.A Vol.11 (1970) p.15 para.26. *c.f.* in, *inter alia*, Pakelli Case, Judgment of 25th April 1983, Ser.A Vol.64 (1983) p.14 para.29; the Case of Monnell and Morris, Judgment of 2nd March 1987, Ser.A Vol.115 (1987) p.22 para.56; Sutter Case, Judgment of 22nd February 1984, Ser.A Vol.74 (1984) p.13 para.28; Ekbatani Case, Judgment of 26th May 1988, Ser.A Vol.134 (1988) p.13 para.27; Case of Helmers v. Sweden, Judgment of 29th October 1991, Ser.A Vol.212-A (1992) p.15 para.31; Bulut v. Austria, Judgment of 22nd February 1996, Reports of Judgments & Decisions, No.5 (1996 II) 346 p.358 para.41.the Case of Vacher v. France, Judgment of 17th December 1996, Reports of Judgments and Decisions, No.25 (1996-VI) 2138 p.2148 para.24.

As mentioned earlier the word "criminal" also has an autonomous Convention meaning and thus is understood independent of the definitions given at national levels. In this connection, the wider and constructive interpretations given to the term have encompassed disciplinary as well as regulatory offences within the meaning of "criminal".[943] As the Court observed in the Case of Engel and Others[944], involving military disciplinary offences,

> "(i)f the Contracting States were able at their discretion to classify an offence as disciplinary instead of criminal, or to prosecute the author of a 'mixed' offence on the disciplinary rather than on criminal plane, the operation of the fundamental clauses of Article 6 and 7 would be subordinated to their sovereign will. A latitude extending thus far might lead to result incompatible with the purpose and object of the Convention. The Court therefore has jurisdiction, under Article 6...to satisfy itself that the disciplinary does not improperly encroach upon the criminal. In short the 'autonomy' of the concept of 'criminal operates, as it were, one way only."

In order to determine whether a particular offence is a criminal offence within the meaning of Art.6, the Court in the above mentioned case developed three criteria.[945] Firstly, it must be examined whether the provision defining the offence charged belongs, according to the legal system of the respondent State, to criminal law. If it does, no further test is required and the guarantees of Art.6 will automatically come into operation.

However, the classification given by the municipal law, according to the Court, is no more than a starting point. The indications afforded by such classification have only a formal and relative value and must be examined in the light of the common denominator of the respective legislations of the various contracting States. Accordingly, if the offence is not classified as criminal under the legal system in question two further alternative criteria[946], viz., (a) the nature of the offence, (b) the

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[943] For examples see, the Case of Engel and Others, Judgment of 8th June 1976, Ser.A Vol.22 (1977) - offenses concerning military discipline; the Case of Campbell and Fell, Judgment of 28th June 1984, Ser.A Vol.80 (1984) - offenses concerning prison discipline; the Case of Demicoli v. Malta, Judgment of 27th August 1991, Ser.A Vol.210 (1991) - breach of parliamentary privileges; Deweer Case, Judgment of 27th February 1980, Ser.A Vol.35 (1980) - breach of price fixing regulations; Belilos Case, Judgment of 29th April 1988, Ser.A Vol.132 (1988) - breach of police regulations concerning public demonstrations; Ozturk v. Germany, 6 EHRR (1984) 409 - traffic offenses; Salabiaku v. France, Judgment of 7th July 1988, Ser.A Vol.141-A (1989) - Breach of customs code; App.No.8998/80, X v. Austria, 32 D & R (1983) 150 - breach of regulations limiting the hours of work of young people.

[944] Judgment of 8th June 1976, Ser.A Vol.22 (1977) p.34 para.81. Also see, Ozturk v. Germany, 6 EHRR (1984) 49 pp.420-21 para.49.

[945] Ibid., pp.34-35 para.82. *c.f.* in, *inter alia*, Ozturk v. Germany, 6 EHRR (1984) 409, p.421 para.50; Case of Campbell and Fell, Judgment of 28th June 1984, Ser.A Vol.80 (1984) pp.34-38 para.67-73; Weber Case, Judgment of 22nd May 1990, Ser.A Vol.177, pp.17-18 para.29-35; the Case of Demicoli v. Malta, Judgment of 27th August 1991, Ser.A Vol.210 (1991) pp.15-17 para.30-35; Schmautzer v. Austria, 21 EHRR (1996) 511 p.523 para.27; Umlauft v. Austria, 22 EHRR (1996) 76 p.87 para.30; Pfarrmeier v. Austria, 22 EHRR (1996) 175 p.187 para.31.

[946] See, Lutz Case, Judgment of 25th August 1987, Ser.A Vol.123 (1987) 4 p.23 para.55.

degree of severity of the penalty that the person concerned risks incurring, are applied to determine the applicability of Art.6.

In line with this jurisprudence the Court in Ozturk v. Germany found a minor traffic offence, which carried a fine of 60 Deutsch-Marks, to be a criminal offence within the meaning of Art.6, albeit it was classified under the domestic law of the respondent State as a regulatory offence. As the Court noted, according to the ordinary meaning of the terms, there generally come within the ambit of the criminal law, offences that make their perpetrator liable to penalties intended, *inter alia*, to be deterrent and usually consisting of fines and of measures depriving the person of his/her liberty. Notwithstanding its decriminalisation, the offence in question carried penalties of punitive character, which is the customary distinguishing feature of criminal penalties. Moreover, in spite of the decriminalisation, the rule of law infringed by the Applicant had, for its part, not undergone any change in its content. It was a rule that was directed, not towards a given group possessing a special status, but towards all citizens in their capacity as road users. It prescribed conduct of certain kind and made the resultant requirement subject to a sanction that was punitive.[947] Thus, both the character of the rule and the purpose of the penalty, which sought to punish as well as deter, showed that the offence in question was, in terms of Art.6 of the Convention, criminal in nature.[948] In arriving at this decision, the Court also took in to consideration the fact that in vast majority of the Contracting States the misconduct in question continued to be classified as part of the criminal law.

The Case of Bendenoun v. France[949] involved a tax surcharge which was classified as a "tax penalty" under the law of the respondent State. The same law defined the conduct of which the Applicant stood accused as a "tax offence". Nonetheless, this offence came under an article of the respondent State's General Tax Code, which applied to all citizens in their capacity as taxpayers, and laid down certain requirements to which it attached penalties in the event of non-compliance. Moreover, the surcharges in question were very substantial and were intended to work both as a

[947] According to the Court in the Weber Case [Judgment of 22nd May 1990, Ser.A Vol.177 (1990) p.18 para.33] sanctions would be regarded as disciplinary if they are designed to ensure that the members of particular groups comply with the specific rules governing their conduct.
[948] Ibid., pp.424-425 para.53. Also see, the Case of Schmautzer V. Austria, Judgment of 23rd October 1995, Ser.A Vol.328-A (1996) p.13 para.27-28; the Case of Umlauft V. Austria, Judgment of 23rd October 1995, Ser.A Vol.328-B (1996) 27 p.37 para.30-31; the Case of Gardinger V. Austria, Judgment of 23rd October 1995, Ser.A Vol.328-C (1996) 50 p.61 para.35-36.
[949] Judgment of 24th February 1994, Ser.A Vol.284 (1994).

punishment as well as a deterrent. In the Court's opinion the cumulative effect of these factors made the offence in issue a criminal one within the meaning of Art.6.[950]

The Court came to a similar conclusion in the Weber Case[951] which concerned an offence committed in connection with the administration of justice. Here again although the first criterion propounded in the Engel case did not underpin the Court's decision as the offence was not classified as criminal under the municipal law of the respondent State, the second and third criteria, viz., the nature of the offence and the nature and degree of severity of the possible penalty at stake, sufficiently demonstrated the applicability of Art.6(1). The law that defined the offence potentially effected the whole population and carried a punitive sanction. Also, the monetary fine the offence entailed had the possibility of being converted into a term of imprisonment in certain circumstances.[952] On the same line the Court in the Case of Demicoli v. Malta[953] found the breach of parliamentary privileges to be a criminal offence in spite of its disciplinary character under the Maltese law.

Conversely, it must be noted that, a sanction amounting to loss of liberty would not *ipso facto* make its principal offence a crime unless the nature, duration or the manner of execution of the sanction is appreciably detrimental to the person concerned.[954] The case of Eggs v. Switzerland involved an offence qualified as disciplinary, consisting of the breach of military duty and sanctioned by 5 days of strict arrest. According to the Commission, although relatively harsh, this freedom-restricting penalty could not, either by its duration or by the conditions of its enforcement have had caused serious detriment to the Applicant. Hence the offence in question was not regarded as criminal.[955] In X v. Belgium[956] a lawyer was subjected to a formal warning by a disciplinary organ. In the Commission's opinion the Applicant here was charged with having violated a rule dealing with the practice of the Barrister's profession and the sanction imposed was intrinsically not a severe one. It was therefore concluded that the Applicant was not the object of a criminal charge within the meaning of Art.6(1).

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[950] Ibis., p.20 para.47.
[951] Judgment of 22nd May 1990, Ser.A Vol.177 (1990).
[952] Ibid., pp.17-18 para.29-35.
[953] Judgment of 27th August 1991, Ser.A Vol.210 (1991).
[954] See, *inter alia*, the Case of Engel and Others, Judgment of 8th June 1976, Ser.A Vol.22 (1977) pp.34-35 para.82; App.No.7754/77, X v. Switzerland, 11 D & R (1978) 216.
[955] See, the Report adopted by the Commission on 4th March 1978, App.No.7341/76, 15 D & R (1979) 35 pp.64-65 para.79.
[956] App.No.8249/78, 20 D & R (1980) 40.

Art.6(1) guarantees to everyone charged with a criminal offence a right to a "fair hearing". Since some of the essential elements of the concept of a "fair hearing" overlaps with the specific guarantees contained in paragraphs 2 and 3 of Art.6[957], the Strasbourg organs usually examine this portion of paragraph 1 together with the latter mentioned paragraphs. As Stavros has observed "(t)he right to a 'fair hearing', which is entrenched in Art.6(1), should be seen...as the generic notion for the more specific guarantees of the provision, especially those of Art.6(2) and (3)."[958] According to Harris, O'Boyle and Warbrick;

> "(w)here a case falls within one of the specific guarantees in Art.6(2) or (3), it is sometimes considered by the Strasbourg authorities under that guarantee by itself or in conjunction with Art.6(1). Where the case has elements that go beyond a specific guarantee, the case is considered under both provisions or just under the general 'fair hearing' guarantee in Article 6(1)."[959]

Art.6 does not define the notion of a 'fair hearing'. Although, as mentioned earlier, paragraphs 2 & 3 enumerate some constituent elements of this notion, the phrase 'minimum rights' in paragraph 3 clearly indicates that those enumerations are not exhaustive. Thus, it must be noted that a trial may not conform to the general standard of a 'fair hearing', even if the minimum rights guaranteed by paragraphs 2 & 3 have been respected.[960]

Generally the applications concerning right to a fair hearing are examined in the light of the entire proceedings in question.[961] As the Commission observed in the Nielsen Case[962]

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[957] See, Artico Case, Judgment of 13th May 1980, Ser.A Vol.37 (1980) p.15 para.32. *c.f.* in, *inter alia*, Goddi Case, Judgment of 9th April 1984, Ser.A Vol.76 (1984) p.11 para.28; the Case of Colozza and Rubinat, Judgment of 12th February 1985, Ser.A Vol.89 (1985) p.14 para.26; Bonisch Case, Judgment of 6th May 1985, Ser.A Vol.92 (1985) pp.14-15 para.29; Unterpertinger Case, Judgment of 24th November 1986, Ser.A Vol.110 (1987) p.14 para.29; Kostovski Case, Judgment of 20th November 1989, Ser.A Vol.166 (1989) p.19 para.39; Kamasinski Case, Judgment of 19th December 1989, Ser.A Vol.168 (1989) pp.31-32 para.62; Delta Case, Judgment of 19th December 1990, Ser.A Vol.191 (1991) p.15 para.34; Case of Edwards v. The United Kingdom, Judgment of 16th December 1992, Ser.A Vol.247-B (1993) 23 p.34 para.33; Doorson v. The Netherlands, Judgment of 26th March 1996, Reports of Judgments and Decisions, No.6 (1996 Vol. II)446 pp.469-70 para.66; Pullar v. The United Kingdom, Judgment of 10th June 1996, Reports of Judgments and Decisions, No.11 (1996 III) 783 p.796 para.45; the Case of Vacher v. France, Judgment of 17th December 1996, Reports of Judgments and Decisions, No.25 (1996-VI) 2138 p.2147 para.22; Foucher v. France, Judgment of 18th March 1997, Reports of Judgments and Decisions, No.33 (1997-II) 452 p.464 para.30; Van Mechelen and Others v. The Netherlands, Judgment of 23re April 1997, Reports of Judgments and Decisions, No.36 (1997-III) 691 p.711 para.49

[958] Stavros, p.42 (footnotes excluded).

[959] See, D.J.Harris, M.O'Boyle, and C.Warbrick, *Law of the European Convention on Human Rights*, (London: Butterworths, 1995), p.202.

[960] See, Extracts from the Report of the European Commission on Human Rights, Neilsen Case, 4 YBECHR (1961) 490 p.548 para.52.

[961] See, Extracts from the Report of the European Commission on Human Rights, Neilsen Case, ibid.. *c.f.* in App.No.5574/72, X v. United Kingdom, 3 D & R (1976) 10 p.16 para.5; Also see. the Case of

> "...the question whether the trial conforms to the standard laid down by paragraph 1 must be decided on the basis of a consideration of the trial as a whole, and not on the basis of an isolated consideration of one particular aspect of the trial or one particular incident. Admittedly, one particular incident or one particular aspect...may have been of such importance as to be decisive for the general evaluation of the trial as a whole. Nevertheless, even in this contingency, it is on the basis of an evaluation of the trial in its entirety that the answer must be given to the question whether or not there has been a fair trial."[963]

This approach has enabled the Strasbourg authorities to 'assess the cumulative impact of a series of procedural shortfalls which, in themselves of secondary importance, could in combination compromise the accused's right to a fair hearing'.[964]

One of the important elements of a "fair hearing" in criminal proceedings is the right of the accused to be present at the hearings.[965] Although this is not expressly mentioned in Art.6(1), the object and purpose of the Article, taken as a whole, show that a person "charged with a criminal offence" is entitled to take part in the hearings.[966] Moreover, it is difficult to conceive how the rights guaranteed in sub-paragraphs (c), (d) & (e) of paragraph 3, viz., rights, "to defend himself in person", "to examine or have examined witnesses" and "to have the free assistance of an interpreter if he cannot understand or speak the language used in court", could be effectively exercised without the accused being present at the hearing.[967]

Barbera, Messegue and Jabardo, Judgment of 6th December 1988, Ser.A Vol.146 (1989) p.31 para.68; Kostovski Case, Judgment of 20th November 1989, Ser.A Vol.166 (1989) p.19 para.39; the Case of Edwards v. The United Kingdom, Judgment of 16th December 1992, Ser.A Vol.247-B (1993) 23 p.34 para.34;App.No.7413/76, X v. The United Kingdom, 9 D & R (1978) pp.100-101; App.No.9000/80, X v. Switzerland, 28 D & R (1982) 127 p.134 para.4; App.No.8603/79, 8722/79, 8723/79 and 8729/79, Crociani and Others v. Italy, 24 YBECHR (1981) 222 pp.252-54 para.3.

[962] 4 YBECHR (1961) 490 pp.548-550 para.52.

[963] However, the Commission in Crociani *et al* v. Italy, [App.No.8603/79, 8722/79, 8723/79 and 8729/79 (joined), 22 D & R (1981) 147 pp.215-216 para.3] admitted that "...a specific factor may be so decisive as to enable the fairness of the trial to be assessed at an earlier stage in the proceedings..."

[964] See, Stavros p.43. Here the author cites the Case of Barbera, Messegue and Jabardo v. Spain in which "...the Convention organs reached a finding of 'overall unfair proceedings', taking into consideration the limited opportunity given to the defense to question a key prosecution witness, the last minute replacement of the president of the trial court, the fact that the applicants were tried immediately after a long night's journey, and the surprising dispatch with which the hearing was concluded."

[965] See, *inter alia*, the Case of Monnell and Morris, Judgment of 2nd March 1987, Ser.A Vol.115 (1987) p.22 para.58; Ekbatani Case, 25th May 1988, Ser.A Vol.134 (1988) p.12 para.25; the Case of Barbera, Messegue and Jabardo, Judgment of 6th December 1988, Ser.A Vol.146 (1989) pp.33-34 para.78. Also see, App.No.1169/61, X v. The Federal Republic of Germany, 6 YBECHR (1963) 520 pp.570-72; App.No.10889/84, C v. Italy, 56 D & R (1988) 40 p.60.

[966] See, *inter alia*, the Case of Colozza and Rubinat, Judgment of 12th February 1985, Ser.A Vol.89 (1985) p.14 para.27.

[967] See, ibid., *c.f.* in, *inter alia*, the Case of Barbera, Messegue and Jabardo, Judgment of 6th December 1988, Ser.A Vol.146 (1989) pp.33-34 para.78; T v. Italy, Judgment of 12th October 1992, Ser.A Vol.245-C (1993) 34 p.41 para.26; the Case of Stanford v. The United Kingdom, Judgment of 23rd February 1994, Ser.A Vol.282-A (1994) pp.10-11 para.26.

This does not, however, mean that trial in absentia is necessarily inconsistent with the Convention.[968] Any conclusion to the contrary, which inevitably will lead to delays that may, for example, cause the dispersal of the evidence or the expiry of the time-limit for the prosecution, deleteriously undermines the whole process of administration of justice.[969] As the Strasbourg jurisprudence reveals conducting a trial in the absence of the accused person is not in itself incompatible with the provisions of Art.6 if the accused has waived, in an unequivocal manner, his/her right to be present at the hearings[970]or, if the authorities, after having taken diligent measures, have been unsuccessful in giving the accused person effective notice of the hearing.[971]

With regard the first mentioned instance an implied waiver is deemed to exist if the accused person does not attend the hearings after having been given effective notice of them.[972] Here the notice means official notice and vague or informal knowledge of the proceedings would not be sufficient.[973] Moreover, the notice, which must be given in person[974], would be regarded as effective only if given in reasonable time[975], in a language the accused person understands.[976] Nonetheless, the waiver would not be regarded as valid unless it is attended by minimum safeguards commensurate to its importance.[977]

According to the Commission, fugitives, who have not been given notice of the hearing, cannot be regarded, on the assumption that by absconding they deliberately intend to evade justice, to have unequivocally waived their right to be present at the hearing. For "(t)he rights secured in Article 6 apply to *everyone charged with a*

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[968] See, *inter alia*, the Case of Poitrimol v. France, Judgment of 23rd November 1993, Ser.A Vol.277-A (1994) p.13 para.31; Opinion of the Commission, the Case of Stamoulakatos v. Greece, Ser.A Vol.271 (1994) 15 p.17 para.56.

[969] See, *inter alia*, the Case of Colozza and Rubinat, Judgment of 12th February 1985, Ser.A Vol.89 (1985) p.15 para.29; Opinion of the Commission, the Case of Stamoulakatos v. Greece, Ser.A Vol.271 (1994) 15 p.17 para.56.

[970] See, *inter alia*, the Case of Poitrimol v. France, Judgment of 23rd November 1993, Ser.A Vol.277-A (1994) pp.13-14 para.31. *c.f.* from, the Case of Pfeifer and Plankl v. Austria, Judgment of 25th February 1992, Ser.A Vol.227 (1992) pp.16-17 para.37.

[971] See, *inter alia,* the Case of Colozza and Rubinat, Judgment of 12th February 1985, Ser.A Vol.89 (1985) pp.14-15 para.28; the Case of F.C.B. v. Italy, Judgment of 28th August 1991, Ser.A Vol.208- B (1991) 12 pp.20-22 para.29-36; T v. Italy, Judgment of 12th October 1992, Ser.A Vol.245-C (1993) 34 p.41 para.26.

[972] See, App.No.10889/84, c v. Italy, 56 D & R (1988) 40.

[973] See, T v. Italy, Judgment of 12th October 1992, Ser.A Vol.245-C (1993) 34 p.42 para.28.

[974] Ibid.. Also see, the opinion of the Commission, the Case of F.C.B. v. Italy, Ser.A Vol.208-B (1991) 24 p.26 para.55.

[975] See, Goddi Case, Judgment of 9th April 1984, Ser.A Vol.76 (1984) pp.12-13 para.31.

[976] See, Brozicek Case, Judgment of 19th December 1989, Ser.A Vol.167 (1989) p.18 para.38-41.

[977] See, *inter alia*, the Case of Poitrimol v. France, Judgment of 23rd November 1993, Ser.A Vol.277-A (1994) pp.13-14 para.31. *c.f.* from, the Case of Pfeifer and Plankl v. Austria, Judgment of 25th February 1992, Ser.A Vol.227 (1992) pp.16-17 para.37.

criminal offence, whether the accused is at liberty, in custody or on the run."[978] Although the Court has not given a conclusive opinion on this issue, some writers seem to disagree with the Commission's view.[979]

In the second mentioned instance, even if the authorities have acted diligently to inform the accused of the proceedings, a trial in absentia would be regarded as compatible with the Convention only if the person concerned can, after coming to know of the proceedings, obtain from the court which has heard his/her case a fresh determination of the merits of the charge, in respect of both law and facts.[980] In this connection it would be inconsistent with the regime of Art.6(1) for the domestic law to require the accused person to prove, in order to reopen the trial, that he/she was not seeking to evade justice or that his/her absence was due to *force majure*.[981] It is not clear whether an accused who waived the right to appear enjoys a similar right to have his/her case reheard. Although the Court in Poitrimol v France[982] left this question open, according to the Commission's observations in the Case of Colozza and Rubinat[983] the fugitives who have not been given notice of the hearings shall, once became aware of the proceedings, be entitled to a rehearing.[984]

In addition to these two instances, a trial may also proceed, without offending Art.6(1), in the absence of the accused, if the interests of the administration of justice require the trial to proceed and the accused, for example, due to illness cannot attend

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[978] See, the Opinion of the Commission, the Case of Colozza and Rubinat, Ser.A Vol.89 (1985) 25 p.30 para.124.

[979] See, Stavros p.265; D.J.Harris, M.O'Boyle, and C.Warbrick, *Law of the European Convention on Human Rights*, (London: Butterworths, 1995), p.205. According to these writers by absconding the fugitives unequivocally demonstrate their willingness not to participate in the proceedings.

[980] See, *inter alia*, the Case of Poitrimol v. France, Judgment of 23rd November 1993, Ser.A Vol.277-A (1994) pp.13-14 para.31. *c.f.* from the Case of Colozza and Rubinat, Judgment of 12th February 1985, Ser.A Vol.89 (1985) p.15 para.29.

[981] See, the Case of Colozza and Rubinat, ibid., pp.15-16 para.30.

[982] Judgment of 23rd November 1993, Ser.A Vol.277-A (1994).

[983] See, the Opinion of the Commission, the Case of Colozza and Rubinat, Ser.A Vol.89 (1985) 25 pp.28-30 para.110-124.

[984] However, Stavros on this issue observes, "(t)he boldness of the Commission's approach is admirable and appears consistent with the often repeated proposition that an implicit waiver of Convention rights should not be easily assumed. It would be unorthodox to allow the waiver of the right to attend proceedings of the institution of which the accused has not been appraised. However, the laws of many State Parties deny the extraordinary remedy of a retrial to the accused who deliberately evades justice...Sensing the potential opposition to a broad finding upholding the Commission's position, the Court expressly left the issue open. In our view, it appears unlikely that the Convention standard will develop in a direction inconsistent with the common European ground. The experience from other areas of Art.6 is that of cautious steps designed to ensure a minimum of common protection, while preserving national particularities." (p.265). Also see, D.J.Harris, M.O'Boyle, and C.Warbrick, *Law of the European Convention on Human Rights*, (London: Butterworths, 1995), p.205.

the hearings[985], or if the accused, without giving any convincing reasons, keeps not attending the hearings with a view to delaying the trial.[986] Nevertheless, it must be noted here that an accused person's right to a fair hearing under Art.6 is absolute and does not depend on his/her personal attendance at the proceedings. As such, a trial in absentia would conform with the Convention only if the authorities have taken appropriate measures to safeguard the interests of the non-attending accused.

With regard to appeal proceedings it must be noted that the Convention does not expressly guarantee to the accused persons a right to be present during the hearings.[987] An appeal conducted solely on written submissions may be justified by the circumstances of the case and/or the special features of the domestic proceedings viewed as a whole. In order to determine whether the personal attendance of the accused person is necessary to ensure a fair hearing at the appeal stage, attention is generally paid to the role of the appeal court, its powers and to the manner in which the accused person's interests are actually presented and protected during the appeal, particularly in the light of the issue to be decided.[988]

The Court has on a number of occasions held that provided that there has been a public hearing at first instance, the absence of "public hearings" before a second or third instance may be justified by the special features of the proceedings at issue. Thus, leave to appeal proceedings and proceedings involving only questions of law, as opposed to questions of fact, may comply with the requirements of Art.6 even if the appellant was not given an opportunity of being heard in person by the appeal courts.[989] This is because when a court of appeal deals exclusively with the questions of law it is only performing a supervisory role and not determining the degree of culpability or criminal liability of the accused.[990] With regard leave to appeal

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[985] See, App.No.7572/76, 7586/76 and 7587/76, G.Ensslin, A.Baader and J.Raspe v. The Federal Republic of Germany, 14 D & R (191979) 64 pp.114-116 para.21-22.

[986] See, App.No.4798/71, X v. The United Kingdom, 40 CD (1972) 31 p.33.

[987] See, *inter alia*, Ekbatani Case, Judgment of 26th May 1988, Ser.A Vol.134 (1988) p.14 para.31; App.No.8289/78, X v. Austria, 18 D & R (1980) 160 p.166 para.1.

[988] See, *inter alia*, the Case of Jan-ake Andersson v. Sweden, Judgment of 29th October 1991, Ser.A Vol.212-B (1992) 35 p.44 para.23; the Case of Fejde v. Sweden, Judgment of 29th October 1991, Ser.A Vol.212-C (1992) 58 p.67 para.27.

[989] See, *inter alia*, Sutter Case, Judgment of 22nd February 1984, Ser.A Vol.74 (1984) p.13 para.30; the Case of Monnell and Morris, Judgment of 2nd March 1987, Ser.A Vol.115 (1987) p.22 para.58; Ekbatani Case, Judgment of 26th May 1988, Ser.A Vol.134 (1988) p.14 para.31; Kamasinski Case, Judgment of 19th December 1989, Ser.A Vol.168 (1989) p.44 para.106; the Case of Jan-ake Andersson v. Sweden, Judgment of 29th October 1991, Ser.A Vol.212-B (1992) 35 p.45 para.27; the Case of Fejde v. Sweden, Judgment of 29th October 1991, Ser.A Vol.212-C (1992) 58 pp.68-69 para.31; Bulut v. Austria, Judgment of 22nd February 1996, Reports of Judgments & Decisions, No.5 (1996 II) 346 p.358 para.41.

[990] See, *inter alia*, Sutter Case, Judgment of 22nd February 1984, Ser.A Vol.74 (1984) p.13 para.30; App.No.1169/61, X v. Federal Republic of Germany, 6 YBECHR (1963) 520 p.572. Also see,

proceedings, according to the Court, the limited nature of the issue involved, i.e., whether to grant or refuse leave to appeal, does not in itself call arguments at a public hearing or the personal appearance of the accused.[991] As the Court observed in the Case of Monnell and Morris[992],

> "(o)n an application for leave to appeal, the court of appeal does not rehear the case on the facts, and no witnesses are called, even though the grounds of appeal involve questions of facts as opposed to questions of law alone...The issue for decision in such proceedings is whether the applicant has demonstrated the existence of arguable grounds which would justify hearing an appeal. If the grounds pleaded are in law legitimate grounds for appeal and if they merit further argument or consideration, leave will be given; if one or other of these conditions is lacking, leave will be refused..."

On the other hand, in Ekbatani Case[993] the Court came to a different conclusion since the appeal court in that instance had to make a full assessment of the question of the applicant's guilt or innocence. In order to arrive at a decision the court of appeal had to examine the case as to the facts and the law. Although convicted by a lower court the applicant denied the facts upon which the charge against him was founded. As such the credibility of the persons involved in the case was a crucial factor in the appeal proceedings. Nevertheless, the court of appeal, without a public hearing, confirmed the lower court's conviction. After an examination of the particular circumstances of the case, the European Court of Human Rights found that the question of the Applicant's guilt or innocence "...could not, as a matter of fact, have been properly determined without a direct assessment of the evidence given in person by the applicant...and by the complainant". Accordingly the Court concluded that "...the Court of Appeal's re-examination of Mr. Ekbatani's conviction at first instance ought to have comprised a full rehearing of the applicant and the complainant."[994]

This does not, however, necessarily mean that when an appeal court has jurisdiction to review a case, both as to facts and as to law, Art.6 requires, irrespective of the nature of the issues to be decided, the proceedings to be oral and public giving an opportunity for the accused to appear in person.[995] Although the publicity requirement is certainly one of the means whereby confidence in the courts is maintained, there are other considerations, including the right to trial within a reasonable time and the related need for expeditious handling of the court's case load, which must be taken into

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F.G.Jacobs and R.C.A.White, *The European Convention on Human Rights* (Oxford: Clarendon Press 1996), p.140.

[991] See, the Case of Monnell and Morris, Judgment of 2nd March 1987, Ser.A Vol.115 (1987) p.22 para.58.

[992] Ibid., para.57.

[993] Judgment of 26th May 1988, Ser.A Vol.134 (1988).

[994] Ibid., p.14 para.32.

[995] See, Helmers v. Sweden, Judgment of 29th October 1991, Ser.A Vol.212-A (1992) p.16 para.36.

consideration in determining the need for a public hearing at stages in the proceedings subsequent to the trial at first instance. Thus, the Court in Jan-ake Andersson v. Sweden[996] and Fejde v. Sweden[997], after having regard to, the fact that there had been public hearings at first instances, the roles of the appeal courts and the nature of the issues submitted to them - which included no questions of facts or law that could not have been adequately resolved on the basis of the case files - and to the minor character of the offences involved, concluded that there existed special features which justified the absence of public hearings at appeal stages. Nonetheless, it must be mentioned here that, according to Strasbourg jurisprudence, an accused person is entitled to appear in person at appeal proceedings if there remains a possibility of his/her sentence being increased by the appeal court.[998]

The procedural equality of the defence and the prosecution or the "equality of arms" is also an important element of a fair hearing[999]. In order to conform with this requirement the accused person must be given a reasonable opportunity of presenting his/her case to the court under conditions which do not place him/her at a substantial disadvantage *vis-à-vis* the prosecution.[1000] Thus, under Art.6(1), both the prosecution and the defence must have equal opportunities to access documents, records, files, etc.,[1001] which would be material to the decision on merit. In addition, the prosecution and the defence must also be equal in matters relating to the presentation of

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[996] Judgment of 29th October 1991, Ser.A Vol.212-B (1992) 35.
[997] Judgment of 29th October 1991, Ser.A Vol.212-C (1992) 58.
[998] See, the Case of Kremzow v. Austria, Judgment of 21st September 1993, Ser.A Vol.268-B (1994) 27 pp.44-45 para.65-67; Opinion of the Commission, the Case of Monnell and Morris, Ser.A Vol.115 (1987) 32 pp.39-40 para.142.
[999] See, *inter alia*, Neumeister Case, Judgment of 27th June 1968, Ser.A Vol.8 (1968) p.43 para.22; Delcourt Case, Judgment of 17th January 1970, Ser.A Vol.11 (1970) p.15 para.28; Bonisch Case, Judgment of 6th May 1985, Ser.A Vol.92 (1985) p.15 para.32; the Case of Borgers v. Belgium, Judgment of 30th October 1991, Ser.A Vol.214-B (1992) 21 p.31 para.24; Bulut v. Austria, Judgment of 22nd February 1996, Reports of Judgments and Decisions, No.5 (1996-II) 346 p.359 para.47; Foucher v. France, Judgment of 18th March 1997, Reports of Judgments and Decisions, No.33 (1997-II) 452 p.465 para.34; Extracts from the Report of the Commission, App..No.524/59 and 617/59, Herbert Ofner and Alois Hopfinger, 6 YBECHR (1963) 680 p.696 para.46; App.No.5871/72, X v. The United Kingdom, 1 D & R (1975) 54 para.2; App.No.7413/76,X v. The United Kingdom, 9 D & R (1978) 100-101.
[1000] See, *inter alia*, the Case of Barbera, Messegue and Jabardo, Judgment of 6th December 1988, Ser.A Vol.146 (1989) pp.33-34 para.78; the Case of Borgers v. Belgium, Judgment of 30th October 1991, Ser.A Vol.214-B (1992) 21 pp.30-32 para.22-29; Bulut v. Austria, Judgment of 22nd February 1996, Reports of Judgments & Decisions, No.5 (1996 II) 346 p.359 para.47; Foucher v. France, Judgment of 18th March 1997, Reports of Judgments and Decisions, No.33 (1997-II) 452 p.465 para.34; Extracts from the Report of the Commission, App.No.596/59 and 789/60, Patanki and Dunshirn v. Austria, 6 YBECHR (1963) 718 pp.730-732 para.36; App.No.8417/78, X v. Belgium, 16 D & R (1979) 200 p.207.
[1001] See, *inter alia*, Foucher v. France, Judgment of 18th March 1997, Reports of Judgments and Decisions, No.33 (1997-II) 452.

evidence[1002] and the treatment of expert witnesses.[1003] It is, however, not incompatible with the Convention to restrict the rights of the defence to inspect a court file to the accused person's lawyer[1004].

According to Strasbourg jurisprudence the principle of "equality of arms" would be violated if the defence is not allowed to reply to the prosecution's submissions or if the prosecuting authority is permitted to retire with the court and take part in its deliberations without giving such an opportunity to the defence.[1005] It is also against this principle to pronounce a verdict of guilt after the prosecuting authorities had been heard in the absence of the accused person or his/her legal representative.[1006] On the other hand, no breach of Art.6(1) would occur if the decision is made in the absence of both the parties.[1007]

When assessing the procedural equality of the parties the Convention's supervisory organs attach a significant importance to the appearances of the proceedings in question.[1008] This has brought in some objectivity to the test for equality of arms. If the appearances of the proceedings give rise to question about the equality of the parties, the Strasbourg authorities do not require the applicants to prove an actual inequality. Instead, a breach of Art.6 is recorded if an objectively justified legitimate doubt is shown about the equality between the prosecution and the defence.[1009]

The notion of a "fair hearing" also requires the proceedings to be of adversarial nature.[1010] Accordingly, both the prosecution and the defence must be given the opportunity to have knowledge of and comment on the observations filed and the

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[1002] See, App.No.12045/86, Douglas Blastland v. The United Kingdom, 52 D & R (1987) 273.
[1003] See, Bonisch Case, Judgment of 6th May 1985, Ser.A Vol.92 (1985) pp.14-15 para.26-33.
[1004] See, the Case of Kremzow v. Austria, Judgment of 21st September 1993, Ser.A Vol.268-B (1994) 27 p.42 para.52. *c.f.* from, Kamasinski Case, Judgment of 19th December 1989, Ser.A Vol.168 (1989) p.39 para.88.
[1005] See, the Case of Borgers v. Belgium, Judgment of 30th October 1991, Ser.A Vol.214-B (1992) 21 pp.30-32 para.22-29; the Opinion of the Commission, Lala v. The Netherlands, 18 EHRR (1994) 586 p.592 at p.595 para.52.
[1006] See, Neumeister Case, Judgment of 27th June 1968, Ser.A Vol.8 (1968) p.43 para.22.
[1007] See, App.No.1793/62, X v. Austria, 6 YBECHR (1963) 458 p.460; App.No.7413/76, X v. The United Kingdom, 9 D & R (1978) 100-101; App.No.11129/84, Brown v. The United Kingdom, 42 D & R (1985) 269 pp.271-272 para.2.
[1008] See, the Case of Borgers v. Belgium, Judgment of 30th October 1991, Ser.A Vol.214-B (1992) 21; Bulut v. Austria, Judgment of 22nd February 1996, Reports of Judgments & Decisions, No.5 (1996 II) 346.
[1009] See, the Case of Brandstetter v. Austria, Judgment of 28th August 1991, Ser.A Vol.211 (1991) pp.20-21 para.41- 45.
[1010] See, *inter alia*, the Case of Barbera, Messegue and Jabardo, Judgment of 6th December 1988, Ser.A Vol.146 (1989) pp.33-34 para.78. *c.f.* in the Case of Brandstetter v. Austria, Judgment of 28th August 1991, Ser.A Vol.211 (1991) p.27 para.66.

evidence adduced by the other party.[1011] In particular, a violation of Art.6(1) would occur if the prosecuting authorities have failed to disclose to the defence all the material evidence for and against the accused.[1012] As the Court observed in the Case of Van Mechelen and Others v. The Netherlands[1013], in order to facilitate adversarial argument, all the evidence must in principle be produced in the presence of the accused at a public hearing.[1014] This applies to all the evidence pertinent to disputed facts even if the facts relate to a point of procedure rather than to the alleged offence as such.[1015]

This, however, does not mean that the prosecution has a plenary right to present evidence of any sort. For, admission of certain types of evidence in a trial, even if they are presented during a public hearing in the presence of the defendant, may contravene the accused person's right to a fair hearing. For example, inclusion of oral or written statements, made by persons who do not appear as witnesses at the trial, in evidence may infringe the rights of the defence if an effective opportunity to refute them by challenging the credibility of the persons who made the statements or the reliability of the evidence is not given either during the investigation or at the trial.[1016] Further, it would also be contrary to the provisions of Art.6(1) to include confessions, made by the accused person during the investigations, as evidence in the trial unless there exist procedures to ensure that such confessions are not made under duress or extracted after maltreating the person concerned.[1017]

[1011] See, the Case of Brandstetter, ibid., pp.27-28 para.67; Bulut v. Austria, Judgment of 22nd February 1996, Reports of Judgments & Decisions, No.5 (1996 II) 346 pp.358-360 para.44-50.

[1012] See, *inter alia*, the Case of Edwards v. The United Kingdom, Judgment of 16th December 1992, Ser.A Vol.247-B (1993) 23 p.35 para.36.

[1013] Judgment of 23rd April 1997, Reports of Judgments and Decisions, No.36 (1997-III) 691 p.711 para.51.

[1014] However, no violation of Art.6(1) would be recorded on the ground of non-disclosure if the resultant defects have properly been examined and remedied by a subsequent procedure before an appeal court. See, the Case of Edwards v. The United Kingdom, Judgment of 16th December 1992, Ser.A Vol.247-B (1993) 23 p.36 para.39.

[1015] See, Kamasinski Case, Judgment of 19th December 1989, Ser.A Vol.168 (1989) p.43 para.102.

[1016] See, Unterpertinger Case, Judgment of 24th November 1986, Ser.A Vol.110 (1987) pp.13-15 para.28-33. *c.f.* in, *inter alia*, Kostovski Case, Judgment of 20th November 1989, Ser.A Vol.166 (1989) p.20 para.41; Windisch Case, Judgment of 27th September 1990, Ser.A Vol.186 (1991) p.10 para.25-26; Delta Case, Judgment of 19th December 1990, Ser.A Vol.191 (1991) p.16 para.36; the Case of Asch v. Austria, Judgment of 26th April 1991, Ser.A Vol.203 (1991) p.10 para.27; Saidi v. France, Judgment of 20th September 1993, Ser.A Vol.261-C (1993) 40 p.56 para.43; the Case of Van Mechelen and Others v. The Netherlands, Judgment of 23rd April 1997, Reports of Judgments and Decisions, No.36 (1997-III) 691 p.711 para.51.

[1017] See, Extracts from the Report of the Commission, Austria v. Italy, 6 YBECHR (1963) 740 p.742 at p.784; App.No.9370/81, G v. The United Kingdom, 35 D & R (1984) 75 p.79 para.5. Also see, the Case of Barbera, Messegue and Jabardo, Judgment of 6th December 1988, Ser.A Vol.146 (1989) p.37 para.87.

However, it must be noted here that the Convention does not lay down any rules on the admissibility of evidence as such, which is primarily a matter for regulation under national laws of the member States.[1018] Thus, for example, inclusion of a statement, made by a person not appearing as a witness at the hearings, in the evidence may not infringe Art.6 if that is "not the only evidence" upon which the accused person's conviction is based.[1019] Similarly, the fact that the domestic law permits the admission of unlawfully obtained evidence, such as involuntary confessions, in a trial **may** also not breach the Convention's obligations if such admissions do not render the trial, taken as a whole, unfair.[1020] In any event no violation of Art.6(1) would be recorded if it is established that the handicaps under which the defence laboured were sufficiently counterbalanced by the procedure followed by the judicial authorities.[1021]

According to Strasbourg jurisprudence, although not specifically mentioned, the right to silence and the right not to incriminate oneself also lie at the heart of the notion of a "fair hearing". Their rationale lies, *inter alia*, in the protection of the accused persons against improper compulsion by the authorities, which is important for the avoidance of miscarriages of justice as well as to the fulfilment of the aims of Art.6. The right not to incriminate oneself, in particular, presupposes that, in order to be a fair hearing,

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[1018] See, *inter alia*, the Case of Asch v. Austria, Judgment of 26th April 1991, Ser.A Vol.203 (1991) p.10 para.26; the Case of Van Mechelen and Others v. The Netherlands, Judgment of 23rd April 1997, Reports of Judgments and Decisions, No.36 (1997-III) 691 p.711 para.50.

[1019] See, the Case of Asch v. Austria, Judgment of 26th April 1991, Ser.A Vol.203 (1991). *c.f.* in, Artner v. Austria, Judgment of 28th August 1992, Ser.A Vol.242-A (1993). Compare these two cases with the Unterpertinger Case [Judgment of 24th November 1986, Ser.A Vol.110 (1987)], the Kostovski Case [Judgment of 20th November 1989, Ser.A Vol.166 (1989)], the Case of Van Mechelen and Others v. The Netherlands [Judgment of 23rd April 1997, Reports of Judgments and Decisions, No.36 (1997-III) 691] and Ludi v. Switzerland [Judgment of 15th July 1992, Ser.A Vol.238 (1992)]. In the first three of these cases the Court found violations of Art.6(1) since the convictions were based either "mainly" or to a "decisive extent" on the evidence of the non- appearing witness. In the last case a violation was recorded since the evidence of the non-appearing witness had "played a part" in the conviction.

[1020] See, Schenk Case, Judgment of 12th July 1988, Ser.A Vol.140 (1988) p.29 para.46. *c.f.* in, Kostovski Case , Judgment of 20th November 1989, Ser.A Vol.166 (1989) p.19 para.39; Windisch Case, Judgment of 27th September 1990, Ser.A Vol.186 (1991) p.10 para.25; Delta Case, Judgment of 19th December 1990, Ser.A Vol.191 (1991) pp.15-16 para.35-36; the Case of Edwards v. The United Kingdom, Judgment of 16th December 1992, Ser.A Vol.247-B (1993) 23 pp.34-35 para.34; Saidi v. France, Judgment of 20th September 1993, Ser.A Vol.261-C (1993) 40 p.56 para.43; Doorson v. The Netherlands, Judgment of 26th March 1996, Reports of Judgments & Decisions No.6 (1996 Vol. II), 446 p.470 para.67; App.No.12505/86, Hubert Wischnewski v. The Federal Republic of Germany, 58 D & R (1988) 106 p.111.

[1021] See, Doorson v. The Netherlands, Judgment of 26th March 1996, Reports of Judgments & Decisions No.6 (1996 Vol. II), 446 p.471 para.72. In this case the Court found no violation of Art.6(1) since the anonymous witnesses were questioned at the appeal stage in the presence of the counsel. However, the Court went on to say, "...it should be recalled that even when 'counterbalancing' procedures are found to compensate sufficiently the handicaps under which the defense labours, a conviction should not be based either solely or to a decisive extent on anonymous statements."(ibid., p.472 para.76). Also see, the Case of Van Mechelen and Others v. The Netherlands, Judgment of 23rd April 1997, Reports of Judgments and Decisions, No.36 (1997-III) 691 pp.711-714 para.49-65.

the prosecution should prove its case without resorting to evidence obtained through methods of coercion or oppression of the accused person.[1022]

Although in certain legal systems trial by jury is an important element in ensuring fairness in the system of criminal justice administration, it is not an essential aspect of a fair hearing within the meaning of Art.6(1).[1023] However, in cases where jury trial take place, the judge's summing-up must be fair.[1024] The summing-up must also be capable of neutralising any prejudices created in the minds of the jury against the accused person.[1025] On the other hand, albeit the guarantee of a fair trial may in certain circumstances require a judge to discharge a jury, it may not be necessary if other safeguards, such as a carefully worded redirection to the jury, could sufficiently achieve the objectives of Art.6(1).[1026] In non-jury trial the national courts must indicate with sufficient clarity the grounds on which they based their decision. As the Court said in the case of Hadjianastassiou v. Greece[1027] "(i)t is this, *inter alia*, which makes it possible for the accused to exercise usefully the right of appeal available to him."

Under Art.6(1) everyone charged with a criminal offence is entitled to a fair hearing 'within a reasonable time'. The aim of this provision, which is especially designed to avoid that a person charged should remain too long in a state of uncertainty about his/her fate, is to protect accused persons against excessive procedural delays.[1028] In this connection the period to be taken into consideration for verifying whether this provision has been observed necessarily begins with the day on which a person is charged[1029] and ends when the acquittal or conviction, including the sentence, becomes final.[1030]

[1022] See, *inter alia*, Saunders v. The United Kingdom, Judgment of 17th December 1996, Reports of Judgments & Decisions, No.24 (1996 Vol. VI), 2044 p.2064 para.68; Serves v. France, Judgement of 20th October 1997, Report of Judgements and Decisions, No.53 (1997-VI) 2159 pp.2173-74 para.46.
[1023] See, *inter alia*, App.No.14739/89, Callaghan and others v. The United Kingdom, 60 D & R (1989) 296 p.301.
[1024] See, App.No.5574/72, X v. The United Kingdom, 3 D & R (1976) 10 p.16 para.16(c).
[1025] See, Extracts from the Report of the Commission, Nielsen Case, 4 YBECHR (1961) 494 p.568.
[1026] See, Gregory v. The United Kingdom, Judgment of 25th February 1997, Reports of Judgments and Decisions, No.31 (1997-I) 296 p.310 para.48.
[1027] Judgment of 16th December 1992, Ser.A Vol.252 (1993) p.16 para.23.
[1028] See, *inter alia*, Stogmuller Case, Judgment of 10th November 1969, Ser.A Vol.9 (1969) p.40 para.5.
[1029] See, *inter alia*, Neumeister Case, Judgment of 27th June 1968, Ser.A Vol.8 (1968) p.41 para.18; Deweer Case, Judgment of 27th February 1980, Ser.A Vol.35 (1980) p.22 para.42; the Case of Foti and Others, Judgment of 10th December 1982, Ser.A Vol.56 (1983) p.18 para.52; App.No.4517/70, Huber v. Austria, 2 D & R (1975) 11 p.20 para.65.
[1030] See, *inter alia*, Eckle Case, Judgment of 15th July 1982, Ser.A Vol.51 (1982) pp.34-35 para.76-78; the Case of Adiletta and Others, Judgment of 19th February 1991, Ser.A Vol.197-E (1991) 59 p.65 para.17; Raimondo v. Italy, 18 EHRR (1994) 237 pp.263-264 para.42; Mansur v. Turkey, 20 EHRR

There is no ceiling limit within which period a case should be concluded in order to be reasonable. In fact, for the purpose of Art.6(1), the reasonableness of the length of proceedings is assessed in the light of the particular circumstances involved in each individual case. In this regard the Strasbourg authorities take into account, among other things, the complexity of the case, the conduct of the applicant as well as the relevant authorities, and what was at stake for the applicant[1031].

In connection with this last mentioned factor, the Court in Abdoella v. The Netherlands[1032] concluded that "...where a person is kept in detention pending the determination of a criminal charge against him, the fact of his detention is a factor to be considered in assessing whether the requirement of a decision on the merits within a reasonable time has been met." This consideration is particularly important for the accused persons who remain in detention during appeal proceedings since the guarantee under Art.5(3) to trial within a reasonable time ends with the conviction at first instance.[1033]

The complexities which prolong proceedings may emerge in criminal cases due to various reasons. In B v. Austria[1034], the Court took note of the difficulties encountered during the investigation and those derived from the nature of the accusations which made the case a complex one. The number of defendants, the nature and the size of the acts complained of, as well as the difficulties the authorities had to encounter in obtaining evidence from abroad contributed towards the complexities in the Neumeister Case.[1035] It was the volume of evidence which made the Eckle Case[1036] complicated.

(1995) 535 p.554 para.68; Philis v. Greece (N0.2), Judgment of 27th June 1997, Reports of Judgments & Decisions, No.40 (1997-IV) 1074 p.1083 para.36; the Case of Zana v. Turkey, Judgement of 25th November 1997, Report of Judgements and Decisions, No.57 (1997-VII) 2533 p.2553 para.83.

[1031] See, *inter alia*, Eckle Case, Judgment of 15th July 1982, Ser.A Vol.51 (1982) p.35 para.80; Abdoella v. The Netherlands, Judgment of 25th November 1992, Ser.A Vol.248-A (1993) pp.16-17 para.24; Mansur v. Turkey, 20 EHRR (1995) 535 p.553 para.61; Philis v. Greece (N0.2), Judgment of 27th June 1997, Reports of Judgments & Decisions, No.40 (1997-IV) 1074 p.1083 para.35; Zana v. Turkey, Judgement of 25th November 1997, Report of Judgements and Decisions, No.57 (1997-VII) 2533 p.2553 para.84; App.No.4517/70, Huber v. Austria, 2 D & R (1975) 11 pp.22-29 para.82-125.

[1032] Judgment of 25th November 1992, Ser.A Vol.248-A (1993) pp.16-17 para.24.

[1033] See, supra 2.3.2.1. Also see, the Case of B v. Austria, Judgment of 28th March 1990, Ser.A Vol.175 (1990); App.No.7412/76, Haase v. The Federal Republic of Germany, 11 D & R (1978) 78.

[1034] Judgment of 28th March 1990, Ser.A Vol.175 (1990) p.18 para.50.

[1035] Judgment of 27th June 1968, Ser.A Vol.8 (1968).

[1036] Judgment of 15th July 1982, Ser.A Vol.51 (1982).

Although Art.6(1) does not require the accused persons to co-operate actively with the authorities in the conduct of the investigation or the trial[1037], no breach of the right to trial within a reasonable time would be recorded if the responsibility for the delay is attributable to the applicant.[1038] On this line, in the Ringeisen Case, a proceeding which lasted for over five years were found not to be unreasonable since it was caused by both the complexity of the case as well as the innumerable requests and appeals made by the Applicant not merely for his release, but also challenging most of the competent judges and for the transfer of the proceedings to different court areas.[1039] In Girolami v. Italy[1040], the Court in determining the length of the proceedings reduced the period during which the Applicant remained absconding.

With regard the conduct of the authorities, the Convention imposes a positive obligation on them to take appropriate measures to conclude trials expeditiously. Thus, unjustified delays caused, for example by prolonged investigations or by the manner in which the authorities handled the case, would result in violation of the right to trial within a reasonable time.[1041] In connection with the handling of the case, it must be noted that, although the Convention does not prohibit the joining of charges or accused persons, such joinder must not lead to unreasonable delays in determining the criminal liability of a person.[1042] On the other hand, as the Strasbourg authorities have conceded, charges or the accused persons must not be severed just for the sake of expediting the proceedings, if such severance is incompatible with the good administration of justice.[1043]

According to the Court, Art.6(1) imposes a duty on the Contracting States "...to organise their judicial systems in such a way that their courts can meet each of its

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[1037] See, *inter alia*, Eckle Case, Judgment of 15th July 1982, Ser.A Vol.51 (1982) p.36 para.82; Zana v. Turkey, Judgement of 25th November 1997, Report of Judgements and Decisions, No.57 (1997-VII) 2533 p.2552 para.79.

[1038] See, *inter alia*, Ringeisen Case, Judgment of 16th July 1971, Ser.A Vol.13 (1971) p.45 para.110; App.No.2257/64, Soltikow v. The Federal Republic of Germany, 14 YBECHR (1971) 868 p.872 para.29-30; App.No.6181/73, Hatti v. The Federal Republic of Germany, 6 D & R (1977) 22 p.38 para.82.

[1039] Judgment of 16th July 1971, Ser.A Vol.13 (1971).

[1040] Judgment of 19th February 1991, Ser.A Vol.196-E (1991) 50.

[1041] See, *inter alia*, Ringeisen Case, Judgment of 16th July 1971, Ser.A Vol.13 (1971) pp.35-40 para.85- 90; Corigliano Case, Judgment of 10th December 1982, Ser.A Vol.57 (1983) pp.15-16 para.45-47; App.No.8435/78, Orchin v. The United Kingdom, 34 D & R (1983) 5 p.12 para.49.

[1042] See, the Case of Hentrich v. France, Judgment of 22nd September 1994, Ser.A Vol.296-A (1994) p.23 para.61; the Case of Foti and Others, Judgment of 10th December 1982, Ser.A Vol.56 (1983) p.23 para.75.

[1043] See, Neumeister Case, Judgment of 27th June 1968, Ser.A Vol.8 (1968) p.42 para.21; Boddaert v. Belgium, Judgment of 12th October 1992, Ser.A Vol.235-D (1993) 70 pp.82-83 para.36-40.

requirements, including the obligation to hear cases within a reasonable time."[1044] As such, the authorities would be held responsible of violating the reasonable time guarantee if the relevant domestic administrative steps as well as the structure and procedures of the courts, including that of appeal courts, did not ensure an expeditious and efficient system of criminal justice administration as envisaged by Art.6(1).[1045] Reasons such as insufficiency of resources or backlog of cases are generally not accepted as valid excuses for unreasonable delays.[1046] On the other hand, a temporary backlog of business would not involve liability on the part of the Contracting States provided that they have taken prompt remedial action.[1047] Also, no breach of the right to trial within a reasonable time would occur if the authorities have prolonged proceedings for the purpose of allowing political, social or other unrests to calm down.[1048]

As mentioned earlier, the reasonableness of the length of the proceedings is assessed according to the circumstances of each individual case. No objective conclusions about a specific time period, within which a case should be concluded in order to be regarded as reasonable, or, the circumstances which would justify delays in proceedings, could be made from the Strasbourg case law relating to Art.6(1). According to Stavros,

> "(a) simple comparison of the duration of proceedings in cases where a violation has, or has not been found does not appear to provide a sufficient indication of the European standard of speedy trial. Periods exceeding nine or ten years have always been considered 'unreasonable', but in the area below the nine years mark, proceedings of a duration of three, four, five or six years have gone either way. Moreover, there exists cases where proceedings lasting even seven or eight years have been declared 'reasonable'"[1049]

On the whole the assessment whether the proceedings have lasted beyond a reasonable time is made after balancing the factors discussed above, viz., the complexity of the case, the conduct of the applicant and the relevant authorities, and what was at stake

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[1044] See, *inter alia*, Philis v. Greece (N0.2), Judgment of 27th June 1997, Reports of Judgments & Decisions, No.40 (1997-IV) 1074 p.1084 para.40; the Case of Zana v. Turkey, Judgement of 25th November 1997, Report of Judgements and Decisions, No.57 (1997-VII) 2533 p.2553 para.83.

[1045] See, *inter alia*, Eckle Case, Judgment of 15th July 1982, Ser.A Vol.51 (1982); the Case of Foti and Others, Judgment of 10th December 1982, Ser.A Vol.56 (1983); Baggetta Case, Judgment of 25th June 1987, Ser.A Vol.119 (1987) 23; Mansur v. Turkey, 20 EHRR (1995) 535; Philis v. Greece (N0.2), Judgment of 27th June 1997, Reports of Judgments & Decisions, No.40 (1997-IV) 1074.

[1046] See, *inter alia*, the Case of B v. Austria, Judgment of 28th March 1990, Ser.A Vol.175 (1990); the Case of Hentrich v. France, Judgment of 22nd September 1994, Ser.A Vol.296-A (1995); App.No.9193/80 v. Netherlands, 6 EHRR (1983-84) 134.

[1047] See, Baggetta Case, Judgment of 25th June 1987, Ser.A Vol.119 (1987) 23 pp.32-33 para.23; App.No.9193/80 v. Netherlands, 6 EHRR (1983/84) 134. Also see, the Case of Foti and Others, Judgment of 10th December 1982, Ser.A Vol.56 (1983).

[1048] See, the Case of Foti and Others, Judgment of 10th December 1982, Ser.A Vol.56 (1983).

[1049] Stavros p.106 (footnotes excluded).

for the applicant. It appears that, in order to record a violation of the right to trial within a reasonable time, the Strasbourg organs require periods of inactivity attributable to the State authorities. For example, in Soltikow v. The Federal Republic of Germany[1050] the Commission found no violation of the right to trial within a reasonable time since, in addition to the applicant's behaviour which delayed the proceedings, at no stage during the ten years in question did any considerable period elapse without some procedural step being taken. On the other hand, it must be noted that the fundamental purpose of Art.6 is to guarantee to everyone charged with a criminal offence a right to a fair hearing. Therefore, presumably, the authorities must at no time compromise the proper administration of justice, which is the overall aim of Art.6, just to achieve the expeditiousness stipulated by paragraph 1.

Art.6(1) guarantees to everyone charged with a criminal offence a right to be tried 'by an independent and impartial tribunal'. The tribunal envisaged here, however, need not necessarily be a court of law of the classic kind integrated within the standard judicial machinery of the country.[1051] According to the Court, for the purpose of Art.6(1), "...a tribunal is characterised in the substantive sense of the term by its judicial function, that is to say determining matters within its competence on the basis of rules of law and after proceedings concluded in a prescribed manner..."[1052] As Stavros has observed "...there appears to be four characteristics of a 'tribunal': power of binding decision, defined competence, resolution of disputes in accordance with rules of law and clear procedural rules."[1053] Thus, organs that do not function as judicial bodies or that have power only to make recommendations would not qualify under Art.6(1) as tribunals competent to determine conclusively the accused persons' criminal liability.[1054] On the other hand, the fact that an organ has authority to perform, in addition to adjudicating criminal charges, other non-judicial functions does not prevent it from being a tribunal within the meaning of Art.6(1).[1055]

Although Art.6(1) does not necessarily require that the tribunal be composed of professional judges, persons taking part in the making of the final decision on merit, such as, for examples, jurors in the case of jury trials or military officers in the case of court martials, must be both independent as well as impartial. In this connection,

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[1050] App.No.2257/64, 14 YBECHR (1971) 868 p.872 para.29.
[1051] See, *inter alia*, the Case of Campbell and Fell, Judgment of 28th January 1984, Ser.A Vol.80 (1984) pp.38-39 para.76.
[1052] See, Belilos Case, Judgment of 29th April 1988, Ser.A Vol.132 (1988) p.29 para.64.
[1053] Stavros pp.124-125 (footnotes excluded).
[1054] See, *inter alia*, the Case of Campbell and Fell, Judgment of 28th January 1984, Ser.A Vol.80 (1984) pp.38-39 para.76.
[1055] Ibid., pp.40-41 para.81.

independence means independence of the tribunal members not only from the parties and the executive, but also from the legislature.[1056] According to the Court, in order to establish whether a tribunal can be considered as "independent", regard must be had, *inter alia*, to the manner of appointment of its members and their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence.[1057] With regard to the manner of appointment, it must be noted that, appointment of tribunal members by the executive or by the legislature is not *per se* incompatible with the Convention.[1058] As Stavros has noted,

> "(i)n order to challenge successfully the independence of a tribunal on the basis of the method of appointment of its members, an applicant is required either to show a generally unsatisfactory practice of appointment, by reference to particular cases, or to prove that improper motives prompted the appointment of the members of the particular tribunal."[1059]

According to Strasbourg jurisprudence, the stability of the members' term of office is also essential for the independence of a tribunal.[1060] As the Court conceded in the Case of Campbell and Fell[1061], the irremovability of tribunal members by the executive during their term of office must in general be considered as a corollary of their independence and thus included in the guarantee of Art.6(1). In particular it must be noted that guarantees against arbitrary removal are important for the protection of tribunal members from outside pressure.

This, however, does not imply that the members should be appointed for life or that they should be irremovable in law.[1062] Appointment for fixed terms is in general not incompatible with the Convention.[1063] In the Case of Campbell and Fell[1064] the members in question held office for a term of three years or such less period as the

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[1056] See, *inter alia*, App.No.8603/79, 8722/79, 8723/79 and 8729/79 (joined), Crociani *et al* v. Italy, 22 D & R (1981) 147 p.227 para.10. Also see, the Case of Campbell and Fell, Judgment of 28th January 1984, Ser.A Vol.80 (1984) pp.39-40 para.78; Belilos Case, Judgment of 29th April 1988, Ser.A Vol.132 (1988) p.29 para.64.

[1057] See, *inter alia*, the Case of Campbell and Fell, Judgment of 28th January 1984, Ser.A Vol.80 (1984) pp.39-40 para.78; Findlay v. The United Kingdom, Judgment of 25th February 1997, Reports of Judgments and Decisions, No.30 (1997-I) 263, p.281 para.73; App.No.12839/87, Eccles, McPhillips and McShane v. Ireland, 59 D & R (1989) 212 p.217.

[1058] See, *inter alia*, the Case of Campbell and Fell, Judgment of 28th January 1984, Ser.A Vol.80 (1984); App.No.8603/79, 8722/79, 8723/79 and 8729/79 (joined), Crociani *et al* v. Italy, 22 D & R (1981) 147.

[1059] Stavros p.127 (footnotes excluded).

[1060] See, *inter alia*, App.No.8209/78, Sutter v. Switzerland, 16 D & R (1979) 166 pp.173-174 para.2.

[1061] Judgment of 28th January 1984, Ser.A Vol.80 (1984) p.40 para.80.

[1062] See, App.No.8209/78, Sutter v. Switzerland, 16 D & R (1979) 166 pp.173-174 para.2.

[1063] See, App.No.8603/79, 8722/79, 8723/79 and 8729/79 (joined), Crociani *et al* v. Italy, 22 D & R (1981) 147 pp.220-221 para.10.

[1064] Judgment of 28th June 1984, Ser.A Vol.80 (1984) p.40 para.80.

Home Secretary may appoint. Under the circumstances of the case, the Court regarded this period, in spite of its relatively short duration, as sufficient to comply with the requirements of Art.6(1).

Moreover, according to the Court, the absence of a formal recognition of irremovability in the law does not itself imply lack of independence provided that it is recognised in fact and that the other necessary guarantees are present.[1065] As the Commission noted in Eccles, McPhillips and McShane v. Ireland[1066], the issue of independence must be assessed in the light of the realities of the situation after having regard, not only to the legal provisions concerning the composition of the tribunal, but also to how these provisions are interpreted and how they actually operate in practice. Thus, the Commission in that case found no violation of Art.6(1), albeit the executive had powers to remove, and reduce salaries of, the judges of the Special Criminal Court in question, since the evidence did not suggest any attempt by the authorities to undermine the independence of the court by an abusive exercise of the aforesaid powers.

On the other hand, a tribunal is not independent within the meaning of Art.6(1) if its members are subject to any outside instructions or authority.[1067] In Sutter v. Switzerland[1068], the fact that the Servicemen who sat as judges in a Military Tribunal were subject to the authority of their hierarchical superiors in their respective units did not undermine the tribunal's independence as they, i.e., those Servicemen who sat as judges, were not answerable to anyone about the way in which they administered justice. In contrast, in the Case of Findlay v. The United Kingdom[1069], all the members of the Court Martial in question were subordinate in rank to the Convening Officer who appointed them. Many of them, including the president, were directly or ultimately under his command. Furthermore, the Convening Officer had the power, albeit in prescribed circumstances, to dissolve the Court Martial either before or during the trial. He was also central to the Applicant's prosecution and closely linked to the prosecuting authorities. In addition, he also acted as "confirming officer". Thus, the decision of the Court Martial was not effective until ratified by him, and he had the power to vary the sentence imposed as he saw fit. In the light of these circumstances the Court said "(t)his is contrary to the well-established principle that the power to give a binding decision which may not be altered by a non-judicial

[1065] Ibid..
[1066] App.No.12839/87, 59 D & R (1989) 212 p.218.
[1067] See, *inter alia*, App.No.8209/78, Sutter v. Switzerland, 16 D & R (1979) 166.
[1068] Ibid. p.174.
[1069] Judgment of 25th February 1997, Reports of Judgments and Decisions, No.30 (1997-I) 263.

authority is inherent in the very notion of 'tribunal' and can also be seen as a component of the 'independence' required by Article 6(1)..."[1070] Similarly, in the Greek Case[1071], the Commission found a violation of Art.6 since the extra ordinary courts in question had to exercise its jurisdiction 'in accordance with the decisions of the Minister of National Defence'. As indicated by the Commission in this case, any arbitrary exercise of a power bestowed on the executive to grant amnesty to, or pardon, convicted persons may also make the tribunals that adjudicate criminal liability unacceptably subservient.

As mentioned earlier the 'appearances of independence' is also an important factor that is taken into account when determining whether a tribunal is independent within the meaning of Art.6. This is an objective assessment based on the English maxim that 'justice must not only be done: it must also be seen to be done'.[1072] In Belilos Case[1073], the Police Board which convicted the Applicant of a minor criminal offence had only one member appointed by the municipality, which is a branch of the executive. The member in question was a senior municipal civil servant as well as a lawyer from police headquarters. However, he functioned in the Police Board in a personal capacity and was not subject to orders in the exercise of his powers. Moreover, under the domestic law of the Respondent State he could not be dismissed during his four year term of office. He also took an oath different from the one taken by the police officers. In spite of all this, the Court was not convinced about the independence of the Police Board in question. It said

> "...the member of the Police Board is a senior civil servant who is liable to return to other departmental duties. The ordinary citizen will tend to see him as a member of the police force subordinate to his superiors and loyal to his colleagues. A situation of this kind may undermine the confidence which must be inspired by the courts in a democratic society. In short, the applicant could legitimately have doubts as to the independence...of the Police Board, which accordingly did not satisfy the requirements of Article 6(1) in this respect."[1074]

As to the question of impartiality of a tribunal, there are two aspects to this requirement. First, the tribunal must be subjectively free of personal prejudice or bias. Secondly, it must also be impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubts in this respect.[1075]

[1070] Ibid., p.282 para.77.
[1071] 12 YBECHR (1969) p.148 para.326.
[1072] See, *inter alia*, the Case of Campbell and Fell, Judgment of 28th January 1984, Ser.A Vol.80 (1984) pp.40-41 para.81; Findlay v. The United Kingdom, Judgment of 25th February 1997, Reports of Judgments and Decisions, No.30 (1997-I) 263, p.282 para.76.
[1073] Judgment of 29th April 1988, Ser.A Vol.132 (1988).
[1074] Ibid., p.30 para.67.
[1075] See, *inter alia*, Piersack Case, Judgment of 1st October 1982, Ser.A Vol.53 (1982) pp.14-15 para.30; De Cubber Case, Judgment of 26th October 1984, Ser.A Vol.86 (1984) pp.13-14 para.24;

The subjective test endeavours to ascertain the personal convictions of the tribunal members.[1076] In this connection, usually the personal impartiality of tribunal members is presumed until there is proof to the contrary.[1077] In order to rebut this presumption, the applicants must show, for example, on facts, that the tribunal members have been hostile to, or have acted with ill-will towards them.[1078]

With regard to the objective test, the Convention's supervisory organs have once again referred to the English maxim that 'justice must not only be done: it must also be seen to be done', and emphasised on the importance of appearances.[1079] According to the Court in Hauschildt Case, any tribunal member whose impartiality is open to reasonable legitimate doubts must withdraw from the hearing. For, "(w)hat is at stake is the confidence which the courts in a democratic society must inspire in the public and above all, as far as criminal proceedings are concerned, in the accused."[1080] However, the standpoint of the accused person, although important, is not decisive in determining whether in a given case there is a legitimate reason to fear that a particular tribunal member lacks impartiality. What is decisive is whether this fear can be held objectively justified.[1081]

In the absence of special circumstances, the mere fact that a tribunal member has also made pre-trial decisions in the case cannot be taken as in itself justifying fears as to his/her impartiality.[1082] What matters is the extent and nature of the pre-trial measures

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Hauschildt Case, Judgment of 24th May 1989, Ser.A Vol.154 (1989) p.21 para.46; the Case of Thorgeir Thorgeirson v. Iceland, Judgment of 25th June 1992, Ser.A Vol.239 (1992) p.23 para.49; Fey v. Austria, Judgment of 24th February 1993, Ser.A Vol.255-A (1993) p.12 para.28; Padovani v. Italy, Judgment of 26th February 1993, Ser.A Vol.257-B (1993) 12 p.20 para.25; Saraiva de Carvalho v. Portugal, 18 EHRR (1994) 534 pp.546-547 para.33; Pullar v. The United Kingdom, Judgment of 10th June 1996, Reports of Judgments and Decisions, No.11 (1996-III) 783 p.792 para.30; Gregory v. The United Kingdom, Judgment of 25th February 1997, Reports of Judgments and Decisions, No.31 (1997-I) 296 p.310 para.48.

[1076] See, *inter alia*, Piersack Case, Judgment of 1st October 1982, Ser.A Vol.53 (1982) pp.14-15 para.30.

[1077] Hauschildt Case, Judgment of 24th May 1989, Ser.A Vol.154 (1989) p.21 para.47; the Case of Thorgeir Thorgeirson v. Iceland, Judgment of 25th June 1992, Ser.A Vol.239 (1992) p.23 para.50; Padovani v. Italy, Judgment of 26th February 1993, Ser.A Vol.257-B (1993) 12 p.20 para.26.

[1078] See, De Cubber Case, Judgment of 26th October 1984, Ser.A Vol.86 (1984) p.14 para.25.

[1079] See, *inter alia*, De Cubber Case, ibid., p.14 para.26.

[1080] Judgment of 24th May 1989, Ser.A Vol.154 (1989) p.21 para.48.

[1081] Ibid.. *c.f.* in, the Case of Thorgeir Thorgeirson v. Iceland, Judgment of 25th June 1992, Ser.A Vol.239 (1992) p.23 para.51; Fey v. Austria, Judgment of 24th February 1993, Ser.A Vol.255-A (1993) p.12 para.30; Padovani v. Italy, Judgment of 26th February 1993, Ser.A Vol.257-B (1993) 12 p.20 para.27; Saraiva de Carvalho v. Portugal, 18 EHRR (1994) 534 p.547 para.35.

[1082] See, Hauschildt Case, Judgment of 24th May 1989, Ser.A Vol.154 (1989) p.22 para.50-51. *c.f.* in, the Case of Sainte-Marie v. France, Judgment of 16th December 1992, Ser.A Vol.253-A (1993) p.16 para.32; Case of Nortier v. The Netherlands, Judgment of 24th August 1993, Ser.A Vol.267 (1993)

taken by the tribunal member.[1083] In the Case of Nortier v. The Netherlands[1084], the fact that the tribunal member in question had made pre-trial decisions in relation to detention on remand, did not compromise his impartiality at the trial stage.

In the case of Saraiva de Carvalho v. Portugal[1085], the presiding judge of the court which sentenced the Applicant to 15 years military imprisonment had issued the *despacho de pronuncia.* According to the Applicant, such a decision meant that at the outset of the proceedings the judge had already become convinced of the Applicant's guilt, a fact that could not fail to affect the conduct of the trial, which was the presiding judge's responsibility. The Court, however, did not agree with this view.

In the Court's opinion, under the Portuguese law applicable at that time, the judge in charge of the case, when issuing the *despacho*, was determining whether the file, including the prosecution's charges, amounted to a prima facie case such as to justify making an individual go through the ordeal of a trial. The issues which the judge had to settle when taking this decision were consequently not the same as those which were decisive for his final judgement. Moreover, in producing the *despacho*, the judge was acting in his capacity as a judge of the court which sentenced the Applicant. Also, the judge had not taken any steps in the investigation or in the prosecution. Accordingly, the presiding judge's detailed knowledge of the case, the Court said,

> "...did not mean that he was prejudiced in a way that prevented him from being impartial when the case came to trial. His function in the initial phase of the proceedings was to satisfy himself not that there was a 'particular confirmed suspicion' but that there was prima facie evidence."[1086]

On the other hand, in the Hauschildt Case[1087], the special circumstances involved, objectively justified the Applicant's fear about the impartiality of the tribunal members. In this case the Applicant's pre-trial detention, as well as continued detention during trial and appeal hearings, were ordered relying mainly on a particular section of an Act which required, *inter alia*, that the judge be satisfied that there is a 'particular confirmed suspicion' that the accused has committed the crime(s) with which he is charged. This wording had officially been explained as meaning that the

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p.16 para.35; Bulut v. Austria, Judgment of 22nd February 1996, Reports of Judgments & Decisions, No.5 (1996 II) 346 p.356 para.33

[1083] See, *inter alia*, Fey v. Austria, Judgment of 24th February 1993, Ser.A Vol.255-A (1993) p.12 para.30; Case of Nortier v. The Netherlands, Judgment of 24th August 1993, Ser.A Vol.267 (1993) p.15 para.33; Saraiva de Carvalho v. Portugal, 18 EHRR (1994) 534 p.547 para.35.

[1084] Judgment of 24th August 1993, Ser.A Vol.267 (1993). Also see, Hauschildt Case, Judgment of 24th May 1989, Ser.A Vol.154 (1989) pp.21-22 para.49.

[1085] 18 EHRR (1994) 534.

[1086] Ibid., pp.547-548 para.38.

[1087] Judgment of 24th May 1989, Ser.A Vol.154 (1989).

judge has to be convinced that there is 'very high degree of clarity' as to the question of guilt. The European Court said,

> "...the difference between the issue the judge has to settle when applying this section and the issue he will have to settle when giving judgement at the trial becomes tenuous. The Court is therefore of the view that in the circumstances of the case the impartiality of the said tribunal was capable of appearing to be open to doubt and that the applicant's fears in this respect can be considered objectively justified."[1088]

A tribunal member's impartiality is also open to legitimate doubts if he/she is/was connected with the investigation or the prosecution. According to the Court;

> "(i)f an individual , after holding, in the prosecutor's department, an office whose nature is such that he may have to deal with a given matter in the course of his duties, subsequently sits in the same case as a judge, the public are entitled to fear that he does not offer sufficient guarantees of impartiality."[1089]

In this respect, it is not necessary to define the exact role he/she played at the prosecutors department or, verify whether he/she in fact had any connections to the case. Similarly, in civil law countries, the successive exercise of the functions of investigating judge and trial judge by one and the same person in one and the same case may also violate the accused person's right to trial by an impartial tribunal.[1090]

In Ben Yaacoub v. Belgium, the Commission recorded a violation of Art.6(1) since the same person had dealt with the case in question first in the *chamber du conseil* (which , *inter alia*, had to ensure that the investigation was complete and commit the accused for trial where there existed sufficient indications of guilt) and subsequently as a member of the trial court.[1091] The Commission came to a similar conclusion in Jon Kristinsson v. Iceland when it was found that the judge in the criminal case brought against the Applicant was also the chief of police.[1092] On the other hand, in Fey v. Austria[1093], the fact that the trial judge had played a marginal interrogation role at the pre-trial stage did not prevent him from being impartial within the meaning of Art.6(1).

A personal involvement of the tribunal members in the matters on which the allegation against the accused person is based may also infringe the objective test. In Demicoli v. Malta[1094] the Applicant was tried by the Maltese House of Representatives for publishing an article in breach of the parliamentary privileges. The

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[1088] Ibid., pp.22-23 para.52.
[1089] See, Piersack Case, Judgment of 1st October 1982, Ser.A Vol.53 (1982) pp.14-15 para.30(d).
[1090] See, De Cubber Case, Judgment of 26th October 1984, Ser.A Vol.86 (1984); the Case of Pfeifer and Plankl v. Austria, Judgment of 25th February 1992, Ser.A Vol.227 (1992).
[1091] See, the Opinion of the Commission, Ben Yaacoub Case, Ser.A Vol.127-A (1988) 10.
[1092] See, the Opinion of the Commission, Jon Kristinsson Case, Ser.A Vol.171-B (1990) 40 p.47.
[1093] Judgment of 24th February 1993, Ser.A Vol.255-A (1993).
[1094] Judgment of 27th August 1991, Ser.A Vol.210 (1991).

two Members of the House whose behaviour in Parliament was criticised in the impugned article and who raised the issue before the House participated throughout in the proceedings, including the finding of guilt and (except for one of them who had meanwhile died) the sentencing. According to the Court "...the impartiality of the adjudicating body in these proceedings would appear to be open to doubt and the applicant's fears in this connection were justified..."[1095]

As the Strasbourg jurisprudence reveals, the impartiality of a tribunal may also be jeopardised if its members take part in different appellate stages of the same proceedings.[1096] However, a tribunal member is not necessarily biased merely because he/she has been involved in other proceedings, for example, civil or criminal proceedings arising out of the same facts or different facts concerning the same person or different persons.[1097] It is also not incompatible with the requirements of impartiality under Art.6(1) for the same tribunal member(s) to re-hear a case that has been referred back by an appeal court.[1098]

Under Art.6(1), any tribunal that determines an accused person's criminal liability must have been 'established by law'. This provision purports to ensure that the judicial organisation in a democratic society is not dependent upon the direction of the executive, but is regulated by law emanating from parliament.[1099] Nevertheless, it is not necessary for the legislation to contain every minute detail concerning the judiciary of the country. Provided that there exist sufficient measures to prevent arbitrary action, it is not inconsistent with the Convention's obligations for the legislation to lay down only the basic rules governing the organisation and competence of the bodies that administer justice and delegate powers to the executive to take appropriate measures with regard particular functional matters.[1100] Also, creation of special courts is not incompatible with the Convention insofar as their creation and functioning remain within the parameters of law.[1101]

[1095] Ibid., p.18 para.41.
[1096] See, *inter alia*, the Case of Oberschlick v. Austria, Judgment of 23rd May 1991, Ser.A Vol.204 (1991).
[1097] See, *inter alia*, Gillow Case, Judgment of 24th November 1986, Ser.A Vol.109 (1987); App.No.11129/84, Brown v. The United Kingdom, 8 EHRR (1985-86) 272; App.No.11831/85, Schmid v. Austria, 54 D & R (1987) 144; App.No.11879/85, Rossi v. France, 63 D & R (1989)105.
[1098] See, Ringeisen Case, Judgment of 16th July 1971, Ser.A Vol.13 (1971) p.40 para.97 - in connection with the determination of civil rights and obligations.
[1099] See, *inter alia*, App.No.8603/79, 8722/79, 8723/79 and 8729/79 (joined), Crociani *et al* v. Italy, 22 D & R (1981) 147 p.219 para.8(a).
[1100] Ibid..
[1101] See, App.No.8279/78, X and Y v. Ireland, 22 D & R (1981) 51.

Art.6(1) also guarantees to everyone charged with a criminal offence a right to a 'public hearing'. According to the Court,

> "(t)he public character of proceedings before the judicial bodies referred to in Article 6(1) protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts, superior and inferior, can be maintained. By rendering the administration of justice visible, publicity contributes to the achievement of the aim of Article 6(1), namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society within the meaning of the Convention..."[1102]

This right, however, is subject to the extensive restrictions expressly laid down in Art.6(1) itself. As provided therein, the press and the public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interest of justice. In the Case of Campbell and Fell[1103], the public order and security problems involved in prison disciplinary proceedings compelled the Court to concede that 'to require that disciplinary proceedings concerning convicted prisoners should be held in public would impose a disproportionate burden on the authorities of the State'.

Similarly, the safety and security of the victims and witnesses may also justify departures from the right to a public hearing. Although Art.6(1) does not explicitly require the interests of witnesses in general, and those of victims called upon to testify in particular, to be taken into consideration, their life liberty and security of person are in principle protected by the other substantive provisions of the Convention. This obliges the Contracting States to organise their systems of criminal justice administration in such a way as not to imperil unjustifiably the interests of victims and witnesses.[1104] Thus, for example, in a drug trafficking case, the maintenance of the anonymity of the witnesses in order to protect them against the possibility of reprisals[1105] or, giving of evidence by witnesses *in camera* in a terrorist murder case[1106], may not infringe the accused person's right to a public hearing.

[1102] See, Sutter Case, Judgment of 22nd February 1984, Ser.A Vol.74 (1984) p.12 para.26. Also see the Case of Barbera, Messegue and Jabardo, Judgment of 2nd December 1988, Ser.A Vol.146 (1989) pp.37-38 para.89; the Case of Helmers v. Sweden, Judgment of 29th October 1991, Ser.A Vol.212-A (1992) p.16 para.36; the Case of Jan-ake Andersson v. Sweden, Judgment of 29th October 1991, Ser.A Vol.212-B (1992) 35 p.45 para.27; the Case of Fejde v. Sweden, Judgment of 29th October 1991, Ser.A Vol.212-C (1992) 58 p.68 para.31.

[1103] Judgment of 28th of June 1984, Ser.A Vol.80 (1984) p.42 para.87.

[1104] See, Doorson v. The Netherlands, Judgment of 26th March 1996, Reports of Judgments & Decisions No.6 (1996 Vol. II), 446 p.470 para.70.

[1105] See, for example, Doorson v. The Netherlands, Judgment of 26th March 1996, Reports of Judgments & Decisions No.6 (1996 Vol. II), 446.

[1106] See, for example, App.No.20657/92, X v. The United Kingdom, 15 EHRR (1993) CD 113. Also see, App.No.3444/67, X v. Norway, 35 CD (1971) 37 pp.49-50 - according to the Commission

As in the case of the right to be present at the hearings, here also an accused person may either expressly or tacitly waive his/her right to a public hearing. Again, in order to be valid, the waiver must have been established in an unequivocal manner.[1107] In this instance, however, a waiver may be disregarded if there exist important public interest considerations to do so.

Also, provided that there has been a public hearing at the first instance, the absence of such a hearing before a second or third instance may be justified by the special features of the proceedings at issue.[1108] On the other hand, if the tribunal at first instance is not a court of classic kind integrated within the standard judicial machinery of the country, any failure at that stage in complying with the public hearing requirement could be remedied by providing a hearing that conforms with the required procedural standards of Art.6(1) at appeal proceedings. However, such a failure could not be remedied and the decision needs to be quashed if the tribunal at first instance is a proper court in both the formal and substantive meaning of the term.[1109]

In order to conform with Art.6(1), the decision on merits in criminal trials must be 'pronounced publicly'. Although this requirement is not subject to any of the limitations provided in the Article itself[1110], the Strasbourg organs do not adopt a literal interpretation of the words 'pronounced publicly'. In each case, the form of publicity given to the judgement under the domestic law of the respondent state is assessed in the light of the special features of the proceedings in question and by reference to the object pursued by Art.6(1) in this context, namely to ensure scrutiny of the judiciary by the public with a view to safeguarding the right to a fair trial.[1111] Thus, it is sufficient for the purpose of Art.6(1) if a judgement is read in public stating the offence committed, the accused person's guilt, the presence (if appropriate) of special circumstances and the sentence imposed even if the full reasons for the judgement are filed later.[1112] In Helmers v. Sweden[1113], which involved a private

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examination of a witness behind closed doors did not violate the accused person's rights under Art.6 since such examination was necessary to protect a nervous witness.

[1107] See, the Case of Barbera, Messegue and Jabardo, Judgment of 2nd December 1988, Ser.A Vol.146 (1989) p.35 para.82.

[1108] See, *supra* pp.181-182.

[1109] See, De Cubber Case, Judgment of 26th October 1984, Ser.A Vol.86 (1984) p.18 para.32.

[1110] See, the Case of Campbell and Fell, Judgment of 28th June 1984, Ser.A Vol.80 (1984) p.43 para.90.

[1111] See, Sutter Case, Judgment of 22nd February 1984, Ser.A Vol.74 (1984) p.14 para.33. *c.f.* in, *inter alia*, the Case of Campbell and Fell, Judgment of 28th June 1984, Ser.A Vol.80 (1984) p.43 para.91; App.No.11826/85, Helmers v. Sweden, 61 D & R (1989) 138 p.145.

[1112] See, App.No.8603/79, 8722/79, 8723/79 & 8729/79 (joined), Crociani *et al* v. Italy, 22 D & R (1981) 147.

criminal prosecution for defamation, the judgement was delivered not by an oral reading in the open court, but by keeping the judgement available to everyone as from the date of delivery at the court's registry. The judgement was published in full and thus was not limited to the operative part. The Commission found this to be adequate to satisfy the requirements of Art.6(1).

3.2.2 - Article 6 Paragraph 2.

As provided by paragraph 2 of Article 6 of the European Convention on Human Rights "(e)veryone charged with a criminal offence shall be presumed innocent until proved guilty according to law." This provision represents one of the constituent elements of the general notion of a "fair hearing" embodied in paragraph 1. As such, in cases where a breach of the latter mentioned paragraph is found, the Strasbourg authorities generally dispense with the examination whether paragraph 2 has been complied with.[1114] This does not, however, mean that the provision of paragraph 2 becomes irrelevant if other rights of Art.6 have been observed. On the contrary, paragraph 2 enjoys an independent position within the system of rights enshrined in Art.6. Accordingly, a violation of the provision of the paragraph under consideration may occur even if all the other provisions of Art.6 have been respected.[1115]

The words "charged" and "criminal" here have the same autonomous Convention meanings as in paragraph 1.[1116] Thus, the guarantee provided in Art.6(2) is applicable, not only to criminal offences proper, but also to regulatory as well as disciplinary offences which entail punitive sanctions.[1117] On the other hand, although Art.6(2) applies from the first instance hearings until the conviction or the acquittal becomes final, it is otherwise if the proceedings are concerned only with the sentence to be imposed. For, the provision in Art.6(2) "...deals only with the proof of guilt and not with the kind or level of punishment."[1118] In this connection, it must be noted that, the confinement of proceedings only to the question of sentence, in a case where the

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[1113] App.No.11826/85, 61 D & R (1989) 138.

[1114] See, *inter alia*, Deweer Case, Judgment of 27th February 1980, Ser.A Vol.35 (1980) pp.30-31 para.56; Opinion of the Commission, Lala v. Netherlands, 18 EHRR (1994) 586 p.592.

[1115] See, App.No.10107/82, I and C v. Switzerland, 48 D & R (1986) 35 p.43 para.55.

[1116] See, *inter alia*, Adolf Case, Judgment of 26th March 1982, Ser.A Vol.49 (1982) pp.115-117 para.30- 34; the Case of Allenet De Ribemont v. France, Judgment of 10th February 1995, Ser.A Vol.308 (1995) pp.16-17 para.37.

[1117] For examples, see, the Case of Albert and Le Compte, Judgment of 10th February 1983, Ser.A Vol.58 (1983); Lutz Case, Judgment of 25th August 1987, Ser.A Vol.123 (1987).

[1118] See, the Case of Engel and Others, Judgment of 8th June 1976, Ser.A Vol.22 (1977) pp.37-38 para.90. Also see, the Case of Albert and Le Compte, Judgment of 10th February 1983, Ser.A Vol.58 (1983) p.20 para.40.

accused has pleaded guilty, is not inconsistent with this provision if undue pressure has not been exerted to obtain such a plea.[1119]

In line with the overall objective of Art.6, which is to ensure a "fair trial", the provision of paragraph 2, which embodies the principle of presumption of innocence, applies primarily to the conduct of court proceedings.[1120] It requires, according to the Court in the Case of Barbera, Messegue and Jabardo[1121], *inter alia*, that,

> "...when carrying out their duties, the members of a court should not start with the preconceived idea that the accused has committed the offence charged; the burden of proof is on the prosecution, and any doubt should benefit the accused. It also follows that it is for the prosecution to inform the accused of the case that will be made against him, so that he may prepare and present his defence accordingly, and to adduce evidence sufficient to convict him."

Nonetheless, it must be noted that the burden of proof does not lie constantly with the prosecution. It may shift to the accused person when he/she is seeking to establish a particular fact, such as a defence.[1122]

The presumption of facts or of law, unfavourable to the accused person, is not against the provision of paragraph 2.[1123] However, the States must ensure that such presumptions operate within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence.[1124] Similarly, the strict liability offences also do not offend the principle of presumption of innocence.[1125]

On the other hand, whatever the nature of the offence, a breach of Art.6(2) would occur if criminal responsibility is attributed by the court to the person concerned prior to his/her being proved guilty 'according to law'. Thus, irrespective of whether the

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[1119] See, App.No.5076/71, X v. The United Kingdom, 40 CD (1972) 64 pp.66-67 para.2.

[1120] See, *inter alia*, Extracts from the Report of the European Commission of Human Rights, Austria v. Italy, 6 YBECHR (1963) 740 p.742 at p.784. According to Strasbourg jurisprudence the principle of presumption of innocence does not apply to criminal investigation matters such as, for example, to the conduct of, interrogations (see, Extracts from the Report of the European Commission of Human Rights, Austria v. Italy, ibid.), medical examinations (App.No.986/61, X v. The Federal Republic of Germany, 5 YBECHR (1962) 192 p.198), or breathalyzer or blood tests (App.No.8239/78, X v. The Netherlands, 16 D & R (1979) 184). Measures taken against an accused person on the basis of the suspicion that exists against him/her are also not incompatible with the provision of paragraph 2. See for examples, App.No.4338/69, X v. Austria, 36 CD (1971) 79 - provisional seizure of property to ensure payment of penalties or costs awarded against the accused; App.No.2291/64, X v. Austria, 24 CD (1967) 20 & App.No.8582/79, Skoogstrom v. Sweden, 5 EHRR (1983/84) 278 - handcuffing or imposing restrictions as regards clothes worn during court hearings.

[1121] Judgment of 6th December 1988, Ser.A Vol.146 (1989) p.33 para.77.

[1122] See, App.No.8803/79, Lingens v. Austria, 26 D & R (1982) 171 pp.178-179 para.4.

[1123] For example, see, App.No.5124/71, X v. The United Kingdom, 42 CD (1973) 135.

[1124] See, Salabiaku Case, Judgment of 7th October 1988, Ser.A Vol.141-A (1989) pp.15-16 para.28. *c.f.* in the Case of Pham Hoang v. France, Judgment of 25th September 1992, Ser.A Vol.243 (1993) p.21 para.33.

[1125] See, for example, App.No.12995/87, Duhs v. Sweden, 67 D & R (1991) 204.

offence involved is one of strict liability or not, the constituent element(s) of the offence required for the conviction must have been established in a manner prescribed by law before the court reaches a verdict of guilt.[1126] Such a verdict may be based on either direct or indirect evidence presented by the prosecution.[1127] However, it is against the principle of presumption of innocence to accept as evidence any admissions or confessions extorted by maltreating the accused person.[1128] In this connection, the Strasbourg authorities have recognised the closer link of the right to remain silent and the right not to incriminate oneself with the presumption of innocence, which impute the burden of proof on the prosecution.[1129] Also, in order to comply with Art.6(2), the accused person must be given an opportunity to rebut, presumptions made, and evidence adduced, against him/her.[1130] With regard to the standard of proof, there is no express provision in the Convention which stipulates that the guilt must be proved beyond reasonable doubts. Although the Court in the Case of Barbera, Messegue and Jabardo admitted that any doubt should benefit the accused[1131], it seems not inconsistent with the Convention to base a conviction on evidence 'sufficiently strong in the eyes of the law' to establish guilt.[1132]

Art.6(2) continues to apply to ancillary proceedings, such as, for example, proceedings to determine the payment of costs or compensation, albeit they do not deal with the proof of guilt, if the case on merit is discontinued without a final decision or concluded with a final decision of acquittal. In the last mentioned instance it would be inconsistent with the principle of presumption of innocence for a court to make statements or express opinions during ancillary proceedings which would suggest that there remain strong indication about the person's guilt capable of substantiating the suspicion which gave rise to initial proceedings.[1133] On the other hand, an opinion or a statement which describes 'a state of suspicion' but does not contain any finding of guilt, expressed or made by a court during ancillary proceedings after the case on

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[1126] See, *inter alia*, Salabiaku Case, Judgment of 7th October 1988, Ser.A Vol.141 (1989).
[1127] See, Extracts from the Report of the European Commission of Human Rights, Austria v. Italy, 6 YBECHR (1963) 740 p.742 at p.784. Also see, App.No.7950/77, X, Y and Z v. Austria, 19 D & R (1980) 213 p.216
[1128] Ibid..
[1129] See, Saunders v. The United Kingdom, Judgment of 17th December 1996, Reports of Judgments & Decisions, No.24 (1996 Vol. VI), 2044 p.2064 para.68.
[1130] See, Salabiaku Case, Judgment of 7th October 1988, Ser.A Vol.141 (1989).
[1131] Judgment of 6th December 1988, Ser.A Vol.146 (1989) p.33 para.77.
[1132] See, Extracts from the Report of the European Commission of Human Rights, Austria v. Italy, 6 YBECHR (1963) 740 p.742 at p.784.
[1133] See, the Case of Sekanina v. Austria, Judgment of 25th August 1993, Ser.A Vol.266-A (1993).

merit has been discontinued without a final decision, does not, although unsatisfactory, violate the provision of Art.6(2).[1134]

However, it must be noted here that the discontinuation of a case itself may breach Art.6(2) if the decision to discontinue has given rise to unfavourable implications as regard the guilt of the person concerned.[1135] Similarly, although neither Art.6(2) nor any other provision of the Convention guarantees a right to reimbursement of costs or a right to compensation for detention on remand if the proceedings are discontinued, a violation of the principle of presumption of innocence may occur if the substance of the reasoning that underpin a decision to refuse reimbursement or compensation, reflects a determination of guilt.[1136] As the Court observed in the Minelli Case[1137],

> "...the presumption of innocence will be violated if, without the accused's having previously been proved guilty according to law and, notably, without his having had the opportunity of exercising his rights of defence, a judicial decision concerning him reflects an opinion that he is guilty. This may be so even in the absence of any formal finding; it suffices that there is some reasoning suggesting that the court regards the accused as guilty."

In addition to the conduct of judicial proceedings, Art.6(2) also applies to public statements made by public officials. As the Strasbourg jurisprudence reveals, the principle of presumption of innocence protects everyone subject to a criminal charge within the meaning of the Convention against being treated by public officials as being guilty of an offence before this is established according to law by a competent court.[1138] This, nevertheless, does not mean that the authorities cannot inform the public about criminal investigations. It is not against Art.6(2) to state publicly that a suspicion exists, or people have been arrested, or that they have confessed, etc.. What is excluded, however, is a formal declaration that somebody is guilty.[1139]

Art.6(2) does not guarantee to an accused person that he/she will have no prejudicial opinions or statements concerning the question of his/her guilt expressed by counsels

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[1134] See, Engelrt Case, Judgment of 25th August 1987, Ser.A Vol.123 (1987) 40; Nolkenbockhoff Case, Judgment of 25th August 1987, Ser.A Vol.123 (1987).

[1135] See, Adolf Case, Judgment of 26th March 1982, Ser.A Vol.49 (1982); the Minelli Case, Judgment of 25th March 1983, Ser.A Vol.62 (1983).

[1136] See, the Minelli Case, Judgment of 25th March 1983, Ser.A Vol.62 (1983); Engelrt Case, Judgment of 25th August 1987, Ser.A Vol.123 (1987) 40; Nolkenbockhoff Case, Judgment of 25th August 1987, Ser.A Vol.123 (1987).

[1137] Judgment of 25th March 1983, Ser.A Vol.62 (1983) p.18 para.37.

[1138] See, the Case of Allenet De Ribemont v. France, Judgment of 10th February 1995, Ser.A Vol.308 (1995) pp.16-17 para.37-41; App.No.2343/64, X v. Austria, 10 YBECHR (1967) 176 p.182; App.No.7950/77, X, Y and Z v. Austria, 19 D & R (1980) 213 p.217; App.No.10847/84, R.F and S.F v. Austria, 44 D & R (1985) 238 pp.244-245.

[1139] See, App.No.7986/77, Krause v. Switzerland, 13 D & R (1979) 73 pp.75-76 para.3.

or witnesses during the trial.[1140] Such opinions or statements may, however, breach the presumption of innocence if the court has failed to control them properly and, that failure gives the impression that the court shared the obvious animosity to the accused and regarded him/her from the outset as guilty.[1141] On the other hand, no breach of Art.6(2) would be recorded if the failures at the first instance hearings in complying with the presumption of innocence have properly been addressed and remedied by the appeal courts.[1142]

3.2.3 - Article 6 Paragraph 3.

According to paragraph 3 of Article 6 of the European Convention on Human Rights,

> "(e)veryone charged with a criminal offence has the following minimum rights:
>
> (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
>
> (b) to have adequate time and facilities for the preparation of his defence;
>
> (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interest of justice so require;
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witness against him;
>
> (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in the court."

Again, like paragraph 2, these rights represent some of the constituent elements of the general notion of a "fair hearing" embodied in paragraph 1.[1143] In particular, it must be noted that the so-called 'equality of arms' principle could be based not only on para.1, but also on para.3, especially on sub-para. (b) & (c), of Art.6(3).[1144] Also, as is evident from the phrase "minimum rights", the list of rights in para.3 is not exhaustive. They are the minimum guarantees which must be accorded to the accused in order for a trial to be fair within the meaning of Art.6.

[1140] See, App.No.343/57, Nielsen v. Denmark, 2 YBECHR (1958/1959) 412 p.446.

[1141] See, Extracts from the Report of the European Commission of Human Rights, Austria v. Italy, 6 YBECHR (1963) 740 p.742 at p.784.

[1142] See, Adolf Case, Judgment of 26th March 1982, Ser.A Vol.49 (1982) pp.18-19 para.40; Extracts from the Report of the European Commission of Human Rights, Austria v. Italy, 6 YBECHR (1963) 740 p.742 at p.784.

[1143] See, *inter alia*, the Case of Colozza and Rubinat, Judgment of 12th February 1985, Ser.A Vol.89 (1985) p.14 para.26; the Case of Vacher v. France, Judgment of 17th December 1996, Reports of Judgments and Decisions, No.25 (1996-VI) 2138 p.2147 para.22; Foucher v. France, Judgment of 18th March 1997, Reports of Judgments and Decisions, No.33 (1997-II) 452 p.464 para.30.

[1144] See, *inter alia*, Extracts from the Report of the Commission, App.No.524/59 & 617/59, Ofner & Hopfinger v. Austria, 6 YBECHR (1963) 680 p.696 para.46; Extracts from the Report of the Commission, App.No.596/59 & 789/60, Patanki & Dunshirn v. Austria, 6 YBECHR (1963) 718 pp.730-732 para.36; App.No.8403/78, Jespers v. Belgium, 27 D & R (1982) 61 p.87 para.55.

However, before proceeding any further it must be mentioned that the rights guaranteed by Art.6(3) are intended to ensure that the defence is able to put forward, without any prejudice, its version of events in such a way as to enable the court to ascertain the truth. Therefore, the rights set forth in para.3 are considered as the general rights of the defence, not as separate rights attributed exclusively to the accused.[1145] This in other words means that not only the accused but also the persons acting on his/her behalf, such as for example, counsel or other legal representatives, are entitled, *mutatis mutandis*, to these rights.[1146]

Since the list of rights in para.3 is not exhaustive, the fact that that para. has been respected does not *ipso facto* make a trial "fair" and render examination for compatibility with para.1 of Art.6 superfluous.[1147] On the contrary, para.1 embodies the generic notion for the more specific rights enumerated in the two following paragraphs[1148] and hence encompasses a wider area than them.[1149] Accordingly, it is possible that a trial may not conform with the general standard of a "fair hearing" as laid down by Art.6, even if para.3 has been complied with.[1150] Moreover, the Strasbourg authorities generally dispense with the examination for compliance with para.3 if a violation of para.1 is revealed.[1151]

The object of the rights guaranteed by Art.6(3) is to put the person charged with a criminal offence on an equal footing with the prosecution in the preparation and presentation of the case. The words "charged" and "criminal" here have the same autonomous Convention meaning as in the two preceding paragraphs. Thus, the guarantees of para.3 should become and remain applicable from the moment the person concerned is subject to the impugned criminal charge until a final decision as to his/her criminal responsibility is reached.[1152] Nevertheless, their manner of application at appellate stages may, again like in para.1, vary according to the role of

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[1145] See, *inter alia*, App.No.524/59, Herbert Ofner v. Austria, 3 YBECHR (1960) 322 p.352; App.No.6185/73, X v. Austria, 2 D & R (1975) 68 p.71 para.2.

[1146] See, App.No.524/59, Herbert Ofner v. Austria, ibid..

[1147] On this point see, P.Van dijk and G.J.H.van Hoof, *The Theory and Practice of the European Convention on Human Rights*, second edition (Deventer: Kluwer Law and Taxation Publishers 1990), p.344.

[1148] See, Deweer Case , Judgment of 27th February 1980, Ser.A Vol.35 (1980) p.30 para.56; Artico Case, Judgment of 13th May 1980, Ser.A Vol.37 (1980) p.15 para.32.

[1149] See, *inter alia*, App.No.1169/61, X v. The Federal Republic of Germany, 6 YBECHR (1963) 520 p.584.

[1150] See, Extracts from the Report of the Commission, Neilsen Case, 4 YBECHR (1961) 490 p.548 para.52.

[1151] See, for example, Deweer Case , Judgment of 27th February 1980, Ser.A Vol.35 (1980) pp.30-31 para.56.

[1152] However, according to Strasbourg jurisprudence, the guarantee of Para.3(d) could be relied upon only during court proceedings. See *infra* p.218.

the appeal courts in the domestic system of criminal justice administration and the special features of the proceedings involved.[1153]

Art.6(3)(a) guarantees to everyone charged with a criminal offence a right to be 'informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him'. The fundamental difference between this provision and the provision of Art.5(2) is that while the latter purports to ensure that the arrested persons are given the information necessary to challenge the lawfulness of their deprivation of liberty of person, this provision seeks to guarantee that persons charged with criminal offences get the information and details necessary to prepare their defences. Also, the word "promptly" may have to be understood less stringently in the context of Art.6(3)(a) than in Art.5(2).

Moreover, it is clear from a comparison of the wordings of the two articles that the information to which a person is entitled concerning the charges made against him/her is more specific and more detailed under Art.6(3)(a) than under Art.5(2).[1154] In order to conform with Art.6(3)(a), the accused person must be informed of the cause of the accusation, i.e., the acts with which he/she is charged and on which his/her indictment is based, and of the nature of the accusation, i.e., the legal classification of the acts in question.[1155] In addition, because of the logical link between para.3(a) and para.3(b) of Art.6, the information about the nature and cause of the accusation must be adequate to enable the accused to prepare his/her defence accordingly.[1156]

It is not necessary, however, to mention at this stage the evidence on which the charge is based.[1157] According to the Court Art.6(3)(a) is satisfied if the information communicated to the person concerned listed the offences of which he/she stand accused of, stated the place and the date thereof, referred to the relevant Article of the Criminal Code and mentioned the name of the victim.[1158] A mere statement like "You are accused of corruption" has been regarded by the Commission as sufficient to fulfil

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[1153] See, *inter alia*, the Case of Kremzow v. Austria, Judgment of 21st September 1993, Ser.A Vol.268-B (1994) 27 p.43 para.58-59; the Case of Vacher v. France, Judgment of 17th December 1996, Reports of Judgments and Decisions, No.25 (1996-VI) 2138 p.2148 para.24.

[1154] See, App.No.343/57, Nielsen v. Denmark, 2 YBECHR (1958-1959) 412 p.462; App.No.9614/81, G.S. and M. v. Austria, 34 D & R (1983) 119 p.121 para.3.

[1155] See, *inter alia*, App.No.524/59, Herbert Ofner v. Austria, 3 YBECHR (1960) 322 p.344.

[1156] See, *inter alia*, App.No.10857/84, Bricmont v. Belgium, 48 D & R (1986) 106 pp.148-149 para.3(a).

[1157] See, *inter alia*, App.No.7628/76, X v. Belgium, 9 D & R (1978) 169 p.173 para.1; the Opinion of the Commission, the Case of Colozza and Rubinat, Ser.A Vol.89 (1985) 25 p.28 para.114.

[1158] See, Brozicek Case, Judgment of 19th December 1989, Ser.A Vol.167 (1989) pp.18-19 para.42.

the requirements of Art.6(3)(a).[1159] On the other hand, it must be noted that, an application against the breach of Art.6(3)(a) is weak if the accused person has failed to take advantage of the opportunities that were available to learn about the accusations levelled against him/her.[1160] Also, the fact that a charge is altered during the proceedings does not infringe Art.6(3)(a) if the defence is made aware of the alteration in good time.[1161]

In order to comply with Art.6(3)(a) the required information must be communicated in a language which the accused person or his/her lawyer understands.[1162] Unless the authorities are in a position to establish that the person concerned has sufficient knowledge of the language in which the information is communicated to understand its substance, they are obliged to provide an appropriate translation on request.[1163] However, Art.6(3)(a) does not necessarily require the information to be given in written form. Insofar as the nature and cause of the accusation are informed, even an oral communication is sufficient to fulfil the requirements of para.3(a).[1164]

Under Art.6(3)(b), everyone charged with a criminal offence is entitled 'to have adequate time and facilities for the preparation of his defence'. This provision covers the position not only of the accused but also of his/her counsel. Thus, the examination whether para.3(b) has been respected takes into consideration the general situation of the defence, not only the situation of the accused.[1165]

The adequate time requirement is purported to protect the accused against a 'hasty trial'[1166]. For this purpose the relevant time period begins from the moment the person concerned is subject to the criminal charge. The time elapsed between this moment and the commencement of the proceedings must be reasonably sufficient for the

[1159] See, App.No.1103/61, X v. Belgium, 5 YBECHR (1962) 168 p.188. Also see, App.No.1169/61, X v. The Federal Republic of Germany, 6 YBECHR (1963) 520 p.584.
[1160] See, Kamasinski Case, Judgment of 19th December 1989, Ser.A Vol.168 (1989) p.37 para.80; the Case of Campbell and Fell, Judgment of 28th June 1984, Ser.A Vol.80 (1984) p.44 para.95-96.
[1161] See, App.No.524/59, Herbert Ofner v. Austria, 6 YBECHR (1963) 690 (a). Also see, App.No.3894/68, X v. The Netherlands, 32 CD (1970) 47.
[1162] See, App.No.6185/73, X v. Austria, 2 D & R (1975) 68 p.71 para.2.
[1163] See, Brozick Case, Judgment of 19th December 1989, Ser.A Vol.167 (1989) p.18 para.41. Also see Kamasinski Case, Judgment of 19th December 1989, Ser.A Vol.168 (1989) pp.36-37 para.78-81.
[1164] See, Kamasinski Case, ibid.. For an opposite view see, P.Van dijk and G.J.H.van Hoof, *The Theory and Practice of the European Convention on Human Rights*, second edition (Deventer: Kluwer Law and Taxation Publishers 1990), p.346.
[1165] See, App.No.524/59, Herbert Ofner v. Austria, 3 YBECHR (1960) 322 p.352. However, it must be noted here that the counsels of the accused persons cannot bring claims in their own names under Art.6(3)(b) since they lack the status of victims of a violation of this provision (see App.No.7909/74, X and Y v. Austria, 15 D & R (1979) 160 pp.161-162 para.1).
[1166] See, App.No.7854/77, Bonzi v. Switzerland, 12 D & R (1978) 185 p.190 para.2; App.No.8463/78, Krocher and Moller v. Switzerland, 26 D & R (1982) 24 p.53 para.15.

accused person to prepare his/her defence, including the appointment of a counsel. In cases where the accused is entitled to legal aid, a counsel should be assigned in good time.[1167] Once the trial is started, adequate time must be provided for the defence for the proper presentation of its case.

Sufficient time must also be given to the accused person to lodge an appeal if under the domestic law he/she is entitled to do so. According to the Court, putting the onus on convicted appellants to find out when an allotted period of time starts to run or expires is not compatible with the "diligence" which the Contracting States must exercise to ensure that the rights guaranteed by Art.6 are enjoyed in an effective manner.[1168] In addition, the conduct of appeal proceedings must also conform with the adequate time requirement of Art.6(3)(b).[1169]

According to the Commission, the question whether the time provided is adequate cannot be determined *in abstracto*, but only in relation to the circumstances of the concrete case.[1170] In this regard, the Strasbourg authorities take into consideration, among other things, the factors such as, the complexity of the case[1171], the kind of proceedings involved, the stage of proceedings[1172], whether the defence is carried out by the accused him/herself or through a counsel[1173], the workload of the counsel[1174], etc. However, no breach of Art.6(3)(b) would be recorded if the accused person him/herself is responsible for the situation of which he/she complains before the Strasbourg authorities.[1175]

In order to bring a successful claim under this part of Art.6(3)(b), the accused person must show that as a result of inadequate time allowed he/she suffered a prejudice in the proceedings.[1176] In X v. The United Kingdom[1177] the Applicant had met and instructed his legal aid counsel only for ten minutes on the actual day of the trial. Although the Applicant was sentenced to seven years imprisonment the Commission

[1167] See, App.No.7909/74, X and Y v. Austria, 15 D & R (1979) 160 pp.162-163 para.3(c).
[1168] See, the Case of Vacher v. France, Judgment of 17th December 1996, Reports of Judgments and Decisions, No.25 (1996-VI) 2138 p.2148 para.28.
[1169] Ibid., p.2149 para.30.
[1170] See, *inter alia*, App.No.5523/72, Huber v. Austria, 17 YBECHR (1974) 314 p.332; App.No.7909/74, X and Y v. Austria, 15 D & R (1979) 160 p.162 para.3.
[1171] See, the Case of Albert and Le Compte, Judgment of 10th February 1983, Ser.A Vol.58 (1983) pp.20-21 para.41; App.No.7909/74, X and Y v. Austria, 15 D & R (1979) 160 p.162 para.3.
[1172] See, App.No.5523/72, Huber v. Austria, 17 YBECHR (1974) 314 p.332.
[1173] See, App.No.2370/64, X v. Austria, 22 CD (1967) 96 p.100.
[1174] See, App.No.7909/74, X and Y v. Austria, 15 D & R (1979) 160 pp.162-163 para.3.
[1175] See, App.No.8251/78, X v. Austria, 17 D & R (1980) 166 pp.169-170.
[1176] See, *inter alia*, the Case of Kremzow v. Austria, Judgment of 21st September 1993, Ser.A Vol.268-B (1994) 27 p.43 para.53-56; App.No.2370/64, X v. Austria, 22 CD (1967) 96 p.100.
[1177] App.No.4042/69, 13 YBECHR (1970) 690.

found no violation of Art.6(3)(b) since he failed to show that, as a result of the brief meeting he had with his counsel, he suffered any prejudice in his representation during the proceedings.[1178] On the other hand, it is the responsibility of the defence to request for an adjournment or a postponement if it feels that the time allowed is inadequate for the preparation of its case.[1179] Generally, if the accused has to change his/her counsel for genuine reasons some additional time should be provided for the new counsel to get acquainted with the case.[1180]

The second part of Art.6(3)(b) guarantees to everyone charged with a criminal offence a right to have adequate facilities for the preparation of his/her defence. This provision is purported to ensure that the accused person has the opportunity to organise his/her defence, in an appropriate manner and, without restriction as to the possibility of putting forward all relevant defence arguments before the trial court, in such a way as to influence the outcome of the proceedings.[1181] However, it must be noted that the adjective "adequate" has restricted the facilities that must be provided to the accused person in compliance with para.3(b) to only those which assist or may assist him/her in the preparation of his/her defence.[1182]

According to the Commission in Jespers v. Belgium[1183], the "facilities" which everyone charged with a criminal offence should enjoy include the opportunity to acquaint him/herself, for the purpose of preparing his/her defence, with the results of investigations carried out throughout the proceedings. As the Commission observed, such an opportunity is particularly important to ensure equality of arms between the prosecution and the defence. However, this does not mean that in order to comply with Art.6(3)(b) the prosecution must reveal to the defence in advance all the evidence that it plans to adduce at the hearing.[1184]

Under the adequate facility guarantee of para.3(b) the accused has a right to have at his/her disposal, in order to exonerate him/herself or to obtain a reduction in his/her sentence, all relevant elements that have been or could be collected by the competent authorities. In this connection, although the Convention does not expressly guarantee to the accused persons a right of access to the prosecution file, the Commission has

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[1178] Ibid., p.696.
[1179] See, the Case of Campbell and Fell, Judgment of 28th June 1984, Ser.A Vol.80 (1984) p.45 para.98.
[1180] See, Goddi Case, Judgment of 9th April 1984, Ser.A Vol.76 (1984) pp.12-13 para.31.
[1181] See, the Opinion of the Commission, Can Case, Ser.A Vol.96 (1985) 13 p.17 para.53.
[1182] See, App.No.8403/78, Jespers v. Belgium, 27 D & R (1982) 61 p.88 para.57.
[1183] Ibid., p.87 para.56.
[1184] See, *inter alia*, App.No.5282/71, 42 CD (1973) 99 p.102.

inferred such a right from the provisions of para.3(b).[1185] Thus, if the element in question is a document placed in a special folder of the prosecution file, access to that document is a necessary facility if it concerns, for example, the acts of which the defendant stands accused, or, the credibility of a testimony, etc..[1186] This, however, does not mean that the accused should be given personal access to such documents. Art.6(3)(b) is satisfied if his/her counsel is granted such access.[1187] On the other hand, according to Strasbourg jurisprudence, denial of personal access to such documents to an accused who is conducting his/her own defence gives rise to a breach of the rights of the defence set forth in para.3(b).[1188]

The facilities referred to in Art.6(3)(b) also contemplate the right of the accused person to communicate with his/her counsel, before, during, as well as after, the trial without any unreasonable restrictions placed by the authorities.[1189] Although this right has not been specifically mentioned in the Convention, the Commission has recognised it as a fundamental part necessary for the preparation of the defence.[1190] With regard to accused persons in remand custody, the authorities are obliged to ensure that they are able to establish private and confidential contact with their counsel for the purpose of preparing their defences.[1191] However, the communications between the accused person and his/her counsel may be subjected to conditions and restrictions if security or public interest reasons require so.[1192] Such conditions and restriction remain within the framework of the Convention as long as they do not cause any actual prejudice to the accused person in the presentation of his/her defence.[1193]

[1185] Ibid., pp.87-88 para.56-58.
[1186] Ibid., p.88 para.57.
[1187] See, *inter alia*, App.No.7138/75, X v. Austria, 9 D & R (1978) 50 p.52; Opinion of the Commission, Kamasinski Case, Ser.A Vol.168 (1989) 50 p.54 para.148.
[1188] See, Foucher v. France, Judgment of 18th March 1997, Reports of Judgments and Decisions, No.33 (1997-II) 452 p.465 para.35.
[1189] See, *inter alia*, Case of Campbell and Fell, Judgment of 28th June 1984, Ser.A Vol.80 (1984) p.45 para.99.
[1190] See, App.No.7854/77, Bonzi v. Switzerland, 12 D & R (1978) 185 p.190 para.2; App.No.8339/78, Schertenleib v. Switzerland, 17 D & R (1980) 180 pp.225-226 para.5; the Opinion of the Commission, Can Case, Ser.A Vol.96 (1985) 13 p.17 para.52.
[1191] See, *inter alia*, Case of Campbell and Fell, Judgment of 28th June 1984, Ser.A Vol.80 (1984); the Opinion of the Commission, Can Case, Ser.A Vol.96 (1985) 13.
[1192] See, *inter alia*, Case of Campbell and Fell, Judgment of 28th June 1984, Ser.A Vol.80 (1984) p.49 para.113; App.No.1850/63, Koplinger v. Austria, 12 YBECHR (1969) 438 p.490 para.40; App.No.7854/77, Bonzi v. Switzerland, 12 D & R (1978) 185 pp.190-191 para.2; App.No.8339/78, Schertenleib v. Switzerland, 17 D & R (1980) 180 pp.225-226 para.5; App.No.8463/78, Krocher and Moller v. Switzerland, 26 D & R (1982) 24 p.53 para.15; the Opinion of the Commission, Can Case, Ser.A Vol.96 (1985) 13 p.17 para.52; App.No.11219/84, Kurup v. Denmark, 42 D & R (1985) 287 pp.291-292 para.1.
[1193] See, the Opinion of the Commission, Can Case, Ser.A Vol.96 (1985) 13 p.17 para.53; the Opinion of the Commission, Lamy Case, Ser.A Vol.151 (1989) 21 p.26 para.105.

The facilities discussed above must be provided to the accused person from the moment he/she is subject to the impugned charge until his/her conviction becomes final. If the domestic law recognises a right of appeal he/she must also get in good time the facilities necessary to do so.[1194] This may require the providing of, among other things, a copy of the pleadings[1195], as well as the reasons for the decisions at lower courts[1196], to the accused.

According to Art.6(3)(c) everyone charged with a criminal offence is entitled 'to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interest of justice so require'. Although this guarantee primarily seeks to ensure that the accused person gets an effective opportunity to influence the outcome of the decision on merits[1197], its application is not confined to court hearings. As the Commission has observed, "(u)nlike Article 6(3)(b) this guarantee is not especially tied to considerations relating to the preparation of the trial, but gives the accused a more general right to assistance and support by a lawyer throughout the whole proceedings."[1198] As such, the accused does not have to wait until the beginning of the court hearings to avail him/herself of legal assistance. He/she is entitled to the expertise of a lawyer from the moment of his/her subjection to the criminal charge in question.[1199]

Para.3(c) guarantees that criminal proceedings will not take place without an adequate representation of the case for the defence.[1200] By granting a right to an effective remedy, undertaken either in person or through a lawyer, who, according to the Commission, functions as "the watchdog of procedural regularity"[1201], this provision has enabled the accused put forward his/her case to the court from a position that is

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[1194] See, *inter alia*, App.No.11396/85, Ross v. The United Kingdom, 50 D & R (1987) 179 p.184.
[1195] See, the Case of Kremzow v. Austria, Judgment of 21st September 1993, Ser.A Vol.268-B (1994) 27 pp.42-44 para.45-50.
[1196] Hadjianastassiou v. Greece, Judgment of 16th December 1992, Ser.A Vol.252 (1992) pp.16-17 para.34-37.
[1197] See, *inter alia*, Pakelli Case, Judgment of 25th April 1983, Ser.A Vol.64 (1983) p.18 para.39.
[1198] See, the Opinion of the Commission, Can Case, Ser.A Vol.96 (1985) 13 p.17 para.54.
[1199] See, *inter alia*, the Case of Imbrioscia v. Switzerland, Judgment of 24th November 1993, Ser.A Vol.275 (1994). However, it must be noted that the guarantees of Art.6(3)(c) do not apply to proceedings concerning detention on remand which are covered by Art.5(4). See, App.No.10868/84, Woukam Moudefo v. France, 51 D & R (1987) 62 p.82 para.3.
[1200] See, App.No.2676/65, X v. Austria, 23 CD (1967) 31 p.35. *c.f.*, in App.No.5923/72, X v. Norway, 3 D & R (1976) 43-44; App.No.8398/78, Pakelli v. The Federal Republic of Germany, 24 D & R (1981) 112 pp.119-120 para.11.
[1201] See, App.No.7572/76, 7586/76 and 7587/76 (joined), Ensslin, Baader and Raspe v. The Federal Republic of Germany, 14 D & R (1979) 64 p.114 para.20.

not disadvantageous *vis-à-vis* the prosecution.[1202] However, according to Strasbourg jurisprudence, Para.3(c) does not give an accused person the right to decide for him/herself in what manner his/her defence should be assured. The decision as to which of the two alternatives mentioned in the article should be chosen, namely, the applicant's right to defend him/herself in person or to be represented by a lawyer of his/her own choosing or, in certain circumstances, one appointed by the court, rests with the competent authorities concerned.[1203] In particular, if the interests of justice so demand, the authorities may require that the accused be assisted or represented by a lawyer.[1204] However, if the accused lacks sufficient means to pay for such stipulated assistance or representation, the authorities must provide him/her the necessary aid.

According to the Court any accused person who chooses to conduct his/her own defence deliberately waives his/her right to be assisted by a lawyer. Such an accused is under a duty to show reasonable diligence. He/she cannot blame the authorities for the procedural deficiencies that result from his/her lack of diligence.[1205]

If the accused does not wish to defend him/herself in person, he/she must be able to have recourse to legal assistance. As the Court observed in the case of Poitrimol v. France[1206], "...the right of everyone charged with a criminal offence to be effectively defended by a lawyer assigned officially if need be, is one of the fundamental features of a fair trial." This right is not subject to the accused person's appearance at the proceedings.[1207] However, it must be noted that the fact that he/she is represented by a lawyer does not deprive the accused of his/her right to be present at the hearing, which is guaranteed by para.3(c) as well as para.1 of Art.6.[1208]

Even an absconding accused is entitled under Art.6(3)(c) to be represented at the proceedings by a lawyer of his/her own choosing. The Contracting States cannot, even for the purpose of coercing the accused to appear before the courts, require him/her to

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[1202] See, the Opinion of the Commission, Goddi Case, Ser.A Vol.76 (1984) 15 p.16 para.55; App.No.5923/72,, X v. Norway, 3 D & R (1976) 43 p.44.
[1203] See, *inter alia*, App.No.2676/65, X v. Austria, 23 CD (1967) 31 p.35; App.No.5923/72, X v. Norway, 3 D & R (1976) 43 p.44.
[1204] See, the Case of Croissant v. Germany, Judgment of 25th September 1992, Ser.A Vol.237-B (1992) 20 p.32 para.27; App.No.16598/90, Philis v. Greece, 66 D & R (1990) 260 p.263 para.1.
[1205] See, *inter alia*, the Case of Melin v. France, Judgment of 22nd June 1993, Ser.A Vol.261-A (1993) p.12 para.25.
[1206] Judgment of 23rd November 1993, Ser.A Vol.277-A (1994) p.14 para.34.
[1207] Ibid.. Also see the Case of Campbell and Fell, Judgment of 28th June 1984, Ser.A Vol.80 (1984) p.45 para.99; the Case of Lala v. The Netherlands, Judgment of 22nd September 1994, Ser.A Vol.297-A (1995) p.13 para.33; the Case of Pelladoah v. The Netherlands, Judgment of 22nd September 1994, Ser.A Vol.297-B (1995) 23 pp.34-35 para.40.
[1208] See, *inter alia*, the Case of F.C.B. v. Italy, Judgment of 28th August 1991, Ser.A Vol.208-B (1991); the Opinion of the Commission, Goddi Case, Ser.A Vol.76 (1984) 15 p.17 para.59-63.

defend him/herself in person.[1209] Also, according to the Commission, in cases which the accused has decided on recourse to legal assistance, it is important that the authorities respect his/her choice of lawyer.[1210]

The accused person's right to be represented by a lawyer of his/her own choosing is, however, not an absolute one.[1211] Under the Convention, the Contracting States have the power to regulate and govern the qualifications of the lawyers and their professional conduct before and outside the courts.[1212] Moreover, according to the Commission, the States have full discretion to exclude lawyers from appearing before the courts.[1213] Also, it is not incompatible with the Convention to impose restrictions with regard to the number of defence lawyers permitted to appear before the courts, as long as such restrictions do not place the accused in a disadvantageous position *vis-à-vis* the prosecution in the presentation of his/her defence.[1214]

Under Art.6(3)(c), if the accused person has not sufficient means to pay for legal assistance, the State is obliged to give it free when the interests of justice so require. According to the Court, the question whether the interests of justice require a grant of legal aid must be determined in the light of the case as a whole[1215] after having regard to factors such as, the seriousness of the offence involved and the sentence risked, the complexity of the case[1216], whether the accused has the ability to present his/her case effectively without the assistance of a lawyer[1217], whether under the circumstances of the case the expertise of a lawyer would help the accused present his/her defence

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[1209] See, the Case of Poitrimol v. France, Judgment of 23rd November 1993, Ser.A Vol.277-A (1994).
[1210] See, the Opinion of the Commission, Goddi Case, Ser.A Vol.76 (1984) 15 pp.17-18 para.64.
[1211] See, the Case of Poitrimol v. France, Judgment of 23rd November 1993, Ser.A Vol.277-A (1994) p.14 para.34.
[1212] See, *inter alia*, App.No.722/60, X v. The Federal Republic of Germany, 5 YBECHR (1962) 104 p.106; App.No.5217/71 and 5367/72, X and Y v. The Federal Republic of Germany, 42 CD (1973) 139.
[1213] See, App.No.722/60, X v. The Federal Republic of Germany, ibid.. Also see, App.No.7572/76, 7586/76 and 7587/76 (joined), Ensslin, Baader and Raspe v. The Federal Republic of Germany, 14 D & R (1979) 64 p.114 para.20; App.No.8295/78, X v. The United Kingdom, 15 D & R (1979) 242 pp.243-244 para.1.
[1214] See, App.No.7572/76, 7586/76 and 7587/76 (joined), Ensslin, Baader and Raspe v. The Federal Republic of Germany, 14 D & R (1979) 64 p.114 para.19.
[1215] See, *inter alia*, Granger Case, Judgment of 28th March 1990, Ser.A Vol.174 (1990) p.18 para.46.
[1216] See, *inter alia*, the Case of Quaranta v. Switzerland, Judgment of 24th May 1991, Ser.A Vol.205 (1991) p.17 para.33-34; App.No.13572/88, Ostergren v. Sweden, 69 D & R (1991) 198 p.203.
[1217] See, *inter alia*, Granger Case, Judgment of 28th March 1990, Ser.A Vol.174 (1990) pp.18-19 para.47; Case of Quaranta v. Switzerland, Judgment of 24th May 1991, Ser.A Vol.205 (1991) pp.17-18 para.36; Case of Pham Hoang v. France, Judgment of 25th September 1992, Ser.A Vol.243 (1993) p.23 para.40; Case of Boner v. The United Kingdom, Judgment of 28th October 1994, Ser.A Vol.300-B (1995) 64 p.75 para.41; Case of Maxwell v. The United Kingdom, Judgment of 28th October 1994, Ser.A Vol.300-C (1995) 87 p.97 para.38; App.No.13572/88, Ostergren v. Sweden, 69 D & R (1991) 198 p.204.

effectively[1218], etc. However, para.3(c) does not require the authorities to appoint a lawyer chosen by the accused.[1219] Nor is it necessary to consult the accused when appointing a legal aid lawyer.[1220] In this regard, the authorities would not be held responsible for violating Art.6(3)(c) if the accused has failed to make use of the assistance made available to him/her.[1221]

Para.3(c) does not give the accused any right to change the legal aid counsel once appointed.[1222] Nor could the accused rely on this provision to demand that the legal aid counsel disregard his/her (counsel's) professional duty or to follow the accused person's particular line of argument in the presentation of the case for the defence.[1223] Further, albeit in order to be effective, the legal aid counsel appointed must be competent enough to represent the accused at the particular stage of proceedings for which his/her assistance is sought[1224], according to the Court in the Case of Imbrioscia v. Switzerland[1225],

> "...a State cannot be held responsible for every shortcoming on the part of a lawyer appointed for legal aid purposes...or chosen by the accused. Owing to the legal profession's independence, the conduct of the defence is essentially a matter between the defendant and his representative; under Article 6(3)(c) the Contracting States are required to intervene only if a failure by counsel to provide effective representation is manifest or sufficiently brought to their attention..."[1226]

The assistance provided in compliance with para.3(c) would not be effective if the legal aid lawyer appointed to defend the accused is changed frequently.[1227] Further, the accused would also be deprived of effective legal assistance if he/she is not permitted to have personal and confidential communication with his/her lawyer,

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[1218] See, *inter alia*, Artico Case, Judgment of 13th May 1980, Ser.A Vol.37 (1980) pp.16-17 para.34; Case of Pham Hoang v. France, Judgment of 25th September 1992, Ser.A Vol.243 (1993) p.23 para.40; Case of Boner v. The United Kingdom, Judgment of 28th October 1994, Ser.A Vol.300-B (1995) 64 p.75 para.41; Case of Maxwell v. The United Kingdom, Judgment of 28th October 1994, Ser.A Vol.300-C (1995) 87 p.97 para.38.

[1219] See, App.No.646/59, X v. The Federal Republic of Germany, 3 YBECHR (1960) 272 pp.276-278; App.No.9728/82, X v. The United Kingdom, 6 EHRR (1984) 345; App.No.12152/86, F v. Switzerland, 61 D & R (1989) 171 p.175.

[1220] See, App.No.6946/75, X v. The Federal Republic of Germany, 6 D & R (1977) 114 pp.116-117 para.2.

[1221] See, App.No.8821/79, Biondo v. Italy, 64 D & R (1990) 5 p.25 para.39.

[1222] See, *inter alia*, App.No.13572/88, Ostergren v. Sweden, 69 D & R (1991) 198 p.204.

[1223] See, App.No.7572/76, 7586/76 and 7587/76 (joined), Ensslin, Baader and Raspe v. The Federal Republic of Germany, 14 D & R (1979) 64 p.114 para.20; App.No.8386/78, X v. The United Kingdom, 21 D & R (1981) 126 p.130 para.6; the Opinion of the Commission, Kamasinski Case, Ser.A Vol.168 (1989) 50 p.56 para.160.

[1224] See, App.No.8821/79, Biondo v. Italy, 64 D & R (1990) 5 pp.24-25 para.38.

[1225] Judgment of 24th November 1993, Ser.A Vol.275 (1994) p.14 para.41.

[1226] *c.f.* from, Kamasinski Case, Judgment of 19th December 1989, Ser.A Vol.168 (1989) pp.32-33 para.65. Also see, Artico Case, Judgment of 13th May 1980, Ser.A Vol.37 (1980) pp.15-16 para.33; Case of Tripodi v. Italy, Judgment of 22nd February 1994, Ser.A Vol.281-B (1994) 38 p.46 para.30.

[1227] See, App.No.1850/63, Koplinger v. Austria, 9 YBECHR (1966) 240 pp.254-256.

chosen by him/her or appointed for the purpose of legal aid.[1228] Furthermore, the authorities would be held responsible for violating Art.6(3)(c) if as a result of their failure to notify the defence lawyer of the date of proceedings the accused is not represented at it.[1229]

The guarantees of Art.6(3)(c) extend to appellate proceedings too if under domestic law the accused is entitled to a right of appeal.[1230] However, the manner in which they apply at appellate stages depends upon the circumstances of the proceedings involved. In this regard, once again, account must be taken of the entirety of the proceedings conducted in the domestic legal order and of the role of the appeal court therein.[1231]

If necessary legal aid must be provided to ensure the effective enjoyment of the right to appeal, even if the chances of appeal being successful are negligible.[1232] According to the Court,

> "(t)he question whether the interests of justice required a grant of legal aid must be determined in the light of the case as a whole. In that respect not only the situation obtaining at the time the decision on the application for legal aid was handed down but also that obtaining at the time the appeal was heard are material."[1233]

However, the fact that Art.6(3)(c) is complied with at appellate stage does not alter the defects of its non-compliance at the first instance hearings if the appeal courts lack jurisdiction to review the case fully on the law and the facts.[1234]

It must be noted that the Convention imposes a positive obligation upon the Contracting States to take steps to ensure that an accused person enjoys effectively the

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[1228] See, *inter alia*, Case of S v. Switzerland, Judgment of 28th November 1991, Ser.A Vol220 (1992) pp.15-16 para.48; Opinion of the Commission, Can Case, Ser.A Vol.96 (1985) 13 p.18 para.57. However, no breach of para.3(c) would occur if personal and confidential communication is denied on public interest or security reasons. See the cases referred in *footnote no.*1192

[1229] See, *inter alia*, Goddi Case, Judgment of 9th April 1984, Ser.A Vol.76 (1984) p.12 para.30.

[1230] See, *inter alia*, Alimena v. Italy, Judgment of 19th February 1991, Ser.A Vol.195-D (1991) 49 p.56 para.20.

[1231] See, *inter alia*, the Case of Monnell and Morris, Judgment of 2nd March 1987, Ser.A Vol.115 (1987) p.22 para.56; Granger Case, Judgment of 28th March 1990, Ser.A Vol.174 (1990) p.17 para.44; Case of Boner v. The United Kingdom, Judgment of 28th October 1994, Ser.A Vol.300-B (1995) 64 p.74 para.37; Case of Maxwell v. The United Kingdom, Judgment of 28th October 1994, Ser.A Vol.300-C (1995) 87 p.96 para.34.

[1232] See, Granger Case, Judgment of 28th March 1990, Ser.A Vol.174 (1990) pp.17-19 para.45-48; the Case of Boner v. The United Kingdom, Judgment of 28th October 1994, Ser.A Vol.300-B (1995) 64 pp.74-76 para.40-44; Case of Maxwell v. The United Kingdom, Judgment of 28th October 1994, Ser.A Vol.300-C (1995) 87 pp.96-98 para.37-41. However, see the Case of Monnell and Morris, Judgment of 2nd March 1987, Ser.A Vol.115 (1987) p.25 para.67 -"the interest of justice cannot...be taken to require an automatic grant of legal aid whenever a convicted person, with no objective likelihood of success, wishes to appeal after having received a fair trial at first instance in accordance with Article 6." *c.f.* in App.No.13572/88, Ostergren v. Sweden, 69 D & R (1991) 98 p.203.

[1233] See, Granger Case, Judgment of 28th March 1990, Ser.A Vol.174 (1990) p.18 para.46.

[1234] See, the Case of Quaranta v. Switzerland, Judgment of 24th May 1991, Ser.A Vol.205 (1991) p.18 para.37.

rights to which they had recognised he/she is entitled.[1235] Any State action which would directly or indirectly impede the effective enjoyment of the rights of the defence set forth in Art.6(3)(c) may give rise to a violation of the Convention's undertakings.[1236] Nevertheless, para.3(c) cannot be taken as providing unlimited rights for the accused person. In particular, the rights of the defence enumerated therein do not preclude the authorities from taking action against an accused person's conduct that amounts to a criminal offence.[1237]

According to Art.6(3)(d) everyone charged with a criminal offence has a 'right to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him'.[1238] The term "witness" here is understood as having an autonomous Convention meaning which may be wider than that of "witness" in the technical sense as understood in the domestic legal system.[1239] According to the Commission, a person is a witness if his/her statements are used in evidence in the determination of the accused person's criminal liability.[1240] Thus, not only the non-professional persons who make testimonies on behalf of either the prosecution or the defence during the court proceedings, but also persons who do not appear at the proceedings as well as experts, appointed by the court or summoned by the prosecution or the defence, are witnesses for the purpose of para.3(d) if their depositions provide a basis for the court's decision on merit. [1241]

However, the guarantees of para.3(d) are not absolute. They are subject to the rules of domestic law governing the admission and examination of witnesses. Such rules do

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[1235] See, Artico Case, Judgment of 13th May 1980, Ser.A Vol.37 (1980) p.18 para.36.

[1236] See, for example, the Case of Brandstetter v. Austria, Judgment of 28th August 1991, Ser.A Vol.211 (1991) pp.23-24 para.53. Also see, App.No.1420/62, 1477/62 and 1478/62, X and Y v. Belgium, 6 YBECHR (1963) 590 p.628 - a breach of para.3(c) would occur if the accused is unable to find a lawyer to represent him/her due to pressure exerted, or maneuvers made, by the authorities.

[1237] See, the Case of Brandstetter v. Austria, Judgment of 28th August 1991, Ser.A Vol.211 (1991) p.23 para.52.

[1238] See, Craig Osborne, 'Hearsay and the European Court of Human Rights' (1993 *Criminal Law Review* 255). According to this author Art.6(3)(d) of the European Convention, taken literally, prevents the prosecution from relying on hearsay evidence in all circumstances.

[1239] See, the Opinion of the Commission, Bonisch Case, Ser.A Vol.92 (1985), p.20 para.86.

[1240] See, *inter alia*, App.No.10083/82, X v. The United Kingdom, 6 EHRR (1984) 140 p.143 para.10; the Opinion of the Commission, Unterpertinger Case, Ser.A Vol.110 (1987) 17 p.18 para.71.

[1241] See, *inter alia*, Bonisch Case, Judgment of 6th May 1985, Ser.A Vol.92 (1985) pp.14-16 para.29-35; Unterpertinger Case, Judgment of 24th November 1986, Ser.A Vol.110 (1987) pp.14-15 para.31; Kostovski Case, Judgment of 20th November 1989, Ser.A Vol.166 (1989) pp.19-20 para.40; the Case of Brandstetter v. Austria, Judgment of 28th August 1991, Ser.A Vol.211 (1991) pp.25-27 para.58- 63; Opinion of the Commission, the Case of Cardot v. France, Ser.A Vol.200 (1991) 25 p.30 para.51.

not offend the Convention as long as they apply equally for witnesses on both sides.[1242]

According to the Commission an accused person does not have an unrestricted right under para.3(d) to put questions to witnesses testifying against him/her in court. The exercise of this right must be governed by the court's appreciation whether or not such questions are likely to assist in, and are thus necessary for, ascertaining the truth.[1243] Also , inclusion of a statement, made by a person who does not appear as a witness at the trial, in evidence is not inconsistent with the accused person's right to examine or have examined witnesses against him/her as long as he/she is given an effective opportunity, either during the investigations or at the trial, to refute the validity of the statement or, if that statement is not the only or, main or decisive evidence upon which his/her conviction is based.[1244] Moreover, according to Strasbourg jurisprudence, although all the evidence must be produced in the presence of the accused[1245], in exceptional circumstances it is not a breach of para.3(d) to hear a witness in the absence of the accused, but in the presence of his/her representative, if the interests of justice require the exclusion of the accused while that particular witness is being examined.[1246]

With regard to the right to summon witnesses on his/her behalf, it must be noted that para.3(d) does not give the accused person an unlimited right to obtain the attendance of witnesses in court. The competent domestic court is free, subject to respect for the principle of equality of arms, to determine whether it is appropriate to call the witnesses requested by the defence[1247]. In particular, the court has the discretionary power to decide and satisfy itself that the proposed evidence is relevant to the matter

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[1242] See, *inter alia*, App.No.4428/70, X v. Austria, 15 YBECHR (1974) 264 p.282; Opinion of the Commission, Bonisch Case, Ser.A Vol.92 (1985) 19 p.22 para.93.

[1243] See, App.No.4428/70, X v. Austria, 15 YBECHR (1974) 264 p.282.

[1244] See, supra p.185. Also See, Unterpertinger Case, Judgment of 24th November 1986, Ser.A Vol.110 (1987) pp.14-15 para.31; Kostovski Case, Judgment of 20th November 1989, Ser.A Vol.166 (1989) p.20 para.41; the Case of Van Mechelen and Others v. The Netherlands, Judgment of 23rd April 1997, Reports of Judgments and Decisions, No.36 (1997-III) 691 pp.711-714 para.49-65; App.No.8417/78, X v. Belgium, 16 D & R (1979) 200 pp.207-208; App.No.8945/80, S v. Federal Republic of Germany, 39 D & R (1984) 43 p.48 para.7; App.No.11853/85, X v. Germany, 10 EHRR (1988) 521 p.523 - use of statements made by persons residing abroad whose presence at the proceedings cannot be enforced by the trial court.

[1245] See, *inter alia*, Kostovski Case, Judgment of 20th November 1989, Ser.A Vol.166 (1989) p.20 para.41; the Case of Van Mechelen and Others v. The Netherlands, Judgment of 23rd April 1997, Reports of Judgments and Decisions, No.36 (1997-III) 691 p.711 para.51.

[1246] See, App.No.11219/84, Kurup v. Denmark, 42 D & R (1985) 287 p.292 para.2.

[1247] See, *inter alia*, the Case of Engel and Others, Judgment of 8th July 1976, Ser.A Vol.22 (1977) pp.38-39 para.91; Bricmont Case, Judgment of 7th July 1989, Ser.A Vol.158 (1989) p.31 para.89; Vidal v. Belgium, Judgment of 22nd April 1992, Ser.A Vol.235-B (1993) 17 p.32 para.33; App.No.4428/70, X v. Austria, 15 YBECHR (1972) 264 p.282.

in hand[1248], and is thus likely to assist in ascertaining the truth.[1249] However, as the Commission observed in the Bricmont Case[1250], the

> "...court must give the reasons for which it decides not to summon those witnesses whose examination has been expressly requested. A court does not have discretion so extensive that it may deprive Article 6(3)(d) of all substance by refraining from demonstrating the irrelevance of the matters on which the examination of the witnesses is proposed."[1251]

The onus of calling defence witnesses lies with the accused person and his/her counsel. The authorities cannot be expected to summon of their own accord witnesses for the defence.[1252] Although, when properly called by the defence, the court must take all relevant steps to ensure that the requested witness(es) would appear at the appropriate time without causing prejudice to the presentation of the defence.[1253], no breach of para.3(d) would occur if a witness, after having been issued with summons, failed to turn up at the proceedings for reasons beyond the control of the authorities.[1254]

The aim of Art.6(3)(d) is to provide the accused person an equal opportunity with the prosecution to rebut before the adjudicating body the charges made against him/her. As such, its guarantees cannot in general be relied upon, for example, to claim a right to cross examine a witness who is being questioned by the authorities, or, to compel the authorities to examine a defence witness, at the pre-trial stage. The guarantee of Art.6(3)(d) remains intact as long as the accused person retains the right to cross examine and call all such witnesses during the trial.[1255]

According to Art.6(3)(e) everyone charged with a criminal offence has a right 'to have the free assistance of an interpreter if he cannot understand or speak the language used

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[1248] See, Stavros, pp.238-249.

[1249] See, the Opinion of the Commission, Bricmont Case, Ser.A Vol.158 (1989) 38 p.45 para.146. Also see, App.No.617/59, Hopfinger v. Austria, 3 YBECHR (1960) 370 pp.390-391; App.No.3566/68, X v. The Federal Republic of Germany, 31 CD (1970) 31 p.35; App.No.1134/61, X v. Belgium, 4 YBECHR (1961) 378 p.382; Austria v. Italy, 6 YBECHR (1963) 740 p.772; App.No.5560/72, X v. Austria, 45 CD (1974) 59 p.65.

[1250] The Opinion of the Commission, Bricmont Case, Ser.A Vol.158 (1989) 38 p.46 para.152.

[1251] Also see, Vidal v. Belgium, Judgment of 22nd April 1992, Ser.A Vol.235-B (1993) 17 p.33 para.34.

[1252] See, App.No.18123/91, F v. United Kingdom, 15 EHRR (1993) CD 32.

[1253] See, App.No.3566/68, X v. The Federal Republic of Germany, 31 CD (1970) 31 p.35; App.No.4078/69, X v. The Federal Republic of Germany, 35 CD (1971) 121 p.125; App.No.5560/72, X v. Austria, 45 CD (1974) 59 pp.65-66.

[1254] See, App.No.4078/69, X v. The Federal Republic of Germany, 35 CD (1971) 121 p.125; App.No.4428/70, X v. Austria, 15 YBECHR (1972) 264 pp.282-284.

[1255] See, *inter alia*, App.No.6566/74, X v. The Federal Republic of Germany, 1 D & R (1975) 84-85; App.No.8339/78, Schertenleib v. Switzerland, 17 D & R (1980) 180 pp.224-225 para.4; App.No.8414/78, X v. The Federal Republic of Germany, 17 D & R (1980) 231 pp.232-233; App.No.9627/81, Ferrari-Bravo v. Italy, 37 D & R (1984) 15 p.41 para.24.

in court'. This guarantee applies not only to oral statements made at the trial and appeal hearings but also to documentary materials and the pre-trial proceedings.[1256] As the Court said in the Kamasinski Case[1257],

> "Paragraph 3(e) signifies that a person 'charged with a criminal offence' who cannot understand or speak the language used in court has the right to the free assistance of an interpreter for the translation or interpretation of all those documents or statements in the proceedings instituted against him which it is necessary for him to understand or to have rendered into the court's language in order to have the benefit of a fair trial..."[1258]

This does not, however, mean that the authorities are obliged to provide written translations of all items of written evidence or official documents involved in criminal proceedings. Para.3(e) is satisfied if the interpretation assistance provided is adequate to enable the defendant to have knowledge of the case against him/her and to defend him/herself, notably by being able to put before the court his/her version of the events.[1259] Also, para.3(e) does not require the authorities to provide the accused a written translation of the judgement. Even if the accused enjoys a right to appeal, an oral explanation of the judgement and its reasonings is sufficient to fulfil the requirements of Para.3(e) as long as such explanation does not hinder the lodging of an appeal.[1260]

In order to comply with Art.6(3)(e) the interpretation assistance provided must be practical and effective. Thus, the obligation of the authorities is not limited just to the appointment of an interpreter. If put on notice in the particular circumstances, they must also ensure that the interpretation provided by the interpreter appointed is adequate.[1261] However, the guarantee of Para.3(e) extends only to those accused persons who cannot understand or speak the language used in the court.[1262] As Harris, O'Boyle and Warbrick have noted "(a)n accused person who understands the language used in court cannot insist upon the services of a translator to allow him to conduct his defence in another language, including the language of an ethnic minority of which he

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[1256] See, for example, Luedicke, Belkacem and Koc v. Federal Republic of Germany [2 EHRR (1979/80) 149 p.163 para.45] in which the Court said, "...it does not at first sight appear excluded that Article 6(3)(e) applies also to the costs incurred by the interpretation of the accusation mentioned in sub- paragraph (a), as well as to the costs incurred by the interpretation of the reasons for arrest and of any charges brought - matters of which everyone who is arrested must, under Article 5(2), be informed 'in a language which he understands'."

[1257] Judgment of 19th December 1989, Ser.A Vol.168 (1989) p.35 para.74.

[1258] *c.f.* from Luedicke, Belkacem and Koc v. Federal Republic of Germany, 2 EHRR (1979/80) 149 p.164 para.48.

[1259] See, Kamasinski Case, Judgment of 19th December 1989, Ser.A Vol.168 (1989) p.35 para.74.

[1260] Ibid., p.38 para.85.

[1261] Ibid., p.35 para.74.

[1262] See, Luedicke, Belkacem and Koc v. Federal Republic of Germany, 2 EHRR (1979/80) 149 p.164 para.48; App.No.2465/65, X v. The Federal Republic of Germany, 24 CD (1967) 50 pp.58-59; App.No.10210/82, K v. France, 35 D & R (1984) 203 p.207 para.8.

is a member."[1263]

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Indisputably the accused persons right to a fair trial under the European Convention on Human Rights is far more explicit and comprehensive than under any of the South-Asian Constitutions considered here. Not only is the case that the guarantees of the European Convention are, comparative to the situation in South Asia, phrased in a direct and less unambiguous manner, but also interpreted and applied in such a way as to include a whole range of collateral rights necessary to protect the interests of the accused persons. On the other hand, in the South-Asian region, while in India, Pakistan, Bangladesh and Nepal, the guarantee of even some of the most basic elements of the notion of a fair trial is indirect, in Sri Lanka, the Constitutional right of the accused persons to a fair trial can only be invoked against violations caused by executive or administrative action.

The guarantees of a fair trial under Art.6 of the European Convention apply equally to minor offences, even if a punishment is not imposed, as well as serious offences, and can be availed by anyone who has been accused of committing an offence that entail punitive sanctions. However, a sanction amounting to loss of liberty would not *ipso facto* make its principle offence a "crime" subject to the regime of Art.6, unless the nature, duration or the manner of execution of the sanction is appreciably detrimental to the person concerned. All in all, whether a particular offence is a crime for the purpose of Art.6 depends either upon, (i) how the offence is classified under the municipal law, i.e., whether the offence is one classified as a crime by the municipal law, or, (ii) the nature of the offence, or, (iii) the degree of severity of the penalty that the person concerned risks incurring. Along these lines, the Strasbourg authorities have found offences that entail even monetary fines or tax surcharges, as well as offences committed against administration of justice, to be crimes within the meaning of Art.6 of the Convention

In contrast, in India, Pakistan and Nepal, the guarantee of a fair trial in criminal proceedings, which is deduced from the due process guarantees of the respective Constitution, can be invoked only if a sanction amounting to deprivation of life or personal liberty is involved. Despite the large and liberal meanings given to the words

[1263] See, D.J.Harris, M.O'Boyle, and C.Warbrick, *Law of the European Convention on Human Rights*, (London: Butterworths, 1995), p.272 (footnotes excluded).

"life" and "liberty"[1264] in the due process clause of the Indian and Pakistani Constitutions, whether the phrase "deprivation of life or liberty" would encompass monetary fines and tax penalties is extremely doubtful.[1265] Also, it must be mentioned here that, within the context of Art.21 of the Indian Constitution and Art.9 of the Pakistani Constitution, the word "deprive" conveys the idea of "total loss" and thus, a restriction or a partial control of the freedoms guaranteed by those Articles would hardly give rise to a breach of a fundamental right. Although in Bangladesh too, the guarantee of a fair trial in criminal proceedings is deduced from the due process guarantees of the Constitution, it can be relied upon by anyone who is the subject of a criminal proceeding, whatever the nature of the offence involved or the severity of the penalty risked.

According to Strasbourg jurisprudence, although not expressly mentioned, Art.6(1) includes a "right of access to a court". Any decision to discontinue proceedings could breach this right if such discontinuation has given rise to unfavourable implications as regard the accused person's guilt. No similar right can be found in any of the South-Asian countries considered here. However, in India, as the Calcutta High Court observed in the case of Tapati Bag v. Patitpaban Ghosh[1266], once a charge is framed the trial has to proceed and the process cannot be put into reverse for discharging the accused. If the accused feels aggrieved by reason of the charge, he/she has either to face the trial or approach the High Court in its revisional jurisdiction.

Under Art.6 of the European Convention the accused persons enjoy an implied right to be present at the hearings. However, trial in absentia is not inconsistent with the Convention if, (i) the accused has waived, in an unequivocal manner, his/her right to be present at the hearings[1267] or, (ii) the authorities, after having taken diligent measures, have been unsuccessful in giving the accused person effective notice of the hearing or, (iii) the interests of the administration of justice require the trial to proceed and the accused, for example, due to illness cannot attend the hearings or, (iv) the accused, without giving any convincing reasons, continuously fails to attending the hearings with a view to delaying the trial. Also, even though all the evidence must

[1264] See, *supra footnotes* 677, 678, 787 and 788.
[1265] In Purushottam Govindji Halai v. Shree B.M.Desai (A.I.R. 1956 S.C. 20), the Indian Supreme Court did not regard the arrest and detention of a defaulter who fails to pay income tax as a punishment or penalty for an offence. However, according to Basu, in India principles of natural justice apply to disciplinary proceedings [see, D.D.Basu, *Human Rights in Constitutional Law* (New Delhi: Prentice-Hall of India Pvt. Ltd. 1994), pp.413-414].
[1266] 193 Cr.L.J. 3932 (Calcutta).
[1267] Note, a waiver would not be regarded as valid unless it is attended by minimum safeguards commensurate to its importance.

usually be produced in the presence of the accused, in exceptional circumstances it is not against the Convention to hear a witness in the absence of the accused, but in the presence of his/her representative, if the interest of justice require the exclusion of the accused while that particular witness is being examined. Nevertheless, in the above mentioned instance (ii), even if the authorities have acted diligently to inform the accused of the proceedings, a trial in absentia would be regarded as compatible with the Convention only if the person concerned can, after coming to know of the proceedings, obtain from the court which heard his/her case, a fresh determination of the merits of the charge, in respect of both law and facts.[1268]

Further, it must be noted that an accused person's right to a fair hearing under Art.6 is absolute and does not depend on his/her personal attendance at the proceedings. As such, a trial in absentia would conform with the Convention only if the authorities have taken appropriate measures to safeguard the interests of the non-attending accused. Also, the accused person's right to be present at the hearings extends to appeal proceedings too if there remains a possibility of his/her sentence being increased by the appeal court.

There is no express or unqualified right for the accused persons to be present at the hearings either under any of South-Asian Constitutions too. The guarantee of Art.13(3) of the Sri Lankan Constitution for the accused persons is "...to be heard, in persons ***or*** by an attorney-at-law...".[1269] Although the Criminal Procedure Codes of

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[1268] Note, it would be inconsistent with the regime of Art.6(1) for the domestic law to require the accused person to prove, in order to reopen the trial, that he/she was not seeking to evade justice or that his/her absence was due to *force majure.*

[1269] Also, unlike the Criminal Procedure Codes of India, Pakistan and Bangladesh, the Criminal Procedure Code of Sri Lanka has made express provisions for the conduct of proceedings in the absence of the accused, especially if the accused is absconding or has left the country. See, for example, Sec148(4), Sec.241, Sec.242 of the Code of Criminal Procedure Act, No.15 of 1979. As provided by Sec. 241 "(1) (a)nything to the contrary in this code notwithstanding the trial of any person on indictment with or without a jury may commence and proceed or continue in his absence if the court is satisfied - (a) that the indictment has been served on such a person and that - (i) he is absconding or has left the island; or (ii) he is unable to attend or remain in court by reason of illness and has consented to the commencement or continuance of the trial in his absence ; or
(iii) he is unable to attend or remain in court by reason of illness and in the opinion of the judge prejudice will not be caused to him by the commencement or continuance of the trial in his absence ; or (iv) by reason of his conduct in court he is obstructing or impeding the progress of the trial; or (b) that such a person is absconding or has left the island and it has not been possible to serve indictment on him.
(2) The commencement or continuance of a trail under this section, shall not be deemed or construed to affect or prejudice the right of such a person to be defended by an attorney-at-law at such trial.
(3) Where in the course of or after the conclusion of the trial of a accused person under subparagraph (i) of paragraph (a) of subsection (1) or under paragraph (b) of that subsection he appears before the court and satisfies the court that his absence from the whole or part of the trial was bona fide then - (a) where the trial has not been concluded, the evidence led against the accused up to the time of his appearance before court shall be read to him and an opportunity afforded to him to cross-examine the

India, Pakistan and Bangladesh require the evidence to be taken in the presence of the accused, they also provide for the continuation of proceedings under certain circumstances without the personal attendance of the accused at the hearing, but in the presence of his/her pleader, if the interest of justice require so.[1270] However, in Nepal, as has been argued by some jurists, under Art.12(1) of the Constitution, the accused persons enjoy an inalienable right to be present at the trial.

The procedural equality of the defence and the prosecution, or the "equality of arms", is also an important element of a fair hearing under Art.6 of the European Convention. Under the principle of equality of arms, the accused person is entitled to have an opportunity of presenting his/her case to the court under conditions which do not place him/her at a substantial disadvantage *vis-à-vis* the prosecution. Both the prosecution and the defence should have equal opportunities to access documents, records, files, etc., which would be material to the decision on merit. According to Strasbourg jurisprudence the principle of "equality of arms" would be violated if the defence is not allowed to reply to the prosecution's submissions. It is also against this principle to pronounce a verdict of guilt after the prosecuting authorities had been heard in the absence of the accused person or his/her legal representative. If the appearances of the proceedings give rise to question about the equality of the parties,

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witness who gave such evidence ; and (b) where the trial has been concluded the court shall set aside the conviction and sentence if any and order that the accused be tried *de novo*

(4) The provisions of subsection (3) shall not apply if the accused person had been defended by an attorney-at-law at the trail during his absence." According to Sec.242 "(t)rial in the High Court in the absence of the accused shall proceed as nearly as may be according to the provisions of this Chapter relating to trials with a jury or without a jury as the case may be." On the other hand, as provided by Sec.299 of the Indian Code of Criminal Procedure, Act II of 1974 "(i)f it is proved that an accused person has absconded, and that there is no immediate prospect of arresting him, the Court competent to try or commit for trial, such person for the offence complained of ***may***, in his absence, examine the witnesses (if any) produced on behalf of the prosecution, and record their depositions and any such deposition ***may, on the arrest of such person, be given in evidence against him on the inquiry into, or trial for, the offence with which he is charged, if the deponent is dead or incapable of giving evidence or cannot be found or his presence cannot be procured without an amount of delay, expense or inconvenience which, under the circumstances of the case, would be unreasonable***." A similar provision can be found in Sec.512 of the Pakistani and Bangladeshi Criminal Procedure Codes.

[1270] As provided by Sec.317 of the Indian Criminal Procedure Code, Act II of 1974, "(1) (a)t any stage of an inquiry or trial under this Code, if the Judge or Magistrate is satisfied, for reasons to be recorded, that the personal attendance of the accused before the Court is not necessary in the interests of justice, or that the accused persistently disturbs the proceedings in Court, the Judge or Magistrate may, if the accused is represented by a pleader, dispense with his attendance and proceed with such inquiry or trial in his absence, and may, at any subsequent stage of the proceedings, direct the personal attendance of such accused." According to Sec.540A of the Criminal Procedure Code of Pakistan, Act V of 1898, "(a)t any stage of an inquiry or trial under this Code, where two or more accused are before the Court, if the Judge or Magistrate is satisfied, for reasons to be recorded, that any one or more of such accused is or are incapable of remaining before the Court, he may, if the accused is represented by a pleader, dispense with his attendance and proceed with such inquiry or trial in his absence, and may, at any subsequent stage of the proceedings, direct the personal attendance of such accused." A similar provision can be found in Sec.540A of Criminal Procedure Code of Bangladesh, Act V of 1898.

the Strasbourg authorities do not require the applicants to prove an actual inequality. Instead, a breach of Art.6 is recorded if an objectively justified legitimate doubt is shown about the equality between the prosecution and the defence.

Art.6 also requires the proceedings to be of adversarial nature. The defence must be given an opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the prosecution. All the evidence must in principle be produced in the presence of the accused at a public hearing.

In all five South-Asian countries criminal proceedings are based on the adversarial system of administration of justice. As a result the accused persons are treated equally with the prosecution and are given a fair, adequate and equal opportunity to present their defences, notwithstanding the absence in the national Constitutions of any express guarantee to that effect. Also, it is guaranteed to the accused persons in India, and Nepal under the due process clause of the respective Constitution that the criminal proceedings which impose sentences amounting to deprivation of life or liberty would be just, fair and non-arbitrary. In Bangladesh this has been guaranteed to every accused person irrespective of the nature of the punishment at stake.

Further, even though the Constitutions of India, Pakistan and Bangladesh do not make any direct reference to the principle of equality of arms, the Criminal Procedure Code of these three countries have incorporated detailed provisions to ensure a considerably high level of procedural equality between the prosecution and the defence. As required by these Codes the accused must be provided with all the information and documents necessary for the preparation of his/her defence free of charge. They also require the evidence to be taken in the presence of the accused, or when his/her attendance at the hearings is dispensed with, in the presence of his/her pleader.

The Criminal Procedure Code of India, Pakistan and Bangladesh have also incorporated provisions to ensure that the accused get an opportunity to defend him/herself properly and effectively. They have entitled the accused to cross examine the prosecution witnesses and adduce evidence to counter the arguments put forward by the prosecution against him/her. If the accused so applied, the Codes have obliged the courts to issue process for compelling the attendance of any witnesses or the production of any document or thing. In Nepal, a trial might be vitiated if the accused is not allowed to cross examine the prosecution witnesses or if he/she is not given an effective opportunity to defend him/herself.

Art.6(1) of the European Convention guarantees to every accused person a right to trial with in a reasonable time. In this regard the relevant time period begins with the day on which the persons concerned is charged and ends when the acquittal or conviction, including the sentence, becomes final. There is no ceiling limit within which a case should be concluded in order to be reasonable. Whether the time elapsed is reasonable depends upon the circumstances of each individual case, viz., the nature and the complexity of the evidence involved; the conduct of the accused, and the authorities; what was at stake for the accused; etc.. However, if the accused is in detention pending the determination of the charge against him/her, the fact of his/her detention is taken into consideration when determining the reasonableness of the length of the trial. No breach of the right to trial within a reasonable time could successfully be alleged if the accused person him/herself is responsible for the impugned delay. On the whole, as it appears form the Strasbourg jurisprudence, no violation of this right would be recorded unless there has been a period of inactivity attributable to the State authorities.

In South-Asia, Art.35(3) of the Bangladeshi Constitution has guaranteed to every accused person a right to a speedy trial. A similar right has been accorded to the accused persons in India under the guarantee of Art.21 of the Constitution, albeit nothing expressly provided in the Article to that effect. In Nepal, Art.12(1) of the Constitution might be offended if a trial is not concluded within a reasonable time. Although the Criminal Procedure Code of Bangladesh has laid down specific time periods for the conclusion of trials any failure to comply with them is of no judicial consequence as those time periods are only directory and not mandatory.

In India, the right to expeditious conclusion of proceedings applies not only to trial stages but also to appellate proceedings and any failure to comply with this right, especially when the accused is in remand, is regarded as repugnant to the guarantee against unlawful deprivation of personal liberty. However, as under the European Convention, no concrete standards have been set to determine what kind of a delay or a delay of what duration would result in the accused person being denied a fair hearing. The issue is resolved upon the circumstances of each individual case after taking into consideration factors such as, the length of the time period in question, the nature of the offence and the charge, and the nature and complexity of the evidence involved in the case, and whether the alleged delay has caused any prejudice to the accused person and if so the gravity of that prejudice, etc.. However, no decision in favour of the accused on the ground of unreasonable delay would be recorded unless the responsibility for the delay is attributable to the prosecution. In particular, no

redress can be sought if the accused person him/herself is responsible for the alleged delay.

Under Art.6 of the European Convention every accused person is entitled to have his/her case tried by an independent and impartial tribunal established by law. Although "independent" in this context means independent not only from the parties but also from the executive and the legislature, the fact that the members of a particular tribunal are appointed by either of the later mentioned branches of the government does not *ipso facto* make the tribunal subservient. However, according to Strasbourg jurisprudence, the irremovability of tribunal members by the executive during their term of office is a strong indication about a tribunal's independence.

A tribunal's 'appearance of independence' is also regarded by Strasbourg authorities as important for the purpose of Art.6. As has been emphasised 'justice must not only be done; but must also be seen to be done'. In general, a tribunal would not be regarded as independent within the meaning of Art.6 if its members are subject to outside instruction or authority.

As regard the impartiality, a tribunal must, firstly, be subjectively free of personal prejudices or bias. Secondly, the tribunal must also be impartial from an objective point of view, in particular, as the Strasbourg authorities have emphasised, from the point of view of the accused. A tribunal's impartiality is jeopardised if its members are/were connected with the investigation or the prosecution, or with the incidents or matters which gave rise to the allegation against the accused, or if its members take part in different appellate stages of the same proceeding.

In South-Asia, only the Constitution of Bangladesh expressly guarantees a right to the accused persons to be tried by an independent and impartial tribunal established by law. Although the Constitutions of the other four South-Asian countries have incorporated provisions to ensure the independence of the judiciary, none of those provisions confer any fundamental right upon the accused persons. On the other hand, the criminal justice administration in all five South-Asian countries considered here is based on the Anglo-American adversary method which adopt the accusatorial method. Consequently, the Magistrates as well as Judges of trial courts do not take any part in the criminal investigation or prosecution of offenders.[1271] They, i.e., Magistrates and

[1271] Note, as provided by the Criminal Procedure Codes of India (Sec.44), Sri Lanka (Sec.41), Pakistan (Sec.64 & 65) and Bangladesh (Sec.64 & 65) the Magistrates can under certain circumstances make arrests. However, as these Codes further provides, if a Magistrate takes cognizance of any offence upon his/her own knowledge that such offence has been committed, the Magistrate must inform, before

Judges, act more or less like umpires and do not take any side or show favour or disfavour to any party. Also, according to the Indian Supreme Court[1272], the primary object of criminal procedure is to ensure a fair trial of the accused persons and, in order for a trial to be fair, justice must not only be done, but it must also seen to all the parties concerned to be done. In particular, the accused person must "...always be given, as far as that is humanly possible, a feeling of confidence that he will receive a fair, just and impartial trial..."[1273] However, it must be noted that under the European Convention, the guidelines set by the Strasbourg authorities as regards the independence and impartiality of the members of tribunals which adjudicate the culpability of offenders, apply not only to judicial bodies of classic kind, but also to *quasi*-judicial bodies and military tribunals as well.

Further, in Pakistani, the State, as defined Art.7 of the Constitution, can be held responsible of violating Art.9 of the Constitution, if it, i.e., the State, has failed to establish independent and impartial courts. Furthermore, it must be noted that in India, and in Pakistan and Bangladesh too, an issue under due process guarantee of the respective Constitutions could be raised if any of the provisions, relating to public trial by an independent and impartial tribunal, of the Criminal Procedure Codes of these countries, have been violated during proceedings which sentence the accused persons to punishments amounting to deprivation of life or personal liberty. As provided by these Codes, no Judge or Magistrate must, except with the permission of the court to which an appeal lies from his/her court, try any case to or in which he/she is a party, or personally interested. Also, no Judge or Magistrate must hear an appeal from any judgement or order passed or made by him/herself. Moreover, if a Magistrate takes cognizance of any offence upon his/her own knowledge that such offence has been committed, the Magistrate must inform, before admitting any evidence in the case, the accused that he/she is entitled to have the case inquired into or tried by another Magistrate. If the accused objects to further proceedings, the case should be transferred to an appropriate court. In addition, no Magistrate or Judge of a criminal court, other than a Judge of a High Court, should try any person for any offence concerning contempt of lawful authority of public servants if the offence concerned was committed before him/herself or in contempt of his/her authority, or is brought under his/her notice as such Judge or Magistrate in the course of a judicial proceeding.

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admitting any evidence in the case, the accused that he/she is entitled to have the case inquired into or tried by another Magistrate. If the accused objects to further proceedings, the case should be transferred to an appropriate court [see, Sec.191 of the Indian Criminal Procedure Code, Act II of 1974; Sec.136(c) of the Sri Lankan Criminal Procedure Code, Act No.15 of 1979; Sec.191 of the Pakistani Criminal Procedure Code of 1898; Sec.191 of the Bangladeshi Criminal Procedure Code of 1898].

[1272] See, T.H.Hussain v. M.P.Mondkar, A.I.R. 1958 S.C. 376 p.379 para.6.

[1273] See, Sukhdev Singh v. Hon'ble Judges of Pepsu High Court, A.I.R. 1954 S.C. 186 at p.190.

Art.6 of the European Convention also guarantees to the accused persons a right to a public hearing. This right is, however, subject to the extensive restrictions expressly provided by Art.6 itself. The safety and security of the victims and witnesses may also justify departures from the right to a public hearing. If there has been a public hearing at the first instance, the absence of such a hearing before a second or third instance may be justified by the special features of the proceedings at issue.

Also, under Art.6 of the European Convention the accused persons are entitled to have the decision of the proceedings against them pronounced publicly. Although this requirement is not subject to any of the limitations provided in the Article itself, the Strasbourg organs do not adopt a literal interpretation of the words 'pronounced publicly'. This right is regarded as sufficiently protected if the judgement is read in public stating the offence committed, the accused person's guilt, the presence (if appropriate) of special circumstances and the sentence imposed, even if the full reasons for the judgement are filed later.

In South-Asia, the accused persons in Bangladesh have been Constitutionally guaranteed a right to a public hearing. According to Dr.Amir Ratna Shrestha, right to an open trial is an integral part of the guarantee of Art.12(1) of the Nepali Constitution. In addition, the Criminal Procedure Codes of India and Pakistan as well as of Bangladesh, and the Court Procedure of the *Muluki Ain*, 1963 of Nepal, too require criminal trials to be open. Nonetheless, in India, Pakistan and Bangladesh, the presiding Judge or Magistrate may, if he thinks fit, order at any stage of any inquiry into, or trial of, any particular case, that the public generally, or any particular person, shall not have access to, or be or remain in, the room or building used by the court. In Sri Lanka, although Art.106 of the Constitution require the sitting of every court, tribunal or other institution established under the Constitution or ordained and established by Parliament, to be held in public, the Article does not confer a fundamental right upon the accused persons as it appears outside of the Bill of Rights.

Further, the Criminal Procedure Codes of India, Pakistan and Bangladesh also require the judgement in every trial in any criminal court to be pronounced, or the substance of such judgement to be explained, in open court either immediately after the termination of the trial or at some subsequent time of which notice shall be given to the parties or their pleaders. In addition, the judgement must contain the point or points for determination, the decision thereon and the reasons for the decision. It must specify the offence (if any) of which, and the section of the Penal Code or other law

under which, the accused is convicted, and the punishment to which he/she is sentenced. If it be a judgement of acquittal, it must state the offence of which the accused is acquitted, and direct that he/she be set at liberty.

As guaranteed by Art.6(2) of the European Convention everyone charged with a criminal offence has a right to be presumed innocent until proved guilty according to law. This guarantee is applicable, not only to criminal offences proper, but also to regulatory as well as disciplinary offences which entail punitive sanctions. Although Art.6(2) applies from the first instance hearings until the conviction or the acquittal becomes final, it is otherwise if the proceedings are concerned only with the sentence to be imposed. Also, the confinement of proceedings only to the question of sentence, in a case where the accused has pleaded guilty, is not inconsistent with this provision if undue pressure has not been exerted to obtain such a plea.

According to Strasbourg jurisprudence, under the guarantee of Art.6(2) the accused persons also enjoy two more rights closely related with the presumption of innocence, namely, right against self-incrimination and right to remain silent until proved guilty according to law. It is against the regime of Art.6(2) for the court to start with a preconceived idea that the accused has committed the offence charged. The burden of proof is on the prosecution and until such time his/her guilt is established the accused has a right to remain silent. The prosecution must prove its case without relying on incriminatory evidence obtained by maltreating the accused. Any doubt remaining at the end of the prosecution's case as to the guilt must benefit the accused.

The guarantees of Art.6(2) continue to apply to ancillary proceedings, such as for example, proceedings to determine the payment of costs or compensation, if the case on merit is discontinued without a final decision or concluded with a final decision of acquittal. However, the discontinuation of a case itself may breach Art.6(2) if the decision to discontinue has given rise to unfavourable implications as regard the guilt of the person concerned. Similarly, although there are no provisions in the Convention guaranteeing a right to reimbursement of costs or a right to compensation for detention on remand if the proceedings are discontinued, a violation of the principle of presumption of innocence may occur if the substance of the reasoning that underpin a decision to refuse reimbursement or compensation, reflects a determination of guilt.

In addition to the judicial proceedings, public statements made by public officials are also subject to the regime of art.6(2). This, nevertheless, does not mean that the

authorities cannot inform the public about criminal investigations. It is not against Art.6(2) to state publicly that a suspicion exists, or people have been arrested, or that they have confessed, etc.. What is excluded is the making of formal declaration that somebody is guilty before that has been established according to law by a competent court.

Out of the five South-Asian Constitutions, only the Sri Lankan Constitution has expressly recognised the accused persons right to be presumed innocent until proved guilty.[1274] Although in India, Pakistan and Bangladesh the right to be presumed innocent until proved guilty and the right to remain silent are not Constitutionally protected as fundamental rights, according to the courts of all three countries those two rights are integral parts of their respective criminal process. Especially in India, as the Assam and Nagland High Court has held, the presumption of innocence continues even in an appeal against acquittal.[1275] In addition, it must be noted that the rules of evidence in all these countries have imputed the burden of proof in criminal proceedings upon the prosecution. Nonetheless, it is doubtful whether in any of the above mentioned South-Asian countries, (i) the persons accused of committing offences other than criminal offences proper, could as of right, remain silent or, claim to be regarded as innocent until proved guilt, or (ii) the presumption of innocence has any relevancy when unfavourable implications as regard the guilt of the person concerned have emerged as a result of discontinuation of proceedings without a decision on merit is pronounced[1276] or, (iii) the presumption of innocence is applicable to ancillary judicial proceedings or to the statements made by public officials.

On the other hand, unlike under the European Convention, under the Constitutions of India, Pakistan, Bangladesh and Nepal, the guarantee against self-incrimination is express. Also, the practice of the Indian and Bangladeshi courts with regard the protection of the accused persons right against self-incrimination is commendable. While in Bangladesh, the exertion of physical pressure to make a person convict him/herself is regarded as sufficient to breach the guarantee against self-incrimination, in India that guarantee is regarded as breached whenever any mode of pressure, subtle or crude, mental or physical, direct or indirect, but sufficiently substantial, is applied for obtaining information from the person concerned suggestive of his/her guilt. In

[1274] Note, however, this right can be enforced only against executive and administrative action, not against judicial action.
[1275] See, Sate of Assam v. Bhabananda Sarma and others, 1972 Cr.L.J. 1552.
[1276] However, in India after the stage of framing a charge the accused cannot be discharged. He/she must either be convicted or acquitted [see, Ratanlal Ranchhoddas and Dhirajlal Keshavlal Thakore, *Ratanlal & Dhirajlal's The Code of Criminal Procedure*, 15th edition (New Delhi: Wadhwa and Co. 1997), p.386].

both these countries the guarantee against self-incrimination extends to incriminatory things as well as to incriminatory statements, whether oral or written.

Art.6(3)(a) of the European Convention guarantees to everyone charged with a criminal offence a right to be 'informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him'. The information provided about the nature and cause of the accusation must be adequate to enable the accused to prepare his/her defence. On the other hand, even a mere statement like "You are accused of corruption" has been regarded by the Commission as sufficient to fulfil the requirements of Art.6(3)(a).

Under Art.6(3)(b), everyone charged with a criminal offence is entitled 'to have adequate time and facilities for the preparation of his defence'. This provision covers the position not only of the accused but also of his/her counsel. Whether time provided is sufficient is determined after taking into consideration, among other things, the factors such as, the complexity of the case, the kind of proceedings involved, the stage of proceedings, whether the defence is carried out by the accused him/herself or through a counsel, the workload of counsel, etc.. The "facilities" which everyone charged with a criminal offence should enjoy include the opportunity to acquaint him/herself, for the purpose of preparing his/her defence, with the results of investigations carried out throughout the proceedings. These must be provided to the accused person from the moment he/she is subject to the impugned charge until his/her conviction becomes final. If the domestic law recognises a right of appeal he/she must also get in good time the facilities necessary to do so.

Art.6(3)(c) guarantees to everyone charged with a criminal offence a right 'to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interest of justice so require'. The accused does not have to wait until the beginning of the court hearings to avail him/herself of legal assistance. He/she is entitled to the expertise of a lawyer from the moment of his/her subjection to the criminal charge in question. The question whether the interests of justice require a grant of legal aid is determined in the light of the case as a whole after having regard to factors such as, the seriousness of the offence involved and the sentence risked, the complexity of the case, whether the accused has the ability to present his/her case effectively without the assistance of a lawyer, whether under the circumstances of the case the expertise of a lawyer would help the accused present his/her defence effectively, etc.. However, para.3(c) does not require the authorities to appoint a lawyer chosen by the accused. Nor is it necessary

to consult the accused when appointing a legal aid lawyer. Also the State cannot held responsible for every shortcoming on the part of a lawyer appointed for legal aid purposes. However, the assistance provided in compliance with para.3(c) would not be effective if the legal aid lawyer appointed to defend the accused is changed frequently, or if the accused is not permitted to have personal and confidential communication with his/her lawyer, chosen by him/her or appointed for the purpose of legal aid.

The guarantees of Art.6(3)(c) extend to appellate proceedings too if under domestic law the accused is entitled to a right of appeal. If necessary legal aid must be provided to ensure the effective enjoyment of the right to appeal, even if the chances of appeal being successful are negligible. However, the fact that Art.6(3)(c) is complied with at appellate stage does not alter the defects of its non-compliance at the first instance hearings if the appeal courts lack jurisdiction to review the case fully on the law and the facts.

Under Art.6(3)(d) everyone charged with a criminal offence has a 'right to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him'. For the purpose of this paragraph a person is a witness if his/her deposition(s) provide a basis for the court's decision on merit. However, the guarantees of para.3(d) are subject to the rules of domestic law governing the admission and examination of witnesses. Such rules do not offend the Convention as long as they apply equally for witnesses on both sides. Although all the evidence must be produced in the presence of the accused, in exceptional circumstances it is not a breach of para.3(d) to hear a witness in the absence of the accused, but in the presence of his/her representative, if the interest of justice require the exclusion of the accused while that particular witness is being examined. When properly called by the defence, the court must take all relevant steps to ensure that the requested witness(es) would appear at the appropriate time without causing prejudice to the presentation of the defence. The court must give reasons if it decides not to summon a witness whose examination has been expressly requested.

Art.6(3)(e) guarantees to everyone charged with a criminal offence a right 'to have the free assistance of an interpreter if he cannot understand or speak the language used in court'. This guarantee applies not only to oral statements made at the trial and appeal hearings but also to documentary materials and the pre-trial proceedings. However, it is not essential to provide written translations of all items of written evidence or

official documents involved in criminal proceedings. Para.3(e) is satisfied if the interpretation assistance provided is adequate and effective to enable the defendant to have knowledge of the case against him/her and to defend him/herself, notably by being able to put before the court his/her version of the events.

There are no express guarantees similar to Art.6(3)(a), (b), (d) or (e) of the European Convention under any of the South-Asian Constitutions considered here.[1277] However, in India, Bangladesh and Nepal, the criminal proceedings might, by not being just, fair and non-arbitrary, offend the due process guarantee of the respective Constitution, if they proceed without the accused being, (i) properly informed of the charge, or (ii) given adequate time and facilities for the preparation of his/her defence, or (iii) given an opportunity to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf. Also, it must be noted that the Criminal Procedure Codes of India, Pakistan and Bangladesh require the accused to be informed with certainty and accuracy the exact nature of the charge made against him/her. Under these Codes it is mandatory to read out the charge framed to the accused and explain it to him/her. A mere reading of the charge is not sufficient compliance with this requirement. The charge must be explained sufficiently to enable the accused to understand the nature of the charge. In Nepal too, a trial can be declared unlawful if the charge and the grounds of the charge has not been informed to the accused.

In India and Pakistan the Code also requires the accused to be provided with all the information and documents necessary for the preparation of his/her defence free of charge. Even though the Criminal Procedure Code of Bangladesh does not contain a similar requirement, the principles of natural justice, which is an integral part of the guarantee of both Art.31and 32 of the Bangladeshi Constitution, might be offended unless the accused is given the information and documents necessary for the preparation of his/her defence. In Pakistan, the accused is entitled to get the information and documents necessary for the preparation of his/her defence at least seven days before the commencement of the hearing. In India a trial might be vitiated if the facilities and time provided to the accused is not adequate to make a proper and effective defence.

[1277] Note, however, some of the rights guaranteed by the sub paragraphs of Art.6(3) are inherent features of the adversarial system, which is the system of criminal justice administration in all five South-Asian countries considered in this study.

The Criminal Procedure Codes of India, Pakistan and Bangladesh have also ensured that the accused gets an opportunity to defend him/herself properly and effectively. They have entitled the accused to cross examine the prosecution witnesses and adduce evidence to counter the arguments put forward by the prosecution against him/her. If the accused so applied, the Codes have obliged the courts to issue process for compelling the attendance of any witnesses or the production of any document or thing. The three Codes also require the evidence to be taken in the presence of the accused. However, as under Art.6(3)(d) of the European Convention, in all three countries the proceedings may be continued without the personal attendance of the accused at the hearing, but in the presence of his/her pleader, if the interest of justice require so. In Nepal, a trial might be vitiated if the accused is not allowed to cross examine the prosecution witnesses or if he/she is not given an effective opportunity to defend him/herself.

On the other hand, in Pakistan[1278] the trials, and in India[1279], Sri Lanka[1280] and Bangladesh[1281], trials as well as inquiries, may be continued and concluded even if the accused cannot be made to understand the proceedings. However, in the first mentioned country, in the case of a Court other than a High Court or if such trial results in a conviction, the proceedings must be forwarded to the High Court with a report of the circumstances of the case for appropriate action. In Sri Lanka, if such inquiry results in a commitment or if such trial results in a conviction the proceedings must be forwarded to the Court of Appeal with a report for appropriate action. In India and Bangladesh, in the case of a Court other than a High Court or if such inquiry results in a conviction, the proceedings must be forwarded to the High Court with a report for appropriate action. Also, as required by the Criminal Procedure Codes of India, Pakistan and Bangladesh, if, while the accused is present in the Court, any evidence is given in a language not understood by him/her, Courts must take steps for the interpretation of such evidence to the accused in a language understood by him/her. If the accused appears by pleader and the evidence is given in a language other than the language of the court, and not understood by the pleader, the evidence must be interpreted to such pleader in the language of the court. However, when documents are put in for the purpose of formal proof, they are interpreted only at the discretion of the Court. [1282] In contrast, the right under Art.6(3)(e) of the European

[1278] See, Sec.341 of the Code of Criminal Procedure, Act V of 1898.
[1279] See, Sec.318 of the Code of Criminal Procedure, Act II of 1974.
[1280] See, Sec.262 of the Code of Criminal Procedure Act, No.15 of 1979.
[1281] See, Sec.341 of the Code of Criminal Procedure, Act V of 1898.
[1282] According to Sec.275 of the Criminal Procedure Code of Sri Lanka "(1) Whenever any evidence is given in a language not understood by the accused and he is present in person and not represented by an attorney-at-law it shall be interpreted to him in open court in a language understood by him. (2)When

Convention of everyone charged with a criminal offence 'to have the free assistance of an interpreter if he cannot understand or speak the language used in court' extends not only to oral statements made at the trial and appeal hearings but also to documentary materials and the pre-trial proceedings

In Sri Lanka everyone charged with an offence has a Constitutional right to be heard by an attorney-at-law at a trial. On the other hand, in India, Pakistan, Bangladesh and Nepal every arrested person is entitled to be defended by a legal practitioner of his/her choice. In India, Bangladesh and Nepal, the right to be defended by a legal practitioner may also be claimed under the due process guarantee of the respective Constitution. While in Sri Lanka the Constitutional right to be heard by a counsel can be availed only at the trial stage, in the other four South-Asian countries, the right to be defended by a legal practitioner of the accused person's choice accrues from the moment he/she is put under arrest. In India and Pakistan, and presumably in Bangladesh too[1283], the right to be defended by a legal practitioner continues until a final decision as to the guilt of the accused is reached. Also, in these last mentioned three countries, a breach of the right to be defended by a legal practitioner would occur unless reasonable, sufficient and effective opportunities and facilities are given both, to the arrestee to appoint a counsel and, the counsel to defend the arrestee. However, except in Sri Lanka, in the other four countries, the right to be defended by a legal practitioner is not applicable to anyone who for the time being is an enemy alien.

Although there is no express Constitutional provision to that effect, the indigent accused in India, Bangladesh and Nepal has a legally enforceable right to receive free legal aid from the State. Presumably, in India and Bangladesh, if the interest of justice require so, legal aid must be continued for appeal proceedings too. Although the only qualification for legal aid in India is the indigence of the accused, according to the Supreme Court, the State need not provide legal aid, on the grounds of social justice, in certain cases involving offences such as economic offences or offences against law

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documents are put in for the purpose of formal proof it shall be in the discretion of the court to cause only so mush thereof as appears necessary to be interpreted." Note, unlike in India, Pakistan and Bangladesh, where the non-compliance of the provisions of the Criminal Procedure Code might give rise to a breach the due process guarantee of the respective Constitution, in Sri Lanka, even though there is a guarantee in the Bill of Rights of the Constitution that no one will be punished with death or imprisonment except by order of a competent court made in accordance with procedure established by law, non-compliance of the provisions of the Criminal Procedure Code by the courts during criminal inquiries or trials cannot give rise to a breach of a fundamental right because of the limited nature of the Supreme Court's fundamental rights jurisdiction.

[1283] According to Art.134(2) of the Sri Lankan Constitution "(a)ny party to any proceedings in the Supreme Court in the exercise of its jurisdiction shall have the right to be heard in such proceedings either in person or by representation by an attorney-at-law." However, this provision does not confer a fundamental right as it appears outside of the Bill of Rights.

prohibiting prostitution or child abuse.[1284] However, whether this approach is consistent with the cardinal principle of presumption of innocence in criminal proceedings is extremely doubtful.

Finally, the guarantees pertinent to fair trial laid down in Art.6 of the European Convention are available to anyone from the moment of charge. According to Strasbourg jurisprudence a person is regarded as subject to a charge from the moment he/she is given an official notification by a competent authority alleging that he/she has committed a criminal[1285] offence, or from the moment some other measure which carries the implication of such an allegation and which likewise substantially affects the situation of the persons concerned, is taken by the authorities.[1286] Even the time period that is taken into consideration for the determination of the question whether the trial has been concluded within a reasonable period, begins to count from this moment. It is doubtful whether this is the same in the South-Asian countries. For example, the directory provisions of the Criminal Procedure Code of Bangladesh, which lay down the time periods for the conclusion of trials, consider the date on which the case is received for trial as the beginning of the relevant time period.[1287] Even the right to counsel does not accrue any earlier than from the moment of arrest in any of the South-Asian countries. Having said that, in Pakistan, the guarantee against self-incrimination is available to anyone from the moment suspicion of committing an offence is focused on him/her.

[1284] See, Khatri and others (II) v. State of Bihar and others, (1981) S.C.C. 627 p.632 para.6.
[1285] Note, the word "criminal" has an autonomous Convention meaning (see, *supra* pp.173-175
[1286] Note, a person arrested for questioning does not come within this definition (see, for example, App.No.9559/81, De Varga-Hirsch v. France, 33 D & R 158).
[1287] However, in Belayet Hossain and others v. Deputy Commissioner, Barisal and others [28 D.L.R. (1976) 305 at p.307], where the accused had been in detention for more than six months without having any order for extension of the period of detention, D.C.Bhattacharya J. considered the failure to pass a valid detention order as a denial of the right to a speedy trial.

Part III

Chapter 4 - Protection Against Retroactive Penal Laws and Penalties (rights against *ex post facto* legislation).

In a civilised society people should be able to plan their activities with a reasonable certainty of the legal consequences. Such planning would become impossible if acts and omissions which were not punishable at the time of their occurrence were made punishable by the laws enacted subsequent to the commission of the act or omission. As a basic principle people have a right to fair warning of conduct which will give rise to criminal liability and punishments. It is against the common sense of justice to alter the criminal quality attributable to an act or omission after the commission of the act or omission. It is also against the common sense of justice to impose upon an offence a penalty greater than the one prescribed by the laws in force at the time of the commission of the offence. Thus, making sure that the responsibilities and restrictions of penal laws will not apply to acts committed prior to the enactment of the penal law is not only an exigency of justice, but also an important public policy which prevents unnecessary inconvenience and chaos in day to day social life.

4.1 - South Asia.

4.1.1 - India.

As provided by Art.20(1) of the Constitution of India "(n)o person shall be convicted of any offence except for violation of a law in force at the time of the commission of that act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence." The provisions here deal with '*ex post facto laws*', albeit that expression is

not specifically mentioned in the Article.[1288] Even though the legislature has power to legislate retrospectively, creation of an "offence" for an act which at the time of its commission was not an offence or imposition of a "penalty" greater than that which was under the law provided, would be violative of the guarantee of Art.20(1).[1289]

Neither the word "offence" nor "penalty" is defined in the Constitution. However, as stipulated by Art.367 of the Constitution, unless the context otherwise provides, for words which are not defined in the Constitution the meaning assigned in the General Clauses Act, 1897 may be given. According to Sec.3(38) of the said Act, an offence is an act or omission made punishable by any law for the time being in force. Also, as the marginal note of Art.20 of the Constitution connotes, the Article concerns 'protection in respect of conviction for offences'. Thus, according to Venkataramiah J. in the case of Shiv Dutt Rai Fateh Chand v. Union of India[1290], the guarantee of Art.20(1) can be invoked by only those who are charged with a crime before a criminal court.[1291]

Further, although the word "penalty" can be given a wider interpretation so as to include, for example, even the recovery of an amount as a penal measure in a civil proceeding, within the context of Art.20(1), the word has been used in a narrower sense as meaning a payment which has to be made, or a derivation of liberty which has to be suffered, as a consequence of a finding that the person accused of a crime is guilty of the charge.[1292] Thus, a law which creates a civil liability with retrospective effect would not *per se* come within the purview of Art.20(1), even if the failure to discharge the liability entails imprisonment, unless the law itself has classified the failure as an offence.[1293] Accordingly, levy of charges for unauthorised use of water enforced retrospectively with enhanced effect is not against the guarantee of Art.20(1).[1294] Nor is the retrospective levy of penalties effected under Income Tax Acts[1295] or under sales tax laws.[1296]

[1288] See, G.P.Nayyar v. State (Delhi Administration), A.I.R. 1979 S.C. (Vol.66) 602 p.606 para.7.
[1289] Ibid..
[1290] (1983) 3 S.C.C. 529 at pp.552-553 para.25.
[1291] The guarantee of Art.20(1) is not applicable even to disciplinary proceedings [see, Poundurang Swamy v. State of Andhra Pradesh, A.I.R. 1971 (Andhra Pradesh) 243].
[1292] Ibid.. Also see, Maqbool Hussain v. The State of Bombay, 1953 S.C.R. 730.
[1293] See, M/s Hatisingh Manufacturing Co. Ltd. v. Union of India, (1960) 3 S.C.R. 528.
[1294] See, Jawala Ram v. State of Pepsu, (1962) 2 S.C.R. 503.
[1295] See, Raghunandan Prasad Mohan Lal v. I.T.A.T., A.I.R. 1970 (Allahabad) 620.
[1296] See, Shiv Dutt Rai Fateh Chand v. Union of India, (1983) 3 S.C.C. 529. However, for an opposite view, see, Rai Bahadur Hurdut Roy Moti Lall Jute Mills v. State of Bihar, A.I.R. 1957 (Patna) 1.

Art.20(1) only prohibits the conviction of a person or his/her being subjected to an enhanced penalty under *ex post facto* laws. A trial under a procedure different from what obtained at the time of the commission of the offence or trial by a court different from that which had competence at the time is not *ipso facto* against the guarantee of Art.20(1). As was held in the case of Shiv Bhadur Singh v. State of Vindhya Pradesh[1297], a person accused of committing an offence has no fundamental right to trial by a particular court or by a particular procedure, except in so far as any constitutional objection by way of discrimination or the violation of any other fundamental right may be involved.[1298] A rule of evidence is a matter of procedure.[1299]

The phrase "law in force" as used in Art.20(1) is understood in its natural sense as being the law in fact in existence and operation, not the law deemed to have become operative, at the time of the alleged act or omission.[1300] If an act or omission is not an offence under the laws in operation at the time of its occurrence, subsequent legislations or amendments cannot make that act or omission culpable.[1301] However, a law punishing a continuing offence is not hit by the prohibition of Art.20(1). That is to say, if a continuing act or omission is made illegal by a penal law, the act or omission can be held punishable from the moment of the penal law's coming into force, albeit until that moment it was an innocent act or omission.[1302]

What offends Art.20(1) is the retrospective creation of penal offences or the imposition of a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.[1303] Thus, retrospective legislation or retrospective application or interpretation of laws is not altogether prohibited by the Constitution. In particular, an *ex post facto* law which only mollifies the rigour of a criminal law does not fall within the prohibition of Art.20(1). In other words, retrospective legislation or retrospective application or interpretation of penal

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[1297] A.I.R. 1953 S.C. 394.
[1298] Also see, Public Prosecutor v. K.C.Ayyappan Pillai, 1953 Cr.L.J. 625.
[1299] See, G.P.Nayyar v. State (Delhi Administration), A.I.R. 1979 S.C. (Vol.66) 602.
[1300] See, Shiv Bhadur Singh v. State of Vindhya Pradesh, A.I.R. 1953 S.C. 394; Rama Shanker Tewari v. State, 1954 Cr.L.J. 1212; *In re* Linga Reddy Venkatareddy, 1956 Cr.L.J. 29.
[1301] See, Chief Inspector of Mines v. Lala Karam Chand Thapper, 1961 S.C.R. (Vol. I) 9. Also see, Abdul Haleem v. State, 1962 (2) Cr.L.J. 414 - a retrospective effect accorded to a definition which made a person "foreigner" who was not a foreigner at the time of his entry to India liable to prosecution is against the guarantee of Art.20(1).
[1302] See, Akharbhai v. Md. Hussain Bhai, 1961 (1) Cr.L.J. 266. Note, in such a situation, previous acquittal cannot operate as a bar to subsequent prosecution (see, G.D.Bhattar v. State, 1957 Cr.L.J. 834).
[1303] See, Kedar Nath v. State of West Bengal, A.I.R. 1953 S.C. 404; Pralhad Krishna v. The State of Bombay, 1952 Cr.L.J. 81.

laws, in so far as the same is beneficial to the accused, is not violative of the guarantee of Art.20(1).[1304]

4.1.2 - Sri Lanka.

As provided by Art.13(6) Constitution of Sri Lanka,

> "(n)o person shall be held guilty of an offence on account of any act or omission which did not, at the time of such act or omission, constitute such an offence, and no penalty shall be imposed for any offence more severe than the penalty in force at the time such offence was committed.
>
> Nothing in this Article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by the community of nations.
>
> It shall not be a contravention of this Article to require the imposition of a minimum penalty for an offence provided that such penalty does not exceed the maximum penalty prescribed for such offence at the time such offence was committed."

Only the first part of this Article guarantees a right to the accused persons. The second and third parts lay down two exceptions to the guarantee of the first part. Apparently the second part is intended at filling the vacuums in the domestic penal laws. It permits the trial and punishment of any person for any act or omission which, at the time when it was committed, was a crime under the general principles of law recognised by the community of nations, irrespective of the legal status of the act or omission under the domestic law.[1305] As provided by the third part of the Article, the imposition of a minimum penalty is not against the guarantee of the first part as long as such penalty does not exceed the maximum penalty prescribed for such offence at the time such offence was committed.

As the overall design of Art.13(6) suggests, the words "offence" and "penalty" in the Article contemplate the criminal offences proper and the sanctions of punitive nature respectively. Hence, the guarantee of Art.13(6) would not be applicable, for example, in the case of proceedings initiated under a tax Statute or if the penalty concerned is of revenue nature.[1306] Further, according to former Chief Justice of Sri Lanka, S.Sharvananda, trial under a procedure different from what obtained at the time of the commission of the offence or by a court different from that which was competent at that time is also not against the guarantee of Art.13(6) of the Constitution. As he goes on to observe;

[1304] See, Rattan Lal v. The State of Punjab, A.I.R. 1965 S.C. 444; T. Baral v. Henry An Hoe, (1983) 1 S.C.C. 177.

[1305] This provision is identical to Art.15(2) of the International Covenant on Civil and Political Rights.

[1306] See, S.Sharvananda, *Fundamental Rights in Sri Lanka - A Commentary* (1993), p.162.

> "(l)aws which alter rules of criminal procedure but do not affect the substantive rights of the accused are not violative of the ex post facto clause even though the legislature makes the change during the course of the trial...A change of procedure is not prohibited as no one has a vested right in procedure. An accused cannot object if the procedure at the time of the trial or conviction is different from what it was at the time of the commission of the offence. A rule of evidence is a matter of procedure..."[1307]

As Jayampathy Wickramaratne has noted[1308], a retrospective law that changes the procedure or punishment to the advantage of the accused is not an *ex post facto* law. So is a law that enhances punishment on proof of a previous conviction even though the previous was prior to the passing of that law.

It must be noted that the guarantee of Art.13(6) relates only to conviction and sentencing, which obviously are judicial acts, under *ex post facto* laws. In the light of the present Constitutional framework of Sri Lanka, fundamental rights can be enforced only against executive or administrative action. Therefore, it is doubtful whether in reality the fundamental right guaranteed by Art.13(6) is a practical or an enforceable one.

4.1.3 - Pakistan.

As enjoined by Art.12 of the Constitution of the Islamic Republic of Pakistan,

> "(1) No law shall authorise the punishment of a person
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> (a) for an act or omission that was not punishable by law at the time of the act or omission; or
>
> (b) for an offence by a penalty greater than, or of a kind different from, the penalty prescribed by law for that offence at the time the offence was committed.
>
> (2) Nothing in clause 1 or in Article 270 shall apply to any law making acts of abrogation or subversion of a Constitution in force in Pakistan at any time since the twenty-third day of March, one thousand nine hundred and fifty-six, an offence."

A plain reading of the Article suggests that it prohibits only the punishment, not the conviction, under *ex post facto* laws. However, it has been held that both the conviction as well as the punishment under *ex post facto laws* are against the guarantee of Art.12.[1309]

The words like "punishment", "offence", "penalty", etc., used in Art.12 indicate that the guarantee of the Article applies only in the field of criminal law. Thus, it is only retrospective criminal legislation which authorises the punishment of a person for an act or omission that was not punishable by law at the time of the act or omission or, which authorises the punishment of a person for an offence by a penalty greater than,

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[1307] Ibid., p.161.

[1308] See, Jayampathy Wickramaratne, *Fundamental Rights in Sri Lanka*, (New Delhi: Navrang Booksellers and Publishers 1996), p.317.

[1309] See, Bhai Khan v. State, 1992 S.C. 14. Also see, Shafi Ahmad v. The State, 1977 P.Cr.L.J. 717.

or of a kind different from, the penalty prescribed by law for that offence at the time the offence was committed, that comes within the mischief of Art.12. Imposing, or enhancing the degree of, a civil liability retrospectively would not attract the guarantee of Art12.[1310] However, as Sharifuddin Pirzada has noted, the constitutional prohibition may not be evaded by giving a civil form to a measure which is essentially criminal.[1311]

As stipulated by Art.12(1)(a), a subsequent law cannot punish an act or omission which was not an offence when it was committed.[1312] Neither can a subsequent law prescribe for an offence a penalty greater than, or of a kind different from, the penalty prescribed by law for that offence at the time the offence was committed.[1313] As Munir has observed,

> "(o)n the plain words of the provision, the change of one kind of punishment by another would *prima facie* be invalid, because the expressions 'greater than' and 'of a kind different from' are used disjunctively. The new penalty may be lesser than the original penalty, but if it is of a different kind, the accused may object to it. But this does not mean that in that case he would escape punishment altogether. If he objects to the new penalty, the original penalty may be imposed on him, because the new penalty being void the previous penalty would stand unimpaired...if there is a change in the kind of punishment, it is immaterial whether it is favourable or unfavourable to the accused. He has a constitutional right to object to the changed penalty..."[1314]

This, however, does not mean that a law which mitigates the severity, but does not change the nature, of a punishment with retrospective effect is hit by the prohibition of Art.12.[1315]

Further, a statute depriving an accused of the discretion given to the court under the law in force at the time of the offence to pass any sentence between the maximum and the minimum sentences, by fixing his/her sentence at a definite term, even if the term so fixed is less than the maximum prescribed by the law in force at the time of the

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[1310] See, Government of Pakistan v. Akhlaque Hussain and West Pakistan Province, P.L.D. 1965 S.C. 527; Saheb Mia Chowdhury v. S.M. Mia, P.L.D. 1966 Dacca 439; Ghous Bakhsh Bizenjo v. Islamic Republic of Pakistan, P.L.D. 1976 Lahore 1504. However, some writers seem to disagree with this narrow definition given to Art.12. As they argue the word "punishment" is wide enough to encompass civil disabilities and disqualifications for professions, trades, elections, etc. [see, Justice Muhammad Munir, *Constitution of the Islamic Republic of Pakistan*, Vol. I (Lahore: P.L.D. Publishers 1996), p.288; Emmanuel Zaffar, *Constitution of the Islamic Republic of Pakistan 1973*, Vol. I (Lahore: Ifran Law Book House 1992/93), p.177].

[1311] See, S.Sharifuddin Pirzada, *Fundamental Rights and Constitutional Remedies in Pakistan*, (Lahore: All Pakistani Legal Decisions, 1966), p.212.

[1312] See, State Bank of Pakistan v. Raza Enterprises, 1990 P.Cr.L.J. 317.

[1313] See, Jamilus Sattar v. Chief Election Commissioner, P.L.D. 1964 Dacca 788; Mehr Khan v. Razia Begum, 1978 S.C.M.R. 294.

[1314] See, Justice Muhammad Munir, *Constitution of the Islamic Republic of Pakistan*, Vol. I (Lahore: P.L.D. Publishers 1996), p.289.

[1315] See, S.Sharifuddin Pirzada, *Fundamental Rights and Constitutional Remedies in Pakistan*, (Lahore: All Pakistani Legal Decisions, 1966), p.216.

offence, operates to increase the punishment.[1316] So does a statute shortening the time within which execution shall take place after sentence.[1317] Further, amendment of prison regulations relating to remission, which in effect increases the period of imprisonment to a larger term than the period prescribed by such regulation on the date of the commission of the offence, is also violative of the guarantee of Art.12(1)(b).[1318]

On the other hand, Art.12(1) is not a bar for a statute to enhance the punishment for a second or subsequent offence. The fact that the prior offence occurred before the statute in question was enacted or became effective does not render it repugnant to the guarantee of Art.12.[1319] Similarly, a law that makes an act or omission which commenced to be committed prior to, but continues to be committed even after, the date the law became operative, punishable, or a law which imposes a greater penalty on a continuing offence, is also not against the guarantee of Art.12.[1320] Further, the prohibition against *ex post facto* legislation in Art.12 does not prevent the legislature from making changes in the procedural laws or making changes relating to the jurisdiction and composition of judicial tribunals with retrospective effect.[1321] Such changes remain valid so long as they do not impair the substantial protections afforded to the accused by the laws in force at the time of the alleged offence.[1322]

4.1.4 - Bangladesh.

As guaranteed by Art.35(1) of the Constitution of the Peoples' Republic of Bangladesh, "(n)o person shall be convicted except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than, or different from, that which might have been inflicted under the law in force at the time of the commission of the offence." The provisions of this

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[1316] Ibid..

[1317] See, Emmanuel Zaffar, *Constitution of the Islamic Republic of Pakistan 1973*, Vol. I (Lahore: Ifran Law Book House 1992/93), p.176.

[1318] See, Farid Khan v. The State, P.L.D. 1965 (W.P.) Peshawar 31.

[1319] See, Justice Muhammad Munir, *Constitution of the Islamic Republic of Pakistan*, Vol. I (Lahore: P.L.D. Publishers 1996), p.287; Emmanuel Zaffar, *Constitution of the Islamic Republic of Pakistan 1973*, Vol. I (Lahore: Ifran Law Book House 1992/93), p.176.

[1320] See, Justice Muhammad Munir, *Constitution of the Islamic Republic of Pakistan*, ibid., p.286.

[1321] As was held in the case of Bazal Ahmad Ayyubi v. West Pakistan Province [P.L.D. 1957 (W.P.) Lahore 388 at p.398], no one has vested rights in procedure. Also see, Justice Muhammad Munir, *Constitution of the Islamic Republic of Pakistan*, ibid., p.282.

[1322] See, Justice Muhammad Munir, *Constitution of the Islamic Republic of Pakistan*, ibid., p.288; Emmanuel Zaffar, *Constitution of the Islamic Republic of Pakistan 1973*, Vol. I (Lahore: Ifran Law Book House 1992/93), p.176.

Article relates only to penal conviction and sanctions.[1323] However harsh its consequences may be, a law does not come within the prohibition of Art.35(1) unless it inflicts a criminal punishment. On the other hand, as Mahmudul Islam has noted, the form of the penalty is not conclusive and the prohibition of this provision cannot be evaded by giving a civil form to which is essentially criminal.[1324]

The first part of Art.35(1) prohibits the making of an act or omission, which when occurred was not a violation of any of the laws in force, an offence by a subsequent law. The phrase "law in force" in Art.35(1) is understood in its natural sense as being the law in fact in existence and in operation at the time of the alleged act or omission as distinct from the law 'deemed' to have become operative.[1325] According to Mahmudul Islam,

> "(i)n determining whether a law imposes punishment for past conduct in violation of the prohibition, the test is whether the legislative aim is to punish an individual for past activity or whether the restriction comes about as a relevant incident to a regulation of a present situation. A law does not come within the prohibition of Art.35(1) by providing punishment or penalty for the continued maintenance of certain conditions which, prior to enactment of the law, were lawful."[1326]

Also, what is prohibited here is the conviction and penalty under an *ex post facto* law. Therefore, changes in the procedural laws with retrospective effect would not infringe the guarantee of Art.35(1).[1327]

It is against the second part of the guarantee of Art.35(1) to impose upon an offence a penalty greater than, or a penalty different from, that which might have been inflicted under the law in force at the time of the commission of the offence. The question whether a change in the penalty has made it greater or different is determined from the perspective of a reasonable person. A new penalty would come within the mischief of Art.35(1) if a reasonable person would regard it as one which is different from, or as one which is more severe than, the one which the law in force at the time of the offence might have prescribed. Nonetheless, retrospective application of changes

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[1323] For a somewhat different view see, Registrar, University of Dacca v. Dr. Syed Sajjad Hussain and others, and University of Dacca v. Dr. Mohar Ali, D.L.R. (1982) Vol.34 p.1.

[1324] See, Mahmudul Islam, *Constitutional law of Bangladesh* (Dacca: Bangladesh Institute of Law and International Affairs 1995), p.181.

[1325] See, F.K.M.A., *Rights of the Citizens Under the Constitution and Law* (Dacca: Bangladesh Institute of Law and International Affairs 1975), pp.69-70.

[1326] See, Mahmudul Islam, *Constitutional law of Bangladesh* (Dacca: Bangladesh Institute of Law and International Affairs 1995), p.181.

[1327] See, F.K.M.A.Munim, *Rights of the Citizens Under the Constitution and Law* (Dacca: Bangladesh Institute of Law and International Affairs 1975), p.69.

which reduce the severity of a punishment or, which introduce a humane method of execution of a punishment is not against the guarantee of Art.35(1).[1328]

4.1.5 - Nepal.

According to Art.14(1) of the Constitution of the Kingdom of Nepal "(n)o person shall be punished for an act which was not punishable by law when the act was committed, nor shall any person be subjected to a punishment greater than that prescribed by the law in force at the time of the commission of the offence." What the first part of this guarantee prohibits is the punishment under *ex post facto* laws.[1329] However, albeit not specifically mentioned, the prohibition presumably extends to cover convictions under such laws as well. The second part of Art.14(1) makes it unconstitutional to inflict upon an offender a punishment greater than that prescribed by the law in force at the time of the commission of the offence.

4.2 - European Convention on Human Rights.

As provided by Art.7 of the European Convention on Human Rights,

> "(1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a crime under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
> (2) This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations."

The effect of this Article is threefold. Firstly, the Article places limitations on the legislatures of the Member States by prohibiting the retroactive creation of penal laws.[1330] Secondly, it precludes the domestic criminal courts from extending with retrospective effect by way of interpretation the scope of existing criminal laws.[1331] Thirdly, it prohibits the imposition of a heavier penalty on a criminal offence than the one that was applicable at the time the alleged offences was committed.[1332]

[1328] See, Mahmudul Islam, *Constitutional law of Bangladesh* (Dacca: Bangladesh Institute of Law and International Affairs 1995), p.182.
[1329] See, Kusum Shrestha, 'Fundamental Rights in Nepal', *Essays on Constitutional Law*, Vol.15 (1993), Nepal Law Society, Kathmandu, 1 pp.18-19.
[1330] See, A.H.Robertson and J.G.Merrills, *Human Rights in Europe*, 3rd Edition (Manchester: Manchester University Press 1994), p.126.
[1331] See, for example, App.No.8710/79, X Ltd. and Y v. UK, 28 D & R (1982) 77; App.No.10038/82, Harriet Harman v. The United Kingdom, 38 D & R (1984) 53.
[1332] See, for example, Jamil v. France, 21 EHRR (1996) 65.

A closer examination of Art.7(1) reveals that it makes no distinction between an act or omission which 'did not yet' constitute a criminal offence and an act or omission which 'no longer' constituted one. Accordingly, convicting a person under an obsolete provision of criminal law would be contrary to the Convention as much as conviction under an *ex post facto* penal law. As European Commission of Human Rights said in the case of X v. The Federal Republic of Germany, Art.7

> "...does not merely prohibit - except as provided in paragraph 2 - retroactive application of the criminal law to the detriment of the accused...it confirms, in a more general way, the principle of statutory nature of offences and their punishment ('nullum crimen, nulla poena sine lege')...it prohibits, in particular, extension of the application of the criminal law 'in malam partem' by analogy...the principle of statutory nature of offences and their punishment implies that a person cannot be held guilty under an obsolete law if the act of which he is accused were performed after the abrogation of that law because a conviction in these circumstances would relate to 'an act or omission which did not constitute a criminal offence under national...law at the time when it was committed'...it is immaterial whether the abrogation of a criminal law be express or implicit, provided that the latter form of abrogation is known to the municipal law of the State concerned."[1333]

The above mentioned principle of 'statutory nature of offences and punishment' does not exclude the possibility of crimes based on common law principles. Any conclusion to the contrary would strike a serious blow to the legal systems of those Member states with common law traditions. As the Court observed in the Sunday Times Case[1334] it would clearly be contrary to the intention of the drafters of the Convention to hold that a restriction imposed by virtue of the common law is not 'prescribed by law' on the sole ground that it is not enunciated in legislation. In X Ltd and Y v. UK[1335] the applicants had been found guilty of the common law offence of blasphemous libel. While conceding that not only written statutes but also rules of common law or other customary law may provide a sufficient legal basis for the criminal convictions envisaged in Art.7, the Commission said,

> "...this branch of the law presents certain particularities for the very reason that it is by definition law developed by the courts, it is nevertheless subject to the rule that the law making function of the courts must remain within reasonable limits. In particular in the area of criminal law it is excluded, by virtue of Art.7(1) of the Convention, that any acts not previously punishable should be held by the courts to entail criminal liability, or that existing offences should be extended to cover facts which previously clearly did not constitute a criminal offence. This implies that constituent elements of an offence such as e.g. the particular form of culpability required for its completion may not be essentially changed, at least not to the detriment of the accused, by the case law of the courts. On the other hand it is not objectionable that the existing

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[1333] See, App.No.1169/61, X v. Federal Republic of Germany, 6 YBECHR (1963) 520 pp.586-588. Also see, App.No.7721/76, X v. Netherlands, 11 D & R (1978) 209.

[1334] 2 EHRR (1979/80) 245 p.271 para.47 - this case concerned Art.10 of the Convention.

[1335] App.No.8710/79, 28 D & R (1982) 77.

elements of the offence are clarified and adapted to new circumstances which can reasonably be brought under the original concept of the offence."[1336]

Nonetheless, analogous application of norms creating criminal liability, thorough extensive interpretation, to acts or omissions for which the norms are not intended to be relevant is prohibited under Art.7, unless the particular analogous application favours the person concerned.[1337] This implies that in order to conform with Art.7 domestic laws which impose criminal liability should be interpreted restrictively.[1338]

Art.7(1) requires the laws creating criminal offences, whether statutory or common law, to be clear and unambiguous. They must also be adequately accessible and formulated with sufficient precision to enable the citizens to regulate their conduct. Interpretation of such laws should always be reasonably foreseeable.[1339] According to Judge Martens,

"...the requirement that a legal definition of a crime be drafted as precisely as possible is not a consequence of but part and parcel of the principle enshrined in Art.7(1)...this requirement serves not only... the aim of enabling the individual to know 'what acts and omissions will make him liable', but is indeed - in accordance with its historical origin -also and *primarily* to secure the individual adequate protection against arbitrary prosecution and conviction: Art.7(1) demands that criminal law should be compatible with the rule of law."[1340]

This, however, does not mean that Art.7(1) is breached unless the concrete facts which gave rise to criminal liability have been set out in detail in the statutory provision or the common law principle involved. According to the Commission Art.7 remains intact as long as it is possible to determine from the relevant statutory provision or the common law principle what act or omission is subject to criminal liability, even if such determination derives from the courts' interpretation of the provision or the principle concerned.[1341] With regard to certainty and foreseeability the Court in the Sunday Times Case said;

"...the consequences which a given action may entail...need not be foreseeable with absolute certainty: experience shows this to be unattainable...whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in

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[1336] Ibid. p.81 para.9. Also see, SW v. United Kingdom, and CR v. United Kingdom, 21 EHRR (1996) 363.

[1337] See, Judgment of 25th May 1993, the Case of Kokkinakis v. Greece, Ser.A Vol.260-A (1993) p.22 para.52. Also see, G v. France, 21 EHRR (1996) 288.

[1338] See, App.No.1103/61, X v. Belgium, 5 YBECHR (1962) 168 p.190; App.No.5327/71, X v. The United Kingdom, 43 CD (1973) 85 p.89. Also see, App.No.4161/69, X v. Austria, 13 YBECHR (1970) 798.

[1339] See, the Sunday Times Case, 2 EHRR (1979-80) 245 p.271 para.49.

[1340] Partly Dissenting Opinion of Judge Martens, the Case Kokkinakis v. Greece, Ser.A Vol.260-A (1993) pp.33-34 para.4.

[1341] See, App.No.5493/72, Handyside v. The United Kingdom, 45 CD (1974) 23 p.49.

terms which, to a greater or lesser extent are vague and whose interpretations and application are questions of practice." [1342]

First sentence of Art.7(1) prohibits the "conviction" of a person "of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed". In the Lawless case both the Commission and the Court emphasised on the need of a conviction based on a retroactive penal law for the application of Art.7. In that case the Applicant, who was a member of the IRA (Irish Republican Army), had at least one previous conviction in connection with subversive activities. In the circumstances that gave rise to the application in consideration, the Applicant was arrested on 11th July 1957 and kept in detention till 11th December the same year without a trial under an order made by the Minister for Justice. The detention order had been made pursuant to the special powers of detention without trial conferred upon the Minister by the Offences Against the State (Amendment) Act 1940, which had been brought into operation on 8th July 1957 by a proclamation of the Irish Government. The Applicant submitted that, when signing the warrant of detention, the Minister had, contrary to the provisions of Art.7, taken into consideration matters alleged to have occurred before 8th July 1957. It was argued that, if the substance rather than the form of 1940 Act were considered, detention under that Act would constitute a penalty for having committed an offence and the offence to which the 1940 Act relates were not punishable before 8th July 1957, when the Act came into operation. He further asserted that if he had been convicted of the alleged offences by an ordinary court, he would in all probability have been sentenced to less severe penalties which would have been subject to review on appeal in due course of law.

However, neither the Commission nor the Court was impressed by these arguments. It was held that Art.7 did not apply to the circumstances of the case, because the Applicant had been detained for the sole purpose of restraining him from engaging in activities prejudicial to the public order or the security of the State. Such a preventive

[1342] 2 EHRR (1979/80) 245 p.271 para.9. Normally it is not the task of Strasbourg organs to ascertain whether a proper interpretation has been given to municipal law by the domestic courts. However, the situation is otherwise in matters where the convention expressly refers to municipal law, as it does in Art.7. According to the Court "(i)n such matters disregard of the domestic law entails breach of the Convention, with the consequence that the Court can and should exercise certain power of review." [see, Winterwerp v. Netherlands, 2 EHRR (1979-80) 387, p.405 para.46]. In order to determine whether a municipal law has been interpreted extensively or applied in a manner that is unforeseeable, it may become necessary for the Strasbourg organs to depart from their normal practice and give the municipal law an autonomous interpretation and examine the interpretation given by domestic courts against it. Nevertheless, this purely supervisory function is undertaken with caution in order to avoid conflict with domestic courts which stand *vis-à-vis* the Strasbourg organs and are not hierarchically inferior to them. Also see, App.No.1852/63, X v. Austria, 8 YBECHR (1965) 190 pp.198-200; App.No.5327/71, X v. The United Kingdom 43 CD (1973) 85 p.89.

measure was not regarded as a conviction on a criminal charge within the meaning of Art.7.[1343] The Commission in its Report said;

> "(t)he Applicant was not detained as a result of a conviction on a criminal charge, nor was his detention a 'heavier penalty' within the meaning of Art.7. Moreover, Section 4 paragraph (I) of the Act of 1940 under which the Applicant was detained, provides that the Minister of State must be of the opinion that the person ordered to be detained *is* engaged in activities which in his opinion, *are* prejudicial to the preservation of public peace and order or to the security of the State. It is, therefore, clear that a person is only liable to be detained under...the Act of 1940 if a Minister of State is of the opinion that the person in question *at a date subsequent to the power of detention conferred by Section 4 being brought in to force* is engaged in activities prejudicial to the preservation of public peace and order or the security of the State. Accordingly, there is no question of Section 4 being retroactive in this question."[1344]

In X v. The Federal Republic of Germany[1345] it was argued that the authorities of the FRG had violated the provisions of Art.7 when they entered on the Applicant's 'Strafregister' a previous conviction given by the Courts of East Germany since the act which gave rise to that conviction did not constitute a crime under the law of the FRG. Rejecting this argument the Commission said;

> "...this complaint...is based upon the misconception of the measure of inscribing a previous conviction upon a person's 'Strafregister'...the inscription on the Applicant's 'Strafregister' of his previous conviction...cannot legitimately be considered as meaning that he was put on trial by the authority inscribing the conviction on his 'Strafregister' and 'held guilty of a criminal offence' within the meaning of Art.7 of the Convention."[1346]

It follows that a conviction based upon a retroactive penal law is necessary, at least in the case of individual applications, to raise an issue under Art.7.[1347] Thus, a decision to extradite a person[1348], or the detention of a person as a vagrant would not fall within

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[1343] See, Lawless Case (Merit), Judgment of 1st July 1961, Ser. A (1960-61) p.51. For the opinion of the Commission see, App.No.332/57, Lawless v. The Republic of Ireland, Report of the Commission, Ser. B; Pleadings, Oral Arguments and Documents 1960-1961, p.9.

[1344] Ibid., the Report of the Commission, p.67.

[1345] App.No.448/59, 3 YBECHR (1960) 254.

[1346] Ibid., p.270.

[1347] According to Art.25 of the European Convention on Human Rights, which sets down the right of individual application, only 'a person non governmental organization or group of individuals claiming to be the ***victim*** of a violation' has the right to bring an action. On the other hand, there is no such requirement in Art.24 which deals with the inter-state applications. Accordingly, a state may bring an application questioning *in abstracto* the compatibility with Art.7 the law of another state. Not even a prosecution is required for such applications to be valid. See the case brought by Ireland against the United Kingdom [App.No. 5451/72, 15 YBECHR (1972) 228; Judgment of 18th January 1978, Ser.A Vol.25 p.91 para.248]. Also see, P.Van dijk and G.J.H.van Hoof, *The Theory and Practice of the European Convention on Human Rights*, second edition (Deventer: Kluwer Law and Taxation Publishers 1990). They argue that "(i)n specific cases, however, the mere existence of a criminal law provision, even when it has not yet been applied in a concrete case, may hinder a person much in his freedom of action that he can already be regarded as a victim."

[1348] See, App.No.7512/76, X v. Netherlands, 6 D & R (1976) 184. On the basis of Soering judgment [Ser.A Vol.161 (1989)] some writers, however, argue that extradition to face a real risk of conviction contrary to Art.7 as a potential breach of that Art. See, D.J.Harris, M.O'Boyle, and C.Warbrick, *Law of the European Convention on Human Rights*, (London: Butterworths, 1995), p.275.

the scope of Art.7.[1349] Similarly, compelling someone to retire early does not constitute holding that person guilty of an offence within the meaning of Art.7.[1350] Nor would a person against whom criminal proceedings are pending be considered as having been 'held guilty of an offence' within the meaning of Art.7.[1351]

The need of a penal conviction to raise an issue under Art.7 has in the early 1970s led the Commission to reject number of applications which were classified as disciplinary offences or regulatory proceedings. For example, in X v. FRG[1352] the Commission said;

> "...the subject of disciplinary proceedings opened against the applicant was not the determination of the applicant's guilt as regards any criminal offence but was in connection with disciplinary offence...the Commission has previously held that the notion of a 'criminal offence' as mentioned in Art.6(2) and (3) of the Convention, does not envisage disciplinary offences...this finding applies equally to the interpretation of these words as mentioned in Art.7(1) of the Convention...Consequently, the guarantees under this Art. are not applicable in the applicant's case."[1353]

This line of approach was significantly changed after the Court's decision in the Case of Engel.[1354] In that case the Court laid down certain criteria for the determination of whether a particular proceeding is "criminal" or "disciplinary".[1355] A proceeding which falls within that criteria is regarded as criminal irrespective of the classification placed upon such proceeding by the national legal system. Although the Judgement in the Engel case referred to Art.6, according to Strasbourg jurisprudence, its reasoning must equally apply to Art.7 as well. Thus, any convictions and sanctions, inclusive of those that result from disciplinary or regulatory proceedings, are within the meaning of the phrase "held guilty" for the purpose of Art.7, if their nature and consequences greatly resemble criminal convictions and penalties.

In Harriet Harman v. The United Kingdom[1356] the Commission declared the application admissible for consideration under Art.7, albeit it related to civil contempt

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[1349] See, De Wilde, Ooms and Versyp v. Belgium, Judgment of 18th June 1971, Ser.A Vol.12 (1970) p.44 para.87.

[1350] See, App.No.23326/94, Mahaut v. France, 82-B D & R (1995) 31. Also see, App.No.14524/89, Yanasik v. Turkey, 74 D & R (1993) 14 - Expulsion of a student from a military academy following disciplinary proceedings does not constitute a conviction for a criminal offense within the meaning of Art.7.

[1351] See, App.No.21915/93, Lukanov v. Bulgaria, 80-A D & R (1995) 108.

[1352] App.No.4274/69, 13 YBECHR (1970) 888 p.890.

[1353] Also see, App.No.4519/70, X v. Luxembourg, 14 YBECHR (1971) 616; App.No.15965/90, R.H. v. Spain, 74 D & R (1993) 14 - dismissal of a civil servant following disciplinary proceedings does not constitute a conviction for an offense within the meaning of Art.7.

[1354] Judgment of 8th June 1976, Ser.A Vol.22 (1977). Also see, supra pp.173-175

[1355] Ibid., p.35.

[1356] App.No.10038/82, 38 D & R (1984) p.53.

of court. The fact that in English law civil contempt is not regarded as a criminal offence[1357] did not exert much influence on the Commissions deliberations. Notwithstanding its objective, i.e., to enforce court orders and procedures[1358], the proceedings brought against civil contempt in English law fell within the Engel criteria as they entailed punitive measures such as fines, imprisonments[1359], which were essentially similar to criminal penalties. However, this case ended without a decision as to whether any violation of Art.7 had been occurred since a friendly settlement was reached between the parties.[1360]

What Art.7 prohibits is only the retrospective creation of criminal offences but not retrospective legislation in general.[1361] Thus, application of procedural laws, inclusive of laws relating to detention on remand, bails, appeals, release from prison on probation or parole, legal aid, etc., with retrospective effect is not contrary to the provisions of Art.7. For, such laws do not relate to the determination of guilt in any substantive manner.[1362] Presumably, however, any retroactive application of changes in law of evidence to the detriment of the accused should bring into question Art.7 since that branch of law is closely connected with the determination of guilt.[1363]

The second sentence of Art.7(1) prohibits the imposition upon an offence of a penalty heavier than the one that was applicable at the time the offence concerned was committed. In Jamil v. France[1364] the Applicant who was convicted of drug smuggling, was sentenced, *inter alia*, to pay a customs fine with imprisonment in default. The appeal court increased the term of imprisonment in default pursuant to a law which was passed after the offence was committed. The Court unanimously found a breach of Art.7(1). However, it must be noted that a mere threat of a penalty would not be sufficient to invoke the guarantee of Art.7.[1365] Also, what the second sentence of Art.7(1) concerned with is the retroactive imposition of heavier penalties, not with the manner of enforcement of penalties already pronounced. [1366]

[1357] See, C J Miller, *Contempt of Court*, Second Edition (Oxford: Clarendon Press 1989).
[1358] Ibid., p.3.
[1359] Ibid., p.4.
[1360] See, 46 D & R (1986) 57.
[1361] See, A.H.Robertson and J.G.Merrills, *Human Rights in Europe*, 3rd Edition (Manchester: Manchester University Press 1994), p.126.
[1362] See, J.E.S.Fawcett, *The Application of the European Convention on Human Rights*, (Oxford: Clarendon Press 1987), pp.202-203.
[1363] For example, retroactive application of changes in the rules of evidence that impute the burden of proof upon the prosecution, can be seriously detrimental to the accused.
[1364] 21 EHRR (1996) 65.
[1365] See, The Greek Case, 12 YBECHR (1969) pp.184-185. Also see, App.No.8734/79, Barthold v. Federal Republic of Germany, 26 D & R (1982) 145 p.155.
[1366] See, App.No.11635/85, Hogben v. The UK, 46 D & R (1986) 231.

In Welch v. The United Kingdom[1367] the court examined the meaning of the word "penalty" in the second sentence of Art.7(1). After having been found guilty of criminal offences involving drug trafficking, alleged to have been committed prior to 1987, the Applicant in this case had been given a 22 year imprisonment. In addition, pursuant to the Drug Trafficking Offences Act 1986, the trial judge had imposed a confiscation order amounting to £66,914. In default of the payment of this sum the Applicant was to receive a further consecutive two years' sentence. On appeal, the Court of Appeal had reduced the overall sentence by two years and the confiscation order by £7,000.

According to the 1986 Act, which had come into force in January 1987, the amount to be recovered under a confiscation order shall be the amount the Crown Court assesses to be the value of the defendant's proceeds of drug trafficking.[1368] Moreover, the Act, *inter alia*, empowered the national courts to assume that any property which the offender currently held or which had been transferred to him in the preceding six years, or any gift which he had made during the same period, to be the proceeds of drug trafficking.[1369] In his application the Applicant complained that the confiscation order made against him amounted to the imposition of a retrospective criminal penalty contrary to Art.7. However, he emphasised that his complaint was limited to the retrospective application of the confiscation provisions of the 1986 Act and not about the provisions themselves. According to the Respondent Government, on the other hand, the confiscation order was not intended to be a punishment or a sanction for any specific offence and therefore did not amount to a penalty within the meaning of Art.7. It was a preventive measure designed to prevent a defendant from benefiting from the proceeds of drug trafficking and to prevent the use of proceeds for drug trafficking in the future.

The Commission by seven votes to seven with the casting vote of the Acting President being decisive found no violation of Art.7.[1370] However, the Court took a different view. In its opinion, by seeking to confiscate the proceeds, as opposed to the profits, of drug trafficking, irrespective of whether there had in fact been any personal enrichment, the confiscation order had gone beyond the notions of reparation and

[1367] Judgment of 9th February 1995, Ser.A Vol.307-A (1995).
[1368] See, Art.4(1) Drug Trafficking Offenses Act 1986, Current Law Statutes Annotated 1986, Vol. I (London: Sweet & Maxwell and Stevens & Sons 1987), c.32-1 at p.32-7.
[1369] Ibid., Art.2, pp.32-5.
[1370] See, the Opinion of the Commission, Welch Case, Ser.A Vol.307 (1995), Annex, 18 p.23 para.55.

prevention into the realm of punishment.[1371] Also, the Court considered the facts that an order could not have been made unless there had been a criminal conviction and that the degree of culpability of an accused was taken into consideration by the domestic courts in fixing the amount of the order, as indications that pointed in the direction of a penalty.[1372] The Court said;

> "(t)he concept of a penalty in this provision is...an autonomous Convention provision...(t)o render the protection offered by Art.7 effective, the court must remain free to go behind appearances and assess for itself whether a particular measure amounts in substance to a 'penalty' within the meaning of this provision...(t)he wording of Art.7(1) second sentence, indicates that the starting-point in any assessment of the existence of a penalty is whether the measure in question is imposed following conviction for a 'criminal offence'. Other factors that may be taken into account as relevant in this connection are the nature and purpose of the measure in question; its characterisation under national law; the procedures involved in the making and implementation of the measure; and its severity."[1373]

As the preparatory work on the Convention reveals the object of Art.7(2) is to make it clear that Art.7 does not effect the laws which were passed under very exceptional circumstances at the end of the second world war to suppress war crimes. However, this provision becomes redundant insofar as a conviction or a penalty based upon a retroactive penal law can be justified under Art.7(1) as being for an act or omission which at the time of its commission or omission constituted a crime under international law. On the other hand, unlike Art.7(1) which refers to international law, Art.7(2) refers to "general principles of law recognised by civilised nations".[1374] The effect of this difference in phraseology, at least in theory, is that under the exception in Art.7(2) national authorities are not prohibited from applying with retrospective effect rules of municipal law which are common to civilised countries but which has not yet been recognised or which have not yet crystallised as principles of international law.

In general, Art.7 does not interfere with the right of Member States to decide what acts or omissions should qualify as offences within their respective legal systems. Neither does it question the nature or severity of penalty imposed upon such offences. Strasbourg review under Art.7 is confined only to questions of legality of penal laws and sentences. In Kokkinakis v. Greece the Court recapitulated the general scope of this review;

> "...Art.7 of the Convention is not confined to prohibiting the retrospective application of the criminal law to an accused's disadvantage. It also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty *(nullum crimen, nulla poena sine lege)* and the principle that the criminal law must not be

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[1371] See, ibid., the Judgment of the Court, p.5 at p.11 para.23.
[1372] Ibid..
[1373] Ibid., p.13 para.27-28. Compare this judgment with the admissibility decision of M v. Italy, App.No.12386/86, 70 D & R (1991) 59.
[1374] Note, the reference is to "nations" in general, not limited to the legal systems of the Member States.

extensively construed to an accused's detriment, for instance by analogy; it follows from this that an offence must be clearly defined in law. This condition is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him liable."[1375]

* * *

The purview of Art.7 of the European Convention is not limited to restraining the retroactive creation of penal laws or to prohibiting the imposition of a heavier penalty on a criminal offence than the one that was applicable at the time the alleged offences was committed. It also precludes the domestic criminal courts from extending with retrospective effect by way of interpretation the scope of existing criminal laws. In South-Asia, while the Constitutions of India, Sri Lanka and Bangladesh have prohibited the conviction under *ex post facto* laws, the Constitutions of Pakistan and Nepal have made it unlawful to inflict any punishment under such laws.[1376] However, in all five countries it is unconstitutional to impose upon an offence a penalty greater than that which might have been inflicted under the laws in force at the time of the commission of the offence. Moreover, in Pakistan and Bangladesh, it is against the Constitution to inflict a penalty which is different from the one prescribed by the laws in force at the time of the alleged offence.

Convictions under not only *ex post facto* laws but also obsolete laws are prohibited by the European Convention. Also, in order to conform with the requirements of Art.7(1) of the Convention, the laws that create criminal offences, whether statutory or common law, must be clear and unambiguous. They must also be adequately accessible and formulated with sufficient precision to enable the citizens to regulate their conduct. In addition, the interpretation of such laws must always be reasonably foreseeable. However, retrospective application of penal laws is not against the guarantee of Art.7 if such application is favourable to the accused person. In India, Sri Lanka, Pakistan and Bangladesh, it is not unconstitutional to apply with retrospective effect the laws which mollifies the rigour of a penal sanction. Nonetheless, it must be noted that in India, as was held in the case of State of Maharashtra v. Dattatraya

[1375] Kokkinakis v. Greece, Judgment of 25th May 1993, Ser.A 260-A (1993) at p.22 para.52.

[1376] However, albeit Art.12 of the Pakistani Constitution has not used the word "conviction", according to the Supreme Court of Pakistan, both the conviction as well as the punishment under *ex post facto laws* are unconstitutional (see, *supra* 4.1.3). Similarly in Nepal, even though Art.14(1) of the Constitution has not used the word "conviction", the overall design of the Article suggests that it prohibits both the conviction as well as the punishment under *ex post facto laws*.

Mathur Kothani[1377], a subsequent decriminalisation cannot have any affect on the offences which have already been committed, though it may be considered in the imposition of penalties.

The guarantee of Art.7 of the European Convention can be invoked only if a criminal conviction or a heavier penalty, based on a retroactive or an obsolete law, is involved. But both the words "criminal" and "penalty" have their own autonomous Convention meanings. Consequently, all convictions and sanctions, inclusive of those that result from disciplinary or regulatory proceedings, come within the purview of Art.7, if their nature and consequences greatly resemble criminal convictions and penalties. On the other hand in all five South-Asian countries the guarantee against *ex post facto* laws can be availed by only those who have been convicted or punished by, a criminal court. However, in Pakistan and Bangladesh, the Constitutional prohibition against *ex post facto* laws cannot be evaded by giving a civil form to a measure which is essentially criminal.

Retroactive application of procedural laws, inclusive of laws relating to detention on remand, bails, appeals, release from prison on probation or parole, legal aid, etc., is not contrary to the provisions of Art.7 of the European Convention. However, application of changes in law of Evidence with retrospective effect to the detriment of the accused is against the guarantee of Art.7. In contrast, in India and Sri Lanka, any retrospective application of changes in both, the procedural laws as well as the rules relating to law of evidence, is not violative of the Constitutional guarantee against *ex post facto* laws. In Bangladesh any changes in the procedural laws with retrospective effect is not against the guarantee relating to *ex post facto* laws. Although the prohibition against *ex post facto* legislation in Art.12 of the Constitution of Pakistan does not prevent the legislature from making changes in the procedural laws or making changes relating to the jurisdiction and composition of judicial tribunals with retrospective effect, such changes remain valid only insofar as they do not impair the substantial protections afforded to the accused by the laws in force at the time of the alleged offence. Also, in Pakistan, amendment of prison regulations relating to remission, which in effect increases the period of imprisonment to a larger term than the period prescribed by such regulation on the date of the commission of the offence, would be repugnant to the guarantee of Art.12.

According to the European Commission, the manner of enforcement of penalties already pronounced does not come within the scope of Art.7. In the case of Hogben v.

[1377] 1976 Cr.L.J. 1931.

the UK[1378] the Applicant, who was serving a life sentence for the murder of a jeweller in the course of an armed robbery, alleged that a sudden change in the parole policy had effectively increased his sentence from that applicable at the time the offence was committed and from that imposed at his trial. However the Commission considered the life imprisonment as the 'penalty' for the purpose of Art.7 and said;

> "...it is true that as a result of the change in parole policy the applicant will not become eligible for release on parole until he has served 20 years' imprisonment. Although this may give rise to the result that his imprisonment is effectively harsher than if he had been eligible for release on parole at an earlier stage, such matters relate to the execution of the sentence as opposed to the 'penalty' which remains that of life imprisonment. Accordingly, it cannot be said that the 'penalty' imposed is a heavier one than that imposed by the trial judge."[1379]

In contrast, under somewhat similar circumstances, the Supreme Court of Pakistan, in the case of Mehr Khan v. Razia Begum[1380], came to a different conclusion. In this case the accused who were found guilty of murder were sentenced to death by the trial court. An amendment made to the Penal Code after the commission of the offence involved, prescribed death or life imprisonment, which meant 25 years imprisonment, for murder. However at the time of the offence transportation for life under the Penal Code meant transportation for 20 years. At the appeal, which took place after the above amendment, instead of death sentence the accused were awarded life imprisonment. But under Art.12 of the Constitution the Supreme Court converted the sentences to transportation for life, i.e., 20 years. Also in Pakistan, a statute which deprives the accused of the discretion given to the court under the law in force at the time of the offence to pass any sentence between the maximum and the minimum sentences by fixing his/her sentence at a definite term, is repugnant to Art.12, even if the term so fixed is less than the maximum prescribed by the law in force at the time of the offence. So is a statute that shortens the time within which execution shall take place after sentence.

The second part of Art.13(6) of the Sri Lankan Constitution is similar to Art.7(2) of the European Convention. However, instead of the phrase "civilised nations" used by the later Article, the former has used the phrase "community of nations". Also, even though having a provision like this to fill the gaps in the municipal law can be useful, any inconsistent or discriminatory use of it can give rise to serious injustices.

[1378] App.No.11635/85, 46 D & R (1986) 231.

[1379] Ibid., p.236. Also see, App.No.15384/89, G.L. v. Italy, 77-B D & R (1994) 5 - a fine for the abuse of process does not increase the principal penalty since it penalizes the vexatious exercise of the right of appeal and not the offense which is the object of the proceedings.

[1380] 1978 SCMR 294.

Part IV

Chapter 5 - Protection Against Double Prosecution and Punishment.

The rights against double prosecution and punishment stem from the old legal maxims such as "Nemo bis in idipsum", "Nimo bis debit Puniri Pro Uno Delictio", "Pro Eadem Causa"; all of which in short mean that no person ought to be punished twice for the same offence or for the same cause. Providing protection against double prosecution and punishment is very important for the safeguard of personal freedom as well as for the command of respect and confidence of public in the system of administration of justice. Particularly in criminal proceedings, when considering the legal disadvantages of second trials to accused persons[1381] and the overwhelming resources at the disposal of the state, there is a great potential for many innocent persons to be found guilty in second trials merely because of their inability to face court proceeding effectively for a second time due to lack of resources or stamina. As Black J. has mentioned in Green v. United States[1382] "...the state with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offence, thereby subjecting him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even-though innocent he may be found guilty."[1383]

[1381] For example, the accused will normally have disclosed his/her complete defense at the first trial. He/she may have also entered the witness-box him/herself. The prosecutor can study the transcripts and may thereby find apparent defects and inconsistencies in the defense to use at the second trial. See, Double Jeopardy (1969), Martin L.Friedland, Clarendon Press, Oxford.

[1382] 355 US 184

[1383] ibid. at pp.187-188

5.1 - South Asia.

5.1.1 - India.

Art.20(2) of the Constitution of India guarantees that "(n)o person shall be prosecuted and punished for the same offence more than once". This guarantee is available only if there have been both prosecution and punishment in respect of the same offence. The word "prosecuted and punished" are taken not distributively so as to mean prosecuted *or* punished. Both the factors must coexist in order that the operation of the clause may be attracted.[1384] As the Indian Supreme Court held in the case of Venkataraman v. The Union of India[1385], the ambit and contents of the guarantee of Art.20(2) "...are much narrower than those of the Common law rule in England or the doctrine of 'Double Jeopardy' in the American Constitution". On the other hand, as provided by Sec.300(1) of the Criminal Procedure Code, Act II of 1974,

> "(a) person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been convicted under sub-section (1) of section 221, or for which he might have been convicted under sub-section (2) thereof."[1386]

According to the Indian Supreme Court, in order to get the benefit of Sec.403 of the Criminal Procedure Code or Art.20(2) of the Constitution, it is necessary for an accused person to establish, (i) that he/she had been tried by a court of competent jurisdiction for an offence, and (ii) that he/she is convicted or acquitted of that offence, and (iii) that the said conviction or acquittal is in force.[1387] Thus a discharge or an acquittal on a technical reason would not prohibit a second prosecution for the same offence.[1388]

[1384] See, Venkataraman v. The Union of India, A.I.R. 1954 S.C. 375. Also see, J.N.Pandey, *Constitutional Law of India*, 31st edition (Allahabad: Central Law Agency 1997), pp.175-176; V.G.Ramachandran, *Fundamental Rights and Constitutional Remedies*, Vol.II, second edition (Lucknow: Eastern Book Company 1982), p.79; *A.S.Chaudhari's Constitutional Rights & Limitations*, second edition, edited by Dr.D.S.Arora, [Allahabad: Law Book Company (P) Ltd. (1990], p.218. However, according to Bombay High Court, the right of protection from double jeopardy is the fact of personal liberty, guaranteed by the Constitution. An individual shall not be brought into danger for one and the same offence more than once. The accused person can set up his/her earlier conviction or acquittal as a complete defence in subsequent trial on the same facts. (see, State of Maharashtra v. Shriram *et al*, 1980 Cr.L.J. 13)

[1385] *Ibid.*.

[1386] Also see Sec.26 of the General Clauses Act 1897.As provided therein, "(w)here an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments but shall not be liable for the same offence." See further, Jayamohan v. State of Kerala, 1981 K.L.T. 372.

[1387] See, The Assistant Collector of Customs, Bombay and another v. L.R. Melwani and another, A.I.R. 1970 S.C. 962.

[1388] See, *In re* Darla Ramadoss, A.I.R. 1958 Andhra Pradesh 707. However, see Gur Charan v. State, A.I.R. 1957 Allahabad 557.

Within the context of Art.20(2) the word "prosecution" means the initiation or starting of proceedings of a criminal nature before a court of law or a judicial tribunal in accordance with the procedure prescribed in the statute which creates the offence and regulates procedure.[1389] Accordingly, the fact that the offence in question was the subject matter of a previous inquiry before a non-judicial body is not a bar to the subsequent prosecution and punishment of the offender for the same offence by a criminal court or *vice versa*. Also, for the purpose of Art.20(2), to "punish" means to impose a penalty upon, to affect with pain or loss or suffering for crime or fault.[1390] Thus, the confiscation of property or the imposition of a civil penalty does not attract the guarantee of Art.20(2).[1391]

In line with the direction of Sec.367(1) of the Constitution, the word "offence" is construed in the light of the definition given to that word by the General Clauses Act, 1897. According to sub-clause 38 of the said Act, an offence means an act or omission made punishable by any law for the time being in force. Breach of laws that entail civil penalties would not be regarded as offences for the purpose of Art.20(2).[1392] Also, what Art.20(2) prohibits is the prosecution and punishment for the same offence more than once.[1393] The guarantee of Art.20(2) would not be attracted if the offences are distinct[1394] or if the offence is a continuing one.[1395]

If in a case where an accused appealed against his/her conviction and the appellate court directs retrial, framing of charges and trial can only be for the charges the accused was convicted and not for the charges he/she was acquitted. Initiating a fresh trial for all the charges would be contrary to the guarantee of Art.20(2).[1396] Also, the guarantee of Art.20(2) is not applicable if the proceedings are a mere continuation of the previous proceedings by way of an appeal against acquittal.[1397]

[1389] See, Maqbool Hussain v. The State of Bombay, 1953 S.C.R. 730; Bachcha Lal v. Lalji, A.I.R. 1976 Allahabad 393.
[1390] See, *A.S.Chaudhari's Constitutional Rights & Limitations*, second edition, edited by Dr.D.S.Arora, [Allahabad: Law Book Company (P) Ltd. (1990], p.220.
[1391] See, Maqbool Hussain v. The State of Bombay, 1953 S.C.R. 730; Bachcha Lal v. Lalji, A.I.R. 1976 Allahabad 393; Romesh Chander v. Superintendent of Customs, 1975 Cr.L.J. 739.
[1392] See, *A.S.Chaudhari's Constitutional Rights & Limitations*, second edition, edited by Dr.D.S.Arora, [Allahabad: Law Book Company (P) Ltd. (1990], p.220.
[1393] See, Bhagwan Swrup Lal Bishan Lal v. State of Maharashtra, A.I.R. 1965 S.C. 682.
[1394] See, The State of Bombay v. S.L.Apte and another, A.I.R. 1961 S.C. 578.
[1395] See, Municipal Board, Saharanpur v. Kripal Ram, 1963 (1) Cr.L.J. 412.
[1396] See, State of Maharashtra v. Shriram *et al*, 1980 Cr.L.J. 13.
[1397] See, Kalawati v. Himachal Pradesh, A.I.R. 1953 S.C> 131; Madhya Pradesh v. Veereswar, A.I.R. 1957 S.C. 592.

5.1.2 - Sri Lanka.

The Constitution of Sri Lanka does not provide express protection against double prosecution and punishment. However, as Jayampathy Wickramaratne argues protection against double jeopardy is an integral part of the fair trial guarantee of Art.13(3) of the Constitution.[1398] Also, even though it cannot be enforced as a fundamental right, Sec.314 of the Code of Criminal Procedure Act, No.15 of 1979 contains a prohibition against putting a person in peril more than once for the same offence.[1399]

5.1.3 - Pakistan.

Art.13(a) of the Constitution of the Islamic Republic of Pakistan provides protection against double punishment. As it stipulates "(n)o person...shall be prosecuted or punished for the same offence more than once...".[1400] The word "prosecution" in the context of this guarantee means initiation or starting proceedings of a criminal nature before a competent court of law or a judicial tribunal in accordance with the procedure prescribed in the statute which creates the offence and regulates the punishment.[1401] The word punishment contemplates a judicial punishment awarded by a criminal court as distinguished from, for example, disciplinary or civil penalties awarded by departmental or statutory authorities.[1402] According to Sec.2(37) of the General Clauses Act (X of 1897) an "offence" is an act or omission made punishable by any law for the time being in force.

[1398] See, Jayampathy Wickramaratne, *Fundamental Rights in Sri Lanka*, (New Delhi: Navrang Booksellers and Publishers 1996), p.302.

[1399] As provided by Sec.314(1), "(a) person who has once been tried by a court of competent jurisdiction for an offence and convicted or acquitted of such offence shall while such conviction or acquittal remain in force not be liable to be tried again for the same offence nor on the same facts for any other offence for which a different charge from the one made against him might have been made under section 166 or for which he might have been convicted under section 167."

[1400] Also see, Sec.403(1) of the Code of Criminal Procedure, Act V of 1898 and Sec.26 of the General Clauses Act (X of 1897). According to Sec.403(1) of the Criminal Procedure Code "(a) person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under section 236, or for which he might have been convicted under section 237." As provided by Sec.26 of the General Clauses Act, where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or anyone of those enactments but shall not be liable to be punished twice for the same offence.

[1401] See, Justice Muhammad Munir, *Constitution of the Islamic Republic of Pakistan*, Vol. I (Lahore: P.L.D. Publishers 1996), p.297.

[1402] See, Muhammad Ayub v. Chairman, Electricity Board, WAPDA, Peshawar, P.L.D. 1987 S.C. 195.

On the first sight the word "or" between the words prosecuted and punished in Art.13(a) seems to suggest that even a prosecution in connection with an offence is sufficient to invoke the Article's protection if a second prosecution is initiated for the same offence. However, second prosecution for the same offence is prohibited only if the previous prosecution has ended either in acquittal or punishment.[1403] A discharge from the previous proceedings does not debar fresh proceedings which can be initiated in respect of the same offence on the same facts on a fresh complaint.[1404] Also, what is forbidden under Art.13(a) is the prosecution or punishment more than once for the *same offence*. Therefore, subsequent trial for a distinct or different or other or continuing offences is not unconstitutional.[1405] Nor is an appeal against acquittal.

5.1.4 - Bangladesh.

As guaranteed by Art.35(2) of the Constitution of the Peoples' Republic of Bangladesh "(n)o person shall be prosecuted and punished for the same offence more than once".[1406] The protection of this guarantee can be invoked only in connection with criminal proceedings initiated before a competent court or a judicial tribunal. Accordingly, Art.35(2) will not be attracted if the previous or subsequent proceedings are of civil or disciplinary nature.[1407] The word "prosecution" for the purpose of this guarantee means an initiation or starting of proceedings either by way of indictment or information in the criminal courts in order to put an offender upon trial.[1408]

What is forbidden under Art.35(2) is the prosecution and punishment for the same offence more than once. A subsequent proceeding would not come within the mischief of Art.35(2) if the previous proceedings have not ended in acquittal or conviction, or if the subsequent proceedings are merely a continuation of the previous proceeding by way of an appeal or retrial. Further, the guarantee of Art.35(2) cannot be invoked if the previous conviction or acquittal is not in force.[1409] Furthermore, the prohibition is against the prosecution and punishment for the *same offence*. Thus, subsequent

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[1403] See, Muhammad Ishaq v. The State, 1992 P.Cr.L.J. 1273.
[1404] See, Muhammad Akram v. Government of Punjab, P.L.D. 1979 Lahore 462.
[1405] See, Justice Muhammad Munir, *Constitution of the Islamic Republic of Pakistan*, Vol. I (Lahore: P.L.D. Publishers 1996), pp.292-295. Also see, Zar Badshah Masood v. Commandant/Magistrate I[st] Class, 1985 P.Cr.L.J. 499.
[1406] Also see Sec.403 of the Code of Criminal Procedure, Act V of 1898 (this provision is identical to Sec.403 of the Pakistani Criminal Procedure Code, see *supra footnote no.* 1400
[1407] See, Serjul Islam v. Director General of Food, 42 D.L.R. (1990) 199. Also see, F.K.M.A.Munim, *Rights of the Citizens Under the Constitution and Law* (Dacca: Bangladesh Institute of Law and International Affairs 1975), p.73.
[1408] See, F.K.M.A.Munim, *Rights of the Citizens Under the Constitution and Law*, ibid..
[1409] See, Mahmudul Islam, *Constitutional law of Bangladesh* (Dacca: Bangladesh Institute of Law and International Affairs 1995), p.183.

prosecution for a separate and a distinct offence is not unconstitutional even if the same facts or transactions which gave rise to the later prosecution have been the basis of a previous prosecution and punishment.[1410] Also, Art.35(2) does not inhibit the prosecution and punishment of continuing offences.[1411]

5.1.5 - Nepal.

According to Art.14(2) of the Constitution of the Kingdom of Nepal "(n)o person shall be prosecuted or punished for the same offence in court of law more than once." Unlike the corresponding provision of the Indian Constitution, the word "or" between the phrases "prosecuted" and "punished" in Art.14(2) of the Nepalese Constitution suggest that the later two phrases are used in a disjunctive sense. Consequently, the protection of Art.14(2) can be availed of even if the previous proceedings for the same offence have ended in acquittal.[1412] However, the guarantee of Art.14(2) applies only in connection with criminal offences. Moreover, as has been expressly mentioned in the Article, this guarantee can be invoked only in connection with court proceedings.[1413] Also, subsequent prosecution for a separate or distinct offence arising out of the same facts which gave rise to a previous prosecution and punishment is not against the guarantee of Art.14(2).[1414]

5.2 - Europe.

Article 4 of Protocol No.7.

According to Art.4 of Protocol No.7 to the European Convention;

> "(1) No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.
>
> (2) The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case..."

As the words "under the jurisdiction of the same State" indicate the application of this provision is limited to national level. Accordingly, a person may be tried and

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[1410] See, H.M.Ershad v. The State, 45 D.L.R. (1993) 533.

[1411] See, Mahmudul Islam, *Constitutional law of Bangladesh* (Dacca: Bangladesh Institute of Law and International Affairs 1995), p.184.

[1412] See, Surya PS Dhungel *et al*, *Commentary on the Nepalese Constitution*, (Kathmandu: DeLF 1998), p.150. For a different view see, Amrit Basnet, 'Double Jeopardy under the Constitution of Nepal', *Essays on Constitutional Law*, Vol.21 (1995), Nepal Law Society, Kathmandu, 65 p.66.

[1413] See, Lal Bhadur Karki v. Ministry of Land Reform, N.L.R. 1990 S.C. 136

[1414] See, Uddad Prasad Shrestha v. Eastern Regional Court, N.L.R. 2043 S.C. 1020.

sentenced more than once for the same offence in different jurisdictions without violating the guarantee of Art.4 Protocol No.7. Also, since Art.4 is concerned only with trial and conviction in criminal proceedings, it is not incompatible with the Convention to subject a person, for the same act, to action of a different character, for example, to disciplinary action as well as to criminal proceedings, within the same jurisdiction.[1415]

In order for the guarantee of Art.4 to become applicable the person concerned must have been finally acquitted or convicted in accordance with the law and penal procedure of the State concerned. However, as provided by sub-paragraph 2, a case may be reopened, even after a final decision, if there is evidence of new or newly discovered facts, or if it appears that there has been a fundamental defect in the proceedings, which could effect the outcome of the case. Here the phrase "new or newly discovered facts" includes new means of proof relating to previously existing facts.[1416] In any case, it must be noted that, as the Explanatory Report reveals, Art.4 does not prevent a reopening of the proceedings in favour of the convicted person and any other changing of the judgement that would be beneficial to him/her.[1417]

* * *

The guarantee of Art.4 of Protocol No.7 to the European Convention against second prosecution and punishment is available to anyone who for the same offence has previously been either acquitted or convicted by a court of competent jurisdiction. In South-Asia, only the Constitutions of Pakistan, Bangladesh and Nepal have provided protection against second prosecution and punishment for persons who have already been either convicted or acquitted for the same offence by a court of competent jurisdiction. On the other hand, in India Constitutional protection against second prosecution and punishment is available to only those who have been previously punished for the same offence by a court of competent jurisdiction.

The guarantee against double prosecution and punishment of the European Convention as well as of the Constitutions of India, Pakistan Bangladesh and Nepal can be invoked only in connection with criminal proceedings. However, the word "criminal" within the context of the European Convention has an autonomous meaning and encompasses any offence that entails sanctions of punitive nature. Also,

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[1415] See, Explanatory Report Relating to Protocol No.7, Vol.6-7 HRLJ (1985/86) 82 p.86 para.32.
[1416] Ibid., para.31.
[1417] Ibid..

Art.4 of Protocol No.7 to the European Convention is not a bar for the reopening of a case or for the changing of a judgement if such reopening or changing is beneficial to a convicted person.

Part V

Chapter 6 - Rights Guaranteed by Art.2 andArt.3 of Protocol No.7 to the European Convention.

In addition to the rights discussed in the preceding Chapters two more important rights, which do not appear in any of the South-Asian Constitutions considered in this study, have been guaranteed to the accused persons by Art.2 and 3 of Protocol No.7 to the European Convention. This Protocol was designed particularly to ensure the conflict free co-existence of the European Convention and the two International Covenants on Human Rights adopted by the General Assembly of the United Nations more than thirteen years after the coming into force of the first mentioned instrument.[1418] The Seventh Protocol has been in force since 1st November 1988 and has by 24th January 2000 been signed by 36 Member States of the Council of Europe.

6.1 - Article 2 of Protocol No.7.

Art.2 of Protocol No.7 provides,

> "(1) Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised shall be governed by law.
> (2) This right may be subject to exceptions in regard to offences of a minor character, as prescribed by law, or in cases in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal."[1419]

[1418] The two Covenants were adopted by the General Assembly on 16th December 1966.

[1419] Note, as provided by Art.128(1) of the Constitution of Sri Lanka "(a)n appeal shall lie to the Supreme Court from any final order, Judgement, decree or sentence of the Court of Appeal in any matter or proceedings, whether civil or criminal, which involves a substantial question of law, if the Court of Appeal grants leave to appeal to the Supreme Court *ex mero motu* or at the instance of any aggrieved party to such matter or proceedings...".[Also see, Art.128(2)] Further, Art.134(1) of the Constitution of India has conferred upon an accused person a right of appeal to the Supreme Court (a) if

Accordingly, the States party to the Protocol must ensure to everyone convicted of a criminal offence by a tribunal a right to have his/her conviction or sentence reviewed by a higher tribunal. This, however, does not mean that in every case the person convicted is entitled to have both his/her conviction and sentence so reviewed. For example, if the person concerned has pleaded guilty to the offence charged, the right to appeal may be restricted only to a review of his/her sentence.[1420]

As the Explanatory Report Relating to Protocol No.7 reveals, the word "tribunal" in Art.2 has been included to show that this provision does not concern offences which have been tried by bodies which are not tribunals within the meaning of Art.6 of the Convention.[1421] Nevertheless, it must be noted that if the offence tried by such a body is a crime in the sense of the Convention, the person concerned must, in case of his/her being found guilty, be able to appeal against the conviction to a tribunal that offers the guarantees set forth in Art.6. This in turn entitles him/her to the right to review by a higher tribunal as the decision of the Art.6 tribunal is subject to the guarantee of Art.2 of Protocol No.7.[1422]

The right guaranteed by sub para.1 is subject to the conditions laid down in sub para.2. Thus, the right to review by a higher tribunal does not apply, (i) for offences of a minor character, as prescribed by law, (ii) if the person concerned has been tried in the first instance by the highest tribunal, or, (iii) if the person concerned has been convicted following an appeal against acquittal. According to the Explanatory Report[1423] an important criterion that should be taken into consideration when deciding whether an offence is of a minor character is the question whether the offence is punishable by imprisonment or not. Finally, it must be noted that Art.2 has

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the High Court has, on appeal, reversed an order of acquittal and sentenced him/her to death; (b) if the High Court has withdrawn for trial before itself any case from any court subordinate to its authority and has in such trial convicted the accused person and sentenced him/her to death; (c) or if the High Court certifies that the case is a fit one for appeal to the Supreme Court [see, H.M.Seervai, "Constitutional Law of India : A Critical Commentary", Vol.II, second edition (1976), N.M.Tripathi Private Ltd., Bombay, p.1389. Also see, Art.132(1) and Art.136(1) of the Constitution of India. See further, Admaji Umar Dalal v. State of Bombay, 1953 Cr.L.J. 542]. Similar provisions can be found in Art.185(2) of the Constitution of the Islamic Republic of Pakistan and Art.103(2) of the Constitution of the People's Republic of Bangladesh. However, all these provisions appear outside of the Bill of Rights of the respective Constitution. Therefore, non these provisions can be regarded as conferring a fundamental right upon the accused persons. (Also see, Sec.372 of the Criminal Procedure Code of India, Act II of 1974, Sec.316 of the Code of Criminal Procedure of Sri Lanka, Act No.15 of 1979, Sec.404 of the Code of Criminal Procedure of Pakistan, Act V of 1898, Sec.404 of the Code of Criminal Procedure of Bangladesh, Act V of 1898).

[1420] See, Explanatory Report Relating to Protocol No.7, Vol.6-7 HRLJ (1985/86) 82 p.85 para.17.

[1421] Ibid..

[1422] See, P.Van dijk and G.J.H.van Hoof, *The Theory and Practice of the European Convention on Human Rights*, second edition (Deventer: Kluwer Law and Taxation Publishers 1990), p.508 para.2.

[1423] Vol.6-7 HRLJ (1985/86) 82 p.85 para.21.

left the modalities for the exercise of the right to review by a higher tribunal and the grounds on which it may be exercised to be determined by domestic law.[1424]

6.2 - Article 3 of Protocol No.7.

Art.3 of Protocol No.7 provides that,

> "(w)hen a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed, or he has been pardoned, on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to the law or the practice of the State concerned, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him."

This provision aims to ensure that compensation shall be paid to a victim of a miscarriage of justice, on the following conditions. First, the person concerned has to have been convicted of a criminal offence by a final decision and to have suffered punishment as a result of such conviction. Thus, this guarantee could not be relied upon in cases where the charge is dismissed or the accused person is acquitted either by the court of first instance or, on appeal, by a higher tribunal. For the purpose of this provision a decision is final 'if it has acquired the force of *res judicata*. This is the case when it is irrevocable, that is to say when no further ordinary remedies are available or when the parties have exhausted such remedies or have permitted the time limit to expire without availing themselves of them.'[1425]

Secondly, Art.3 is applicable only if the conviction is overturned or a pardon is granted as a result of a new or newly discovered fact which shows conclusively that there has been some serious failure in the judicial process amounting to a miscarriage of justice that has caused grave prejudice to the convicted person. Accordingly, a necessity to pay compensation would not arise if a conviction is reversed or a pardon is granted on some other ground. Also, no compensation could be claimed under this provision if the responsibility for not being able to disclose the unknown fact in time is wholly or partly attributable to the convicted person.[1426]

[1424] Ibid., p.85 para.18. Also see, App.No.19715/92, T v. Luxembourg, 15 EHRR (1993) CD 107.

[1425] See, the Commentary on Article 3, Explanatory Report of the European Convention on the International Validity of Criminal Judgments, as quoted in the Explanatory Report Relating to Protocol No.7, 6-7 *HRLJ* (1985 86) 82 p.85 para.22.

[1426] See, Explanatory Report Relating to Protocol No.7, Vol.6-7 HRLJ (1985/86) 82 p.86 para.24.

Part VI

Chapter 7 - Observations and Conclusion.

For the purpose of protecting the collective social interests as well as the interests of individuals, society confers wide and coercive powers upon the State to administer criminal justice. However, at the same time, civilised societies have developed various procedural safeguards in order to ensure that these wide and coercive powers would not be harnessed to the detriment of personal liberty.[1427] These procedural safeguards pertinent to criminal justice administration are not privileges but the rights of everyone who is suspected or accused of committing an offence. As John A. Andrews has observed, the extent to which these rights are respected and protected within the context of its criminal proceedings is an important measure of a society's civilisation.[1428]

The present research was conducted with three main objectives. Firstly, to determine whether the Constitutional rights relating to criminal justice administration in five South-Asian neighbouring States, namely, India, Sri Lanka, Pakistan, Bangladesh and Nepal, are, in comparison with the corresponding rights of the European Convention of Human Rights, of acceptable international standard. Secondly, to suggest measures, if any, the South-Asian States should adopt in order to raise the present level of Constitutional protection afforded to the persons accused or suspected of committing offences. Thirdly, the research also aimed to ascertain whether there exists a common

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[1427] According to J.S.Creamer [see, *The law of Arrest, Search and Seizure*, third edition (London: Holt Rinehart and Winston 1980), p.1] "(t)he criminal law is the cutting edge of the law. It is in the area of criminal law that the impact of government becomes the most severe and the most devastating to the citizen."

[1428] See, John A. Andrews (editor), *Human Rights in Criminal Proceedings : A Comparative Study*, (Boston: Martinus Nijhoff Publishers 1982), p.8.

Constitutional practice in the South-Asian region among the neighbouring States with regard to the rights relating to criminal justice administration.

Despite the differences highlighted earlier in Chapter 2, it is neither an exaggeration of the status of normative contents of the Constitutional provisions of the South-Asian States and their related jurisprudence, nor an under-estimation of the richness of the European jurisprudence, to conclude that the protection provided in relation to arrest and detention in the five South-Asian States does not fall to any unacceptable level below the standards set by the supra-national supervisory organs of the European Convention. This, however, does not mean that the situation in the South-Asian States is completely satisfactory. With all respect, it would not at all be over-zealous to say that there still remains some work to be done before those South-Asian states can actually be satisfied with the status of their respective Constitutional guarantees relating to arrest and detention.

As pointed out in Chapter 2.1, out of the five South-Asian Constitutions, only the Constitution of Sri Lanka provides an express guarantee dealing exclusively with unlawful arrests. In the other four countries, namely, India, Pakistan, Bangladesh and Nepal, protection against unlawful arrest is deduced from the due process guarantee of the respective Constitution. Albeit some differences exist in the manner in which the guarantee against unlawful arrest is applied among the five countries, as is evident from this research, the absence of an express or exclusive provision has not made the protection afforded against unlawful arrest by the Constitutions of the last mentioned four countries less effective than what is afforded by the Sri Lankan Constitution. In fact in Bangladesh, and probably in Nepal too, the Constitutional guarantee against arbitrary deprivation of personal liberty has incorporated both substantive as well as procedural aspect of the due process concept. This has enabled the examination by courts in Bangladesh and Nepal of not only the lawfulness of the actions of the authorities making arrests, but also the abstract reasonableness and the non-arbitrariness of the substantive as well as procedural laws which authorise arrest.

In India, the Constitutional guarantee to personal liberty has incorporated the procedural aspect of the due process concept. Thus the Indian courts are competent to examine the reasonableness, fairness and the non-arbitrariness of the procedural laws as well as the lawfulness of the actions followed by the authorities in making an arrest. In Pakistan while Art.9 has guaranteed procedural lawfulness in the case of an arrest, the courts have assumed under Art.4(2)(a), which is not regarded as a fundamental right, jurisdiction to review compatibility with the concept of procedural

due process of procedural laws that lay down the manner and form to be followed in making an arrest. Admittedly, however, an express Constitutional provision dealing exclusively with arrest is the better way of providing protection against arbitrary and unlawful arrests. An express provision could not only facilitate the straight-forward and less complicated resolving of the issues relating to unlawful arrests in criminal proceedings, but also bring the provisions of the national Constitutions into line with the corresponding provisions of the international human rights documents.[1429]

In Sri Lanka, where there is an express provision dealing exclusively with unlawful arrests, only procedural lawfulness has been guaranteed. In other words, the courts in Sri Lanka have jurisdiction only to determine, in relation to enacted laws, the lawfulness of actions followed by the authorities in making an arrest.[1430] It is suggested that, in order to make the Constitutional guarantee against unlawful arrest more effective in Sri Lanka, at the least, the concept of procedural due process must be injected into the regime of Art.13(1).

The concept of "personal liberty" in India, insofar as immunity from unlawful arrest is concerned, is conceived to be synonymous with freedom of movement and locomotion. In Pakistan and Bangladesh fundamental right to personal liberty conveys the idea of freedom from physical restraint and incarceration. In order to bring a successful constitutional claim against unlawful arrest in these three countries, it must be established that the action taken by the authorities has resulted in a "total loss" of the claimant's "personal liberty". On the other hand, as the Strasbourg organs have conceded, under certain circumstances the cumulative effect of combination of various conditions might sometimes constitute an arrest, even if there has been no apprehension or confinement to a cell of the person concerned. Moreover, according to Strasbourg jurisprudence, even if the degree of physical constraints is insubstantial, an arrest might still transpire if, for example, the impugned measure has resulted in socially isolating the person concerned. Adopting an approach similar to the one adopted by the Strasbourg organs when dealing with the question whether there has been an arrest would obviously fortify the protection afforded against unlawful arrests in India, Pakistan and Bangladesh.

[1429] See, for example, Art.3 & 9 of the Universal Declaration of Human Rights (UDHR), Art.9(1) of the International Covenant on Civil and Political rights (ICCPR), Art.7(3) of the American Convention on Human Rights (ACHR) and Art.6 of the African Charter on Human and Peoples' Rights (ACHPR).

[1430] See the case of Joseph Perera v. Attorney General [(1992) 1 Sri L.R. 199] in which the majority of the Supreme Court upheld the lawfulness of an arrest made in pursuance of a regulation which the full bench of the same court in the same case agreed to be *ultra vires* of the Constitution

The roots of the present Criminal Procedure Codes of Pakistan, Bangladesh and Sri Lanka lie in the late Nineteenth century Indian Criminal Procedure Codes enacted by the British rulers. As a result the present criminal procedural laws of these four countries coincide to a great extent. The modalities of arrest are the same in all four countries. They all have permitted arrest under warrant as well as without warrant in certain circumstances. The instances where a person can be arrested without a warrant are almost the same, if not identical. Also, in all four countries objective justifications are required to establish the reasonableness of suspicions upon which police officers can make arrests without warrant. However, it must be noted that in India, police officers making arrests without warrant are required, if the offence involved is a bailable one, to inform the persons arrested that they are entitled to be released on bail and that they may arrange for sureties on their behalf. Incorporating a similar requirement into the procedural laws of the other four South-Asian States could be beneficial to the arrestees. Further, in Sri Lanka, a Magistrate issuing a warrant for the arrest of any person, in the case of a bailable offence, is obliged to direct by endorsement on the warrant the officer to whom the warrant is directed to take such security as prescribed by the court and release the person concerned from custody. On the other hand, in India, Pakistan and Bangladesh, the Criminal Procedure Codes have given the courts issuing warrants of arrest a discretion in this matter even if the offence involved is a bailable one. Whether such an expressed discretion is really necessary, especially in connection with bailable offences, is doubtful.

In India, Pakistan, Bangladesh and Nepal the Constitutional guarantee that everyone arrested should be informed of the reasons for such arrest has been phrased in an identical manner ; "(n)o person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest". On the other hand, in Sri Lanka the Constitution stipulates that "...(a)ny person arrested shall be informed of the reasons for his arrest". If interpreted literally, this difference in phraseologies implies that, while in the last mentioned country the obligation to state the grounds or the reasons of arrest arises whenever a person is arrested, in the first mentioned four countries the person arrested should be informed of the reasons for such arrest only if he/she is detained in custody.

Both in India and Sri Lanka the guarantee that everyone arrested should be informed of the reasons for such arrest, is purported to provide, *inter alia*, at the outset of criminal proceedings an opportunity for the arrested person to remove any mistake, misapprehension or misunderstanding in the minds of the arresting authority. Further, in India, as well as in Pakistan and Bangladesh, the guarantee is also aimed at

enabling the making of an application for bail or the moving of the appropriate court for a writ of habeas corpus. Furthermore, in all five countries stating the grounds or the reasons of arrest is expected to underpin the arrested person's recourse to legal advice and the making of his/her defence in time for the purposes of trial.

As far as the substance of the information is concerned no significant difference seems to exist among the five countries. They all require the grounds communicated to be clear and unambiguous, as well as to contain sufficient particulars so as to enable the person arrested to understand why his/her liberty has been deprived. No country regards the mere communication of a section of a law or, especially in Sri Lanka, the object of arrest, as sufficient compliance with the Constitutional requirements.

Also, there is no obligation in any of the five countries to furnish, at the moment of arrest or immediately after it, the full details of the alleged offence or the law applicable to it. Nor do they require the communication to be in the precision of a charge. However, the stipulated information must be communicated in a language intelligible to the arrested person. In all the countries but Nepal, oral communication is sufficient to comply with the Constitutional requirement that the arrested person must be informed of the reasons of arrest. The requirement in Nepal that the person arrested must be served with a detention order may exert some pressure on the authorities to furnish comparatively more precise and detailed information than in other South-Asian countries.

Except in Sri Lanka, in all the other countries the Constitutions require the grounds of arrest to be communicated 'as soon as may be'. While in Pakistan and Bangladesh the phrase 'as soon as may be' has been interpreted as meaning 'within twenty four hours', in India and Nepal it has been equated to 'a reasonable period of time'. Although commendable, the efforts made by the Supreme Court of Sri Lanka to fill the gap in the Constitution cannot be regarded as satisfactory. A fundamental right is one guaranteed to the fullest effect by the Constitution or the Supreme Law of the land. Such a right must be consistent and concrete, as well as be phrased in clear and unambiguous terms. Indispensable or intrinsic components of a fundamental right must be contained in the Constitution itself and must not derive from or depend upon judicial interpretations. For, unlike Constitutional provisions, there always remains the possibility of judicial decisions not being followed or being over-ruled by higher courts. Further, in Nepal some proper judicial interpretation needs to be undertaken to define the exact parameters of Art.14(5). Also, the right to know the grounds of arrest would be more meaningful in the South-Asian states if they too, like the European

Convention, regard that right as an elementary safeguard, independent of the rights relating to criminal trials, available at the pre-trial stage to challenge the lawfulness of arrests before courts of law.

The Constitutions of all five South-Asian countries have guaranteed to every person arrested and detained a right to be produced before a judicial officer within a stipulated time period. Also, in all these countries continuation of detention after such production has been subjected to the authorisation of such judicial officer. In India, Pakistan and Bangladesh these guarantees have been phrased in an identical manner;

> "Every person who is arrested and detained in custody shall be produced before the nearest Magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the Magistrate and no such person shall be detained in custody beyond the said period without the authority of a Magistrate."

Although on the first sight Art.14(6) of the Napalese Constitution too seems to have been phrased in a similar manner, the crucial word "nearest" before the phrase "judicial officer" is missing in that Article. Notwithstanding the fact that the Nepali Supreme Court in Tika Prasad Thakali v. Bhav Nath Sharma, Secretary, Ministry of Forestry[1431] interpreted Art.14(6) as requiring the arrested and detained persons to be produced before the *nearest* judicial authority, it is submitted here that the word "nearest" must be included in Art.14(6). For, as mentioned earlier, important elements of a Constitutional safeguard pertinent to personal liberty must not depend upon judicial decisions.

Except for the Constitution of Nepal, the rest of the Constitutions in the region require everyone arrested and detained to be produced before the judicial officer nearest to the place where the arrests concerned were made.[1432] According to the jurisprudence of the Sri Lankan Supreme Court, despite the absence of any time period in Art.13(2), a constitutional infirmity might occur unless a person arrested without warrant is produced before the appropriate judicial officer within a reasonable time after arrest. It must be noted that the first limb of Art.13(2) of the Sri Lankan Constitution only requires the production before the judicial officer to be in accordance with the procedure established by the relevant law. As far as criminal proceedings are concerned the relevant law is mainly laid down in the Code of Criminal Procedure Act, No.15 of 1979. And Sec.36 thereof obliges the police officers who make arrests without warrant to produce the person so arrested before a Magistrate without

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[1431] 2018 Nep.L.Rep. 147

[1432] However, as the Supreme Court of Nepal observed in Tika Prasad Thakali v. Bhav Nath Sharma, Secretary, Ministry of Forestry (2018 Nep.L.Rep. 147) the person arrested and detained must be produced before the *nearest* judicial authority.

unnecessary delay. The twenty-four hour limit mentioned in Sec.37 of the Code has been interpreted by the Sri Lankan Supreme Court as denoting the outer limit of the time period that may be taken for the production of a person arrested without warrant before the appropriate Magistrate. There is no reason why this progressive and salutary interpretation should not apply to arrests made with warrant too. For, similar to Sec.36, Sec.54 of the Code obliges the person executing a warrant of arrest to bring the person arrested before the appropriate court without unnecessary delay. As well as preserving the consistency of jurisprudence, such a uniform application will undoubtedly be useful in keeping the detentions in police custody as short as possible.

Although the corresponding provisions of the Constitutions of India, Pakistan and Bangladesh stipulate that the persons arrested must be produced before a judicial officer within a period of twenty-four hours of arrest, the situation under the respective criminal procedure codes of these countries is not different from that of Sri Lanka. They all require production before the Magistrate to be made within a reasonable time after arrest. Thus, with the each Constitution's pledge of due process, there is room for the courts in India, Pakistan and Bangladesh to regard, as in Sri Lanka, the twenty-four hour limit as representing the periphery of the time period that may be taken for the production of a person arrested before the appropriate Magistrate, and declare a violation of the arrestee's fundamental rights whenever there has been an unnecessary delay.

None of the Constitutions in the region makes any distinction between arrests made with warrant and without warrant. They all require everyone arrested and detained to be produced before a judicial officer within the stipulated time period. If the arrest is made by a Magistrate, the relevant jurisprudence of India, Pakistan and Bangladesh necessitates the arrestee to be produced before a Magistrate other than the one who made the arrest. However, unlike in Pakistan and Bangladesh, in India the Magistrate's going to the place of detention, instead of the arrestee being brought to the Magistrate's court, and ordering remand does not breach the right of the arrested persons to be produced before a judicial officer. But whether the Indian practice is conducive to the arrestee's proper and effective exercising of the rights collateral to the right to be produced before a judicial officer, for example like the right to engage a lawyer to challenge the lawfulness of arrest and detention, is very much doubtful.

The Magistrates in India, Sri Lanka, Pakistan and Bangladesh are obliged not to order detention, at least in the first instance, if the arrestee is not physically present before them. In Sri Lanka the remand order of a Magistrate changes the nature of detention

from police custody to judicial custody. Put in a different way, detention in police custody, which might be unfavourable for the arrestee's interests, is lawful in Sri Lanka only until the arrestee is produced before the nearest Magistrate, which must be done without any unnecessary delays. On the other hand, in India, Pakistan and Bangladesh, if they think fit, the Magistrates have the discretion under the respective Criminal Procedure Codes to order detention in police custody for a period not exceeding fifteen days in total. However, if detention in police custody is ordered, the Magistrates are bound to record reasons for doing so. Also, the Criminal Procedure Code of Pakistan has made special provisions to protect female arrestees against police detentions. In Nepal if detention is upheld, the law authorises the police to hold the suspect for twenty five days to complete investigation, with a possible extension of further seven days.

Under the Criminal Procedure Codes of India, Sri Lanka[1433], Pakistan and Bangladesh, bail is a right for bailable offences.[1434] With regard to non-bailable offences, the courts in these countries have been given a discretion, subject to certain restrictions, to grant bail.[1435] Further, in all four countries bail must be fixed with due regard to the circumstances of the case and any bail bond fixed must not be excessive.[1436] Furthermore, in India, Pakistan and Bangladesh the relevant courts and the police officers must, from time to time, review the conditions warranting continued detention and the detenu must be released if those conditions have disappeared. Also, it must be noted that in these last mentioned three countries, because of the respective Constitution's guarantee of due process, laws and discretions that might affect personal freedom of arestees' need to be applied and exercised in a just, fair and reasonable manner.

When the investigation cannot be completed within twenty-four hours, the Magistrate before whom the suspect is produced has the power under the relevant provision of the Sri Lankan Criminal Procedure Code, viz., Sec.115, to order detention for a full fifteen day period.[1437] There is no requirement under Sec.115(2) for the Magistrate to

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[1433] See, Sec.402 of the Code of Criminal Procedure Act, No.15 of 1979.

[1434] Note, in India as provided by Sec.50(2) of the Code of Criminal Procedure, Act II of 1974, any police officer making an arrest without a warrant must, if the offence involved is a bailable one, inform the person arrested that he is entitled to be released on bail and that he may arrange for sureties on his behalf.

[1435] For the situation in Sri Lanka, see, Sec.403(1) of the Code of Criminal Procedure Act, No.15 of 1979.

[1436] For the situation in Sri Lanka, see, Sec.404, ibid..

[1437] As Sec.115(2) of the Sri Lankan Criminal Procedure Code provides "(t)he Magistrate before whom a suspect if forwarded under this Section, if he is satisfied that it is expedient to detain the suspect in

review from time to time the conditions warranting detention.[1438] Considering the fact that there is no provision in the Sri Lankan Constitution under which the lawfulness of unnecessarily prolonged detentions can be challenged, it is submitted that Art.115(2) of Criminal Procedure Code must be amended to make the time to time reviewing of the conditions warranting continued detention compulsory.

Also, unlike in India, Pakistan and Bangladesh, release from continued detention can be ordered in Sri Lanka only by the relevant court.[1439] On the other hand, because of the restricted nature of the Supreme Court's exclusive fundamental rights jurisdiction in Sri Lanka[1440], any erroneous application of the provisions of, or wrongful exercise of discretion granted under, the Criminal Procedure Code by a judge to the detriment of the arrestee's personal freedom cannot be the subject matter of a fundamental rights application, albeit Art.13(2) of the Constitution is clear and unambiguous in its promise that any further detention subsequent to production before the judge of the nearest competent court after arrest, will only be "...in terms of the order of such judge made ***in accordance with procedure established by law***." According to the Supreme Court, if the decision or an action of a judge is not in accordance with the procedure established by law, the remedy available to the aggrieved party is to invoke the appellate or revisionary powers of the Appellate Courts.[1441]

Nevertheless, a breach, whether by a judicial officer or by an officer of the executive, of the procedure established by law in ordering detention or in exercising a discretion pertinent to ordering detention, is violative of the unequivocal fundamental right guaranteed by Art.13(2) of the Constitution. [1442] In such an instance how the victim can get relief against the violation of his/her Constitutionally guaranteed right by making an appeal to a court other than the Supreme Court remains a question. For, according to its own jurisprudence pertinent to the Constitution and fundamental

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custody pending further investigation, may after recording his reasons, by warrant addressed to the superintendent of any prison authorise the detention of the suspect for a total period of fifteen days...".

[1438] Compare Sec.115(2) of the Sri Lankan Criminal Procedure Code with Sec.167(2) of the Indian, Pakistani and Bangladeshi Criminal Procedure Codes.

[1439] Compare Sec.403(2) of the Sri Lankan Criminal Procedure with Sec.437(2) of the Indian Criminal Procedure Code and Sec.497(2) of the Pakistani and Bangladeshi Criminal Procedure Codes.

[1440] As mentioned before the Sri Lankan Supreme Court's exclusive fundamental rights jurisdiction under Art.126 of the Constitution is limited to investigating and granting relief against only those violations alleged to have been caused by 'executive or administrative' action.

[1441] With regard the situation in India Pakistan and Bangladesh concerning the judicial orders that violate fundamental rights see, *In re* Madhu Limaye, A.I.R. 1969 S.C. 1014 p.1019 para.14; Noor Hussain v. Superintendent, Darul Aman, Multan, and two other, P.L.D. 1988 Lahore 333 pp.335-336 para.7; Maimunnessa v. State, 26 D.L.R. (1974) 241.

[1442] See, for example, Kumarasinghe v. The Attorney General and others, SC App.54/82, SC Minutes of 6 September 1982 - in this case the Supreme Court conceded that a breach of a fundamental right could occur from wrongful exercise of judicial discretion.

rights, only the Supreme Court has the jurisdiction to review fundamental rights application and grant relief. Also, as the Court conceded in Saman v. Leeladasa and another, "(t)he provisions of the Constitution are supposed to provide a speedy and efficacious remedy...The remedy is speedy because the short time limits prescribed by the Constitution are rigidly enforced."[1443]

Although the Sri Lankan Supreme Court has consistently refused to assume jurisdiction to remedy even the blatantly obvious breaches of Art.13(2) made by judges at lower levels, because such breaches are conceived to be neither executive nor administrative action, in Siriyawathie v. Pasupathi and Janz[1444], the Court ordered the Petitioner, who was languishing in a jail for over seven years under an unlawful detention order issued by a Magistrate, to be compensated. In the Court's opinion, even though the detention order was illegal, the prison authorities who implemented the faulty order should have taken the appropriate measures under the rules made in pursuance of the Prison Ordinance to rectify the Magistrate's errors. By failing to do so, according to the Court, the prison authorities who are part of the executive, violated the Petitioner's right guaranteed by Art.13(2) of the Constitution. There seems to be no reason why this view cannot be adopted in all the other cases involving illegal detention orders. It must be noted that in all cases the detention orders are implemented not by the Magistrates who issue them but by the prison authorities.

Where there is a right, especially a Constitutional right, there must be a remedy (*ubi jus, ubi remedium*).[1445] Thus, without rendering the whole guarantee of Art.13(2) of the Sri Lankan Constitution illusory, a Constitutional amendment must be brought in to remove the restriction placed upon the Supreme Court's fundamental rights jurisdiction, i.e., the restriction that the Court can investigate and grant relief against only those violations alleged to have been caused by executive or administrative action, and make the judicial actions too subject to the fundamental rights regime.[1446] Until such time, it is submitted with respect that the Supreme Court must follow the view adopted in Siriyawathie v. Pasupathi and Janz[1447] case as the precedent in dealing with illegal detention orders issued by the judicial officers. This would not

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[1443] See, (1989) 1 Sri L.R. 1 at p.40.
[1444] SC App.112/86, SC Minutes of 28 April 1987.
[1445] See, See. Sakhi Daler Khan v. Superintendent in Charge, Recovery of Abducted Women, P.L.D. 1957 (W.P.) Lahore 813 p.823.
[1446] See the observations made by R.K.W.Goonesekere in 'Some aspects of the Law of Arrest', Tivanka Wickramasinghe Memorial Lecture, Delivered in January 1998, *The Bar Association Law Journal (1998) Vol. I Part. II*, p.51 at p.55.
[1447] SC App.112/86, SC Minutes of 28 April 1987.

only be beneficial to the detainees but also prevent an important Constitutional provision relevant to personal freedom from becoming redundant.

In all the South-Asian countries, except in Sri Lanka, from the moment of arrest the arrestee becomes entitled to consult and be defended by a legal practitioner of his/her choice. While in Nepal it is the duty of the arresting authority to inform the arrestee about this right, in India it is the duty of the Magistrate before whom the arrestee is produced to make him/her (the arrestee) aware of this right. Also, in India, Bangladesh and Nepal if the arrestee is unable to exercise this right because of indigence, the State is obliged to provide legal assistance free of charge. In order to make the protection against unlawful arrest effective, in Sri Lanka too the arrested persons must be accorded a right to consult and be defended by a legal practitioner of the arrestee's choice, which must accrue, at least, from the moment of arrest if not from the moment the suspicion of committing an offence is focused on the person concerned.

Under the European Convention everyone arrested is guaranteed, *inter alia*, (i) that he/she will not be deprived of personal liberty beyond the time period absolutely required by the circumstances involved, and (ii) in cases where the circumstances involved do not warrant release from custody that he/she will be tried within a reasonable time. Also, according to Strasbourg jurisprudence the accused persons who are in custody are entitled to have their case given priority and conducted with particular expedition. Similar guarantees are implicit under the due process clauses of the Constitutions of India, Pakistan, Bangladesh and Nepal. However, because of the harshness and detrimental affects of prolonged detentions, it is suggested that the South-Asian countries should have express guarantees in their Constitutions to ensure, (i) that no detainee will be deprived of personal liberty beyond the time period absolutely required by the circumstances of the case and, (ii) where detention is indispensable, that the trial would commence without unreasonable delay.

Out of the five South-Asian Constitutions only the Sri Lankan Constitution expressly provides a right to a fair trial. In the remaining four South-Asian States, the Constitutional guarantee of a fair trial in criminal proceedings is indirect. While in India, Pakistan and Nepal this guarantee is deduced from Art.21, Art.9 and Art.12(1) of the respective Constitution, in Bangladesh the accused persons have to invoke either Art.31 or Art.32 of the Constitution in order to claim a right to a fair trial. Nonetheless, in all five States the criminal trials are based on the Anglo-American adversarial system, under which the courts that determine the criminal liability of accused persons act more or less like umpires and do not take any side or show favour

or disfavour to any party. Also, under this system of administration of justice, the parties involved in a trial are treated equally and given a fair, adequate and equal opportunity to present their respective cases before the court. It is only after having a proper perspective of the issue(s) in question, that the court is expected to pronounce a verdict in favour of the party who has succeeded in proving its case according to law.[1448]

Although Art.35(3) of the Constitution of the People's Republic of Bangladesh does not mention the phrase "fair trial", it guarantees to the accused persons a right to trial by an independent and impartial tribunal established by law. Also, under Art.31 of the same Constitution, every accused person has an inalienable right to be treated in accordance with "law", which includes principles of natural justice as well as enacted law. On the other hand, albeit Art.4 of the Constitution of the Islamic Republic of Pakistan too guarantees to the accused persons a similar right, the Article does not appear within the Bill of Rights and accordingly does not confer a fundamental right. However, Art.9 of the Pakistani Constitution, which does appear within the Bill of Rights, requires every deprivation of life or personal liberty to be in accordance with enacted law. Art.4 of the Constitution is not only a supreme law of the land, but also part of the country's enacted law. Therefore, arguably, any breach of the requirements of Art.4, in particular any breach of the principles of natural justice, during proceedings which culminate in verdicts that impose sentences amounting to deprivation of life or liberty of convicts should give rise to a violation of the fundamental right guaranteed by Art.9.

Art.21 of the Indian Constitution guarantees to everyone a right not to be deprived of life or personal liberty except in accordance with procedure established by "law". Here also the word "law" includes the principles of natural justice as well as enacted law. Thus, in order for a sentence depriving a convict of his/her life or personal liberty to be lawful in India, the proceedings that imposed such a sentence must have been conducted in consonance with both, the principles of natural justice and the enacted law.

In Nepal, where the capital punishment is Constitutionally proscribed, deprivation of personal liberty of a convict as a punishment for an offence would fall foul of Art.12(1) of the Constitution unless the proceedings, upon which the conviction was

[1448] Note, most of the fundamental principles of the adversarial system of administration of justice have been incorporated as procedural safeguards in the Criminal Procedure Codes of India, Sri Lanka, Pakistan and Bangladesh.

founded and the punishment in question was imposed, have been conducted in accordance with both the enacted law as well as the principles of natural justice. However, it must be noted that an issue under Art.21 of the Indian Constitution or Art.9 of the Pakistani Constitution or Art.12(1) of the Nepali Constitution, concerning the conduct of penal proceedings can be raised only if at the end of such proceedings the accused has been awarded a sentence that deprives him/her of life (only in India and Pakistan) or personal liberty. In other words, in these three States only those accused persons who are suspected of committing offences that entail deprivation of life or personal liberty as a punishment have a Constitutional right to be treated in a just, fair, reasonable and lawful manner.

In India and Pakistan penal sentences that deprive an accused person of his/her life or personal liberty would offend the due process guarantee of the Constitution unless the procedural safeguards pertinent to fair trial laid down in the respective Criminal Procedure Codes have been properly followed during the proceedings which impose such sentence. In Bangladesh, irrespective of the nature of the punishment imposed, the criminal proceedings would be vitiated if the provisions of the Criminal Procedure Code relating to fair hearing have not been complied with. The reason being, under Art.31 of the Constitution, every accused person has a fundamental right to be treated in accordance with law.[1449] The Criminal Procedure Codes of these countries require the accused to be informed with certainty and accuracy the exact nature of the charge made against him/her. In India and Pakistan the Code also requires the accused to be provided with all the information and documents necessary for the preparation of his/her defence free of charge.[1450] The relevant Section of the Pakistani Criminal Procedure Code oblige the authorities to provide this information and material to the accused at least seven days before the commencement of the hearing. In Nepal, a trial can be declared unlawful if the charge and the grounds of the charge have not been informed to the accused.

Although the Criminal Procedure Codes of India, Pakistan and Bangladesh require the evidence to be taken in the presence of the accused, in none of these countries has the accused an unqualified right to be present at the hearing. The Courts in all three countries have the power to continue proceedings without the personal attendance of

[1449] However, the due process guarantee of the Constitutions of India, Pakistan and Bangladesh might not be attracted to violations of procedural laws unless a failure of justice has transpired.

[1450] Note, even though the Criminal Procedure Code of Bangladesh does not contain a similar requirement, the principles of natural justice, which is an integral part of the guarantee of both Art.31and 32 of the Constitution, might be offended unless the accused is given the information and documents necessary for the preparation of his/her defence.

the accused at the hearing, but in the presence of his/her pleader, if the interest of justice require so. However, if, while the accused is present in the court, any evidence is given in a language not understood by him/her, the Criminal Procedure Codes of the above three countries oblige the courts to take steps for the interpretation of such evidence to the accused in a language understood by him/her. If the accused appears by pleader and the evidence is given in a language other than the language of the court, and not understood by the pleader, the evidence must be interpreted to such pleader in the language of the court. In Nepal, it has been argued, that the accused has an inalienable right under Art.12(1) of the Constitution to be present at the trial.

The Criminal Procedure Codes of India, Pakistan and Bangladesh have also incorporated provisions to ensure that the accused gets an opportunity to defend him/herself properly and effectively. They have entitled the accused to cross examine the prosecution witnesses and adduce evidence to counter the arguments put forward by the prosecution against him/her. If the accused so applied, the Codes have obliged the courts to issue process for compelling the attendance of any witnesses or the production of any document or thing. In Nepal, a trial might be vitiated if the accused is not allowed to cross examine the prosecution witnesses or if he/she is not given an effective opportunity to defend him/herself.

Except in Sri Lanka in the other four South-Asian States, the Constitutions guarantee to the accused persons a right against self-incrimination. In Pakistan this right is available to anyone from the moment the suspicion of committing an offence is focused on him/her. In India and Bangladesh, the guarantee against self-incrimination becomes available from the moment the name of the person concerned is mentioned as an accused in a First Information Report or in a complaint instituted against him/her in a court. Further, while the exertion of physical pressure to make a person convict him/herself is sufficient to breach the guarantee of Art.35(4) of the Bangladeshi Constitution, in India the guarantee of Art.20(3) of the Constitution is breached whenever any mode of pressure, subtle or crude, mental or physical, direct or indirect, but sufficiently substantial, is applied for obtaining information from the person concerned suggestive of his/her guilt. However, in both these countries the guarantee against self-incrimination extends to incriminatory things as well as to incriminatory statements, whether oral or written. On the other hand, in Pakistan the guarantee of Art.13(b), which extends only to oral statements, is breached whenever a person is compelled to make a confession.

In Sri Lanka everyone charged with an offence has a right to be heard in person or by an attorney-at-law at a trial. In India, Pakistan, Bangladesh and Nepal the Constitutions guarantee to everyone arrested a right to be defended by a legal practitioner of his/her choice. If interpreted literally this means that in the last mentioned four countries an individual's right to be defended by a legal practitioner of his/her choice depends on whether he/she has been arrested, and not on whether he/she has been accused or suspected of committing an offence. However, in India, Bangladesh and Nepal, the accused can claim a right to be defended by a legal practitioner also under the due process guarantee of the respective Constitutions, viz., Art.21 of the Indian Constitution, Art.31 and 32 of the Bangladeshi Constitution, and Art.12(1) of the Nepali Constitution, all of which require the proceedings to be just, fair and reasonable.[1451] Except in Sri Lanka, in the other four South-Asian countries, the right to be defended by a legal practitioner of the accused person's choice accrues from the moment he/she is put under arrest.[1452] In Sri Lanka the Constitutional right to be heard by a counsel can be availed only at the trial stage.[1453]

Indigent accused in India, Bangladesh and Nepal have a right to receive free legal aid from the State. In India it is the duty of the Magistrate or the Sessions Judge to inform the accused that if he/she is unable to engage the services of a legal practitioner on account of poverty or indigence, he/she is entitled to obtain free legal services at the cost of the State. Nevertheless, it must be mentioned here that, except in Sri Lanka, in the other four South-Asian States, the right to be defended by a legal practitioner is not applicable to anyone who for the time being is an enemy alien.

In Sri Lanka, Art.13(5) of the Constitution guarantees to every accused person a right to be presumed innocent until he/she is proved guilty. In India, Pakistan and Bangladesh, the courts have recognised the presumption of innocence to be a part of the criminal process. This in effect has entitled the accused to remain silent until his/her guilt is established beyond reasonable doubt. Also, the rules of evidence in all four countries have imputed the burden of proof in criminal proceedings upon the prosecution.[1454]

[1451] However, it must be noted that, as mentioned earlier, the due process guarantee of the Indian, Pakistani and Nepali Constitutions can be invoked by only those persons who have been sentenced to death or sentenced to punishments amounting to deprivation of personal liberty. On the other hand, Sec.303 of the Indian Criminal Procedure Code, Act II of 1974, Sec.340 of the Pakistani Criminal Procedure Code of 1898 and Sec.340 of the Bangladeshi Criminal Procedure Code of 1898 guarantee to every accused person, whether arrested or not, a right to be defended by a pleader of his/her choice at the trial, irrespective of the nature of the offence involved.

[1452] Note, in Nepal the authorities are obliged to inform the arrestee about this right.

[1453] See, Wijaya Kumaranatunga v. Samrasinghe and others, FRD (2) 347 p.361.

[1454] With regard the situation in Sri Lanka see Sec.101-102 of the Evidence Ordinance.

Art.35(3) of the Bangladeshi Constitution guarantees to every accused person a right to a speedy trial. According to the Supreme Court of India, speedy trial is a fundamental right implicit in the guarantee of Art.21 of the Constitution.[1455] In Nepal, as has been argued by Dr.Amir Ratna Shrestha, Art.12(1) of the Constitution might be offended unless criminal proceedings are completed within a reasonable period of time.

In Bangladesh, the accused have been constitutionally guaranteed a right to a public trial by an independent and impartial tribunal established by law. Although the Constitutions of the other four South-Asian countries have incorporated provisions to ensure the independence of the judiciary, none of those provisions confer any fundamental right upon the accused persons. However, as the Pakistani Supreme Court has held, the State, as defined by Art.7 of the Constitution, can be held responsible of violating Art.9 of the Constitution, if it, i.e., the State, has failed to establish independent and impartial courts. Also, it must be noted that in India, and in Pakistan and Bangladesh too, an issue under due process guarantee of the respective Constitutions could be raised if any of the provisions, relating to public trial by an independent and impartial tribunal, of the Criminal Procedure Codes of these countries have been violated during proceedings which sentence the accused persons to punishments amounting to deprivation of life or personal liberty.

Indisputably, the right to a fair trial is the most important feature of a civilised system of criminal justice administration. It makes a crucial difference between rule by law and rule by caprice. All the other guarantees pertinent to criminal proceedings would be of little or no use without a proper guarantee of a fair trial. Whether the protection provided by the Constitutions of the five South-Asian States as regards the right to a fair trial in criminal proceedings meets the standard set by the European Convention is somewhat doubtful. Although the Sri Lankan Constitution has expressly guaranteed to the accused persons a right to a fair trial, because of the limited nature of the Supreme Court's fundamental rights jurisdiction, the right can be invoked only against executive or administrative action.

The aim of Art.31 of the Constitution of Bangladesh is to guarantee a right to due process. Art.21 of the Indian Constitution, Art.9 of the Pakistani Constitution, Art.32 of the Bangladeshi Constitution and Art.12(1) of the Nepalese Constitution are all

[1455] However, it must be noted that Art.21 of the Indian Constitution can be invoked only if questions relating to life or personal liberty is involved.

designed primarily to provide protection against arbitrary deprivation of personal liberty. Although from the aforementioned Constitutional provisions the Courts in the above four countries have deduced a right to a fair trial, and have thereby attempted to fill a lacuna in the respective Constitution, these endeavours cannot be regarded as satisfactory, as the court decisions are open to over-ruling at any time. Also, as mentioned before, in India, Pakistan and Nepal, under the existing Constitutional framework, the guarantee of fair trial in criminal proceedings can be invoked only if a sanction amounting to deprivation of personal liberty is involved.

An all important right like the right to a fair trial must not derive from, or depend upon judicial interpretations. Further, whatever the nature of the punishment at risk, or even if a punishment is not imposed at all, everyone accused of committing an offence must be made entitled to a fair trial. Because, even a conviction *per se* could have severe mental and social impact upon the individual concerned. As the Strasbourg organs have noted, the right to a fair trial holds a prominent place in democratic societies. The absence of a firm and unambiguous assurance of a fair trial could, especially in the times of turmoil which any democratic society might go through sometime, seriously undermine the confidence of public in the system of criminal justice administration. For these reasons, it is submitted that in India, Pakistan, Bangladesh and Nepal the right to a fair trial, with all its concomitant guarantees, must be expressly recognised by the respective Constitution as a right independent of other rights relating to personal liberty. In Sri Lanka, if Art.13(3) of the Constitution is to be of any significance for the upholding of the rule of law, the Supreme Court must be given the jurisdiction to review judicial action that violates the fundamental right to a fair trial. It is further submitted that, in all the South-Asian countries, as under the European Convention, (i) the word "criminal" must be given a broad meaning so as to include within its domain all offences that entail sanctions of punitive nature, (ii) the right to a fair trial and other attendant guarantees, inclusive of especially the guarantee of speedy conclusion of proceedings, must accrue from the moment the suspicion of committing an offence is focused on a person.

As regards protection against retroactive penal laws and penalties, while the Constitutions of India, Sri Lanka and Bangladesh have prohibited the conviction under *ex post facto* laws, the Constitutions of Pakistan and Nepal have made it unlawful to inflict any punishment under such laws. However, in all five countries it is unconstitutional to impose upon an offence a penalty greater than that which might have been inflicted under the laws in force at the time of the commission of the offence. Moreover, in Pakistan and Bangladesh, it is against the Constitution to inflict

a penalty which is different from the one prescribed by the laws in force at the time of the alleged offence.

In India, Sri Lanka, Pakistan and Bangladesh, it is not unconstitutional to apply with retrospective effect the laws which mollifies the rigour of a penal sanction. But in India, a subsequent decriminalisation cannot have any affect on the offences which have already been committed, though it may be considered in the imposition of penalties. Further, in all five South-Asian countries the guarantee against *ex post facto* laws can be availed upon only by those who have been charged before, or convicted by, a criminal court. Nonetheless, in Pakistan and Bangladesh, the Constitutional prohibition against *ex post facto* laws cannot be evaded by giving a civil form to a measure which is essentially criminal.

As per the Supreme Court of Bangladesh any changes in the procedural laws with retrospective effect is not against the guarantee relating to *ex post facto* laws. Although the prohibition against *ex post facto* legislation in the Pakistani Constitution does not prevent the legislature from making changes in the procedural laws or making changes relating to the jurisdiction and composition of judicial tribunals with retrospective effect, such changes remain valid only insofar as they do not impair the substantial protections afforded to the accused by the laws in force at the time of the alleged offence. Also, in Pakistan, amendment of prison regulations relating to remission, which in effect increases the period of imprisonment to a larger term than the period prescribed by such regulation on the date of the commission of the offence, would be repugnant to the guarantee of Art.12. On the other hand, in India and Sri Lanka, any retrospective application of changes in both, the procedural laws as well as the rules relating to law of evidence, is not violative of the Constitutional guarantee against *ex post facto* laws. However, it must be noted that retroactive application of changes in the law of evidence, for example, retroactive application of changes in the rules of evidence that impute the burden of proof upon the prosecution, can be seriously detrimental to the accused.

Further, in Pakistan a statute depriving an accused of the discretion given to the court under the law in force at the time of the offence to pass any sentence between the maximum and the minimum sentences, by fixing his/her sentence at a definite term, operates to increase the punishment. This is so even if the term so fixed is less than the maximum prescribed by the law in force at the time of the offence. On the other hand in Sri Lanka, as the Constitution has expressly recognised, the imposition of a minimum penalty for an offence, insofar as such penalty does not exceed the

maximum penalty prescribed for such offence at the time such offence was committed, is not against the guarantee of Art.13(6).

Only the Constitutions of Pakistan Bangladesh and Nepal have provided protection against second prosecution and punishment for persons who have already been either convicted or acquitted for the same offence by a court of competent jurisdiction. In India Constitutional protection against second prosecution and punishment is available to only those who have been previously punished for the same offence by a court of competent jurisdiction. It is submitted that, (i) in Sri Lanka protection against double prosecution and punishment must be made a fundamental right, and (ii) in India the concept of *autrefois acquit* must be recognised as part of the guarantee against double jeopardy.

None of the South-Asian Constitutions has expressly guaranteed to the accused persons a right to appeal against conviction, although they all have recognised the jurisdiction of the superior courts to review the decisions of the lower courts. Nor do the accused in these five States have any express right to compensation in the case of unlawful arrest or miscarriage of justice. On the other hand these are standard guarantees accused persons enjoy under the European Convention on Human Rights.

As is evident from this research the criminal jurisprudence of the European Convention is much more refined and explicit than that of the South-Asian Constitutions. For two main reasons this is not surprising. Firstly, the Courts in the South-Asian countries which interpret and give effect to fundamental rights of the national Constitutions are not specialised human rights institutions like the European Court of Human Rights and the European Commission of Human Rights. They, i.e., the South Asian Courts, deal with matters relating to fundamental rights in the midst of thousands of other duties. Also, the domestic courts could be vulnerable to various pressures and problems that exist at national level. As Krishna Iyre has noted under the heading "The Escalating Pathology of the Indian Judiciary - Some Reflections",

> "(o)ur Republic today reels, our democracy dithers, our people perish because justice dies under the upas tree of overt and covert vices in the Power Process and judges themselves often jettison those qualities which make them the impregnable refuge of those victims of injustice inflicted by the oblique Executive, the value-neutral Legislature and the ubiquitous, hydra-headed mafia which controls the State's Controllerate itself."[1456]

[1456] See, V.R.Krishna Iyre, *Access to Justice - A Case for Basic Change* (Delhi: B.R.Publishing Corporation 1993), p.1. For the situation in Nepal see, Kusum Shrestha, 'Our Judiciary in Limbo', in *Essays an Constitutional Law*, Vol.7 (1991), Nepal Law Society, Kathmandu, p.56.

Secondly, as Patricia Hyndman has rightly observed, the "...national guarantees of fundamental rights, however impressive their appearance, will only be as effective as those wielding real power allow them to be."[1457] This observation is corroborated by the state of fundamental rights in Sri Lanka, where fundamental rights can be enforced only against executive or administrative action. To cite a few more examples from South-Asia in support of Patricia Hyndman's observation are, (i) the placement of a narrower definition upon the term "crime" by the courts in the region which severely restricts the application of fundamental right relating to criminal procedure, (ii) the situation in Pakistan as regards the rights against self-incrimination, which according to the Lahore High Court does not extend to written statements and incriminatory things, (iii) the view of the Indian and Sri Lankan Superior courts that the retroactive application of rules relating to law of evidence is not violative of the Constitutional guarantee against *ex post facto* legislation.

It follows that Constitutional guarantees and occasionally delivered court judgements alone, no matter how explicit and impressive they may be, are not sufficient to protect the fundamental rights and freedoms of the individuals. Along with such guarantees and judgements there must also exist by and large among those who hold and wield power, a culture of recognising and respecting the dignity of each and every human being irrespective of his/her social and economic status. In this regard, whether the present situation in the South-Asian states considered in this research meet the situation in the Member States of the European Convention is extremely doubtful. Unless some forms of radical change, for instance supra-national monitoring which is free of national prejudices and pressures, are agreed upon to supervise the effective implementation of fundamental rights by the national authorities, such a culture might not evolve at all or take a very long time to evolve. For, as history demonstrates, never or seldom will there spontaneously arise among those who hold and wield power, a willingness to respect the dignity and rights of the subjects.

Moreover, the five South-Asian states considered in this research are home to more than 1.189 billion people, more than a sixth of the planet's population, of whom most are illiterate, politically ignorant and immature, and live in abject poverty. Under such circumstances, the adult franchise upon which the parliamentary democracy of the five States is based, could result in bringing to power governments that do not have the capacity of acting rationally, without passion and in terms of constitutional

[1457] See, Patricia Hyndman, 'Sri Lanka : A Study in Microcosm of Regional Problems and the Need for More Effective Protection of Human Rights', *Denver Journal of International Law and Policy*, Vol.20:2 (1992) 269 p.294.

tradition. There is a great potential for such a government, as well as for a government that comes into power through a *coup d'etat*, which has been a common occurrence in some of the South Asian countries[1458], to act in total disregard of human dignity, especially when revolutionary spirits or spirits of nationalism take them over. It is worthwhile to quote Teitgen, Rapporteur of the Committee on Legal and Administrative Questions, from the speech made to the Consultative Assembly of the Council of Europe on 7th September 1949;

> "(a)n honest man does not become a gangster in twenty-four hours. When an honest man suddenly does something very wicked, it means that he had long been corrupted by evil. In thought and conscience he succumbed to temptation. He had become familiar with the misdeed which he was going to commit. He slowly descended the steps of the ladder. One day evil carried him off and he became a blackguard. Democracies do not become Nazi countries in one day. Evil progresses cunningly, with a minority operating, as it were, to remove the levers of control. One by one freedoms are suppressed, in one sphere after another. Public opinion and the entire national conscience are asphyxiated. And then, when everything is in order, the 'Führer' is installed and the evolution continues even to the oven of crematorium. It is necessary to intervene before it is too late. A conscience must exist somewhere which will sound the alarm to the minds of a nation menaced by this progressive corruption, to warn them of the peril and to show them that they are progressing down a long road which leads for, sometimes even to Buchenwald or Dachau."[1459]

It must be noted that a supra-national human rights monitoring mechanism can not only function as a warning system that scrutinises the policies and goals of governments, but also establish a web of obligations for the governing elites to rule for the good of all.

In the absence of a truly universal community, the efforts undertaken at global level, mainly by the United Nations, to protect and promote liberties and freedoms of individuals by scrutinising the activities of domestic authorities have proved to be ineffective. The constantly conflicting interests of politically, economically, as well as culturally diverse member states have rendered the macro UN human rights agendas largely unworkable. Often-levelled allegations about the sincerity of members in resolving human rights problems have turned most of the international bodies that are meant to address and ameliorate the suffering of individuals into bickering political platforms. Also, the exorbitant costs and the cumbersome procedures involved have put even the few available universal mechanisms beyond the reach of billions of poor individuals who are the likeliest to be denied fundamental liberties and freedoms in the hands of unscrupulous and despotic authorities.

[1458] There has been several military coups in Pakistan and Bangladesh since they gained independence. In October 1999 in the latest coup once again the Pakistani Military sacked the democratically elected government and took over the running of the country.

[1459] Collected Edition of the "Travaux Preparatoires" of the European Convention on Human Rights Vol. I (Hague: Martinus Nijhoff 1975), p.292.

However, during the last fifty years it has been proved, especially in Europe, that mechanisms made at regional levels to protect and promote human rights are much more effective in scrutinising abuse and misuse of state power than universal mechanisms. The more homogeneous political, economical, social and cultural surroundings of the regions, together with the relatively small number of the participants, have enabled the regional mechanisms to surmount most of the ideological and dogmatic differences that impede the proper functioning of universal mechanisms. This in turn has diverted most of the regional mechanisms' energies of collectiveness towards actual protection of liberties and freedoms of individuals rather than wasting them on resolving contentious substantive issues.

Nevertheless, it must be admitted here that, although highly desirable, it is quite quixotic to expect the economically underdeveloped South-Asian countries to agree upon a "comprehensive" regional mechanism to enforce collectively all the human rights recognised in contemporary international law. Under the present circumstances of the region such a project would undoubtedly take a very long time to materialise. Rather than waiting until the conditions become conducive for the creation of a "comprehensive" human rights agreement, it would be much more sapient to approach the issue of protection of liberties and freedoms of individuals in South-Asia step-by-step, in parallel with the economic and social development of the countries in the region. What is important is to bring the countries together and initiate a collective human rights enforcement mechanism. It is not necessary that such a mechanism should begin with incorporating all the human rights recognised in present international law. The argument that structural approaches would jeopardise the indivisibility and interdependency of human rights should be ignored. Human rights are there not for the human rights' sake. Nor are they there for the formulation of academic theories. They were developed to protect the dignity of human beings.

Moreover, there is no "all or nothing" rule in human rights law. Not even the European Convention began with incorporating all the human rights recognised in international law of the time. Therefore, the process of building a regional forum for the collective protection of liberties and freedoms of individuals in South-Asia may begin at the outset with incorporating a common formula of rights agreeable to all states concerned. Once that forum is in operation its functions would certainly raise the level of consciousness about human rights making way for the subsequent incorporation of other rights.

The rights relating to criminal justice administration could provide an ideal starting point for the establishment of a supra-national human rights mechanism in South-Asia. As can be seen from this research there are not any potentially major legal problems among the countries that prevent the creation of a common regional formula required for such an endeavour. The manner in which the suspects and accused are treated in the neighbouring countries coincide to a great extent. Also, all five countries follow, unlike the Member States to the European Convention, the Anglo-American adversary system of administration of justice. Moreover, four out of the five countries, viz.. India, Sri Lanka, Pakistan and Bangladesh, have very similar Criminal Procedure Codes which derive from a single root. Further, lack of resources and economic-underdevelopment are not impediments for effective implementation of the rights relating criminal justice administration. Furthermore, these rights could without much difficulty go hand in hand with the economic development process. What is needed is a genuine willingness among those who hold and wield power at national level to come to a single platform with their neighbouring counterparts to address collectively each others problems concerning the effective protection of human rights and fundamental freedoms.

One may consider the current political tensions existing among some of the South-Asian countries as an obstacle for the creation of a regional human rights mechanism.[1460] However, what is advocated here is not the political integration in South-Asia but the creation of a regional mechanism based on mutual respect and equality, and tailored to suit the particular needs of the region, to address and redress collectively the burning human rights problems of each country which often have been the cause of political tension with their neighbours.[1461] On the other hand, whatever the present political tensions, there are other factors which link the South-Asian neighbours together. Most important of all is the ancient history and culture common to all these countries.[1462] Also, they all have similar social and economic conditions and challenges. Further, four out of the five countries share a legacy of being ruled by the British colonials, who left the same unfading mark on the legal and Constitutional traditions of the four countries. Furthermore, all five countries have pluralistic societies, which makes an objective supra-national human right monitoring

[1460] See, for example, Christian Wagner, *Regional Cooperation in Europe and South Asia : Can the European Union Serve as a Model for SAARC*, (Kathmandu: Nepal Foundation for Advanced Studies), pp.5-12.

[1461] See. for example, E.Sudhakar, *SAARC : Origin, Growth & Future*, (New Delhi: Gyan Publishing House. 1994).

[1462] As Sudhakar notes, "...the States of South Asia with their racial, social, cultural and ethnic homogeneity and common historical background had all the necessary conditions for the growth and success of a regional organisation." See, Sudhakar, *SAARC : Origin, Growth & Future*, ibid., p.3.

mechanism, relatively free of ethnic, religious or other potential prejudices that might exist at national level, *a fortiori* appropriate for the region.

Moreover, notwithstanding the political tensions, the countries in the region have already established a regional inter-governmental organisation, namely, South-Asian Association for Regional Co-operation (SAARC), which includes in addition to the five countries considered in this research, Bhutan and Maldives, in order, among other things, (i) to promote the welfare of the peoples of South-Asia and to improve their quality of life, (ii) to accelerate economic growth, social progress and cultural development in the region and to provide all individuals the opportunity to live in dignity and to realise their full potentials.[1463] If the necessary will is there, this existing inter-governmental framework of SAARC can be used as the basis for the creation of a regional human rights mechanism. Such a mechanism would, as has been demonstrated by the European Convention on Human Rights during the last fifty years in a Continent that was devastated by two World Wars within a relatively short period of time before the coming into force of the Convention, not only be beneficial to the individuals, but also on a broader scale safeguard the democratic institutions of the participants and bring much desired peace, stability and harmony to the South-Asian region which are the essential preconditions of regional co-operation as well as economic, social and human development.

[1463] See, Art.1(a) and (b) of the Charter of The South-Asian Association for Regional Co-operation.

Table of Cases

India

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European Commission on Human Rights

European Court of Human Rights

Others

Bibliography

A.S.Chaudhari's Constitutional Rights & Limitations, second edition, edited by Dr.D.S.Arora, [Allahabad: Law Book Company (P) Ltd. (1990]

Amerasinghe, A.R.B., *Our Fundamental Rights of Personal Security And Physical Liberty*, (Ratmalana: Sarvodaya Book Publishing Services1995).

Andrews, John A. (editor), *Human Rights in Criminal Proceedings : A Comparative Study*, (Boston: Martinus Nijhoff Publishers 1982).

Aryal, Ravi Sharma, 'Remedial Right Under the Constitution of the Kingdom of Nepal', *Essays on Constitutional Law*, Vol.18 (1994), Nepal Law Society, Kathmandu, p.97.

Azad, Ghulam Murtaza, *Judicial System of Islam,* (Islamabad: Islamic Research Institute, International Islamic University 1987).

Basu, D.D., "Constitutional Documents", Vol.I, 5th edition (Calcutta: S.C.Sarkar & Sons Pvt. Ltd. 1968).

Basu, D.D., "Introduction to the Constitution of India", 7th edition (New Delhi: Prentice-Hall of India Pvt. Ltd. 1995)

Basu, D.D., *Commentary on the Constitution of India*, Vol.II fifth edition, [Calcutta: S.C.Sakar & Sons (Private) Ltd. 1965}.

Basu, D.D., *Human Rights in Constitutional Law* (New Delhi: Prentice-Hall of India Pvt. Ltd. 1994).

Batra, Manjula, *Protection of Human Rights in Criminal Justice Administration : A Study of the Rights of Accused in Indian and Soviet Legal Systems* (New Delhi: Deep & Deep Publication 1989)

Beddard, Ralph, *Human Rights and Europe*, third edition (Cambridge: Grotius Publications Ltd.)

Bernhardt, Rudolf, "Reforms of the Control Machinery Under the European Convention on Human Rights : Protocol No.11", 89 *AJIL* (1995) 145.

Bhargava, Kant Kishore, *et al* (editors), "Shaping South Asia's Future : Regional Cooperation" (New Delhi: Vikas Publishing House Pvt. Ltd. 1995).

Bodenhamer, David, *Fair Trial : Rights of the Accused in American History*, (New York: Oxford University Press 1992)

Buergenthal, Thomas, "The Effect of the European Convention on Human Rights on the Internal Law of Member States", in *The European Convention on Human Rights*, (London: Stevens & Sons Ltd. 1965).

Castberg, Frede, *The European Convention on Human Rights*, edited by Torkel Opsahl and Thomas Ouchterlony (New York: Oceana Publications Inc. 1974).

Chaudhari & Chaturvedi's Law of Fundamental Rights, 4th edition [Allahabad: Law Publishers (India) Pvt. Ltd. 1995].

Collected Edition of the "Travaux Preparatoires" of the European Convention on Human Rights Vol. I (Hague: Martinus Nijhoff 1975).

Collins, Henry (editor), "Thomas Paine : Rights of Man" (Penguin Books1969).

Cooray, J.A.L., "Constitutional and Administrative Law of Sri Lanka" (Colombo: Sumathi Publishers 1995).

Cooray, J.A.L., "Constitutional Government and Human Rights in a Developing Society" (1969).

Creamer, J.S., *The law of Arrest, Search and Seizure*, third edition (London: Holt Rinehart and Winston 1980).

Dhungel, Surya PS *et al*, *Commentary on the Nepalese Constitution*, (Kanthmandu: DeLF 1998)

Dolle, Sally, 'Liberty and security of person', in *International Human Rights Law in the Commonwealth Caribbean*, ed. by Angela Byre and Beverly Y Byfield (Netherlands: Kluwer Academic Publications 1991), 33.

Drzemczewski, Andrew, "Principal Characteristics of the New ECHR Control Mechanism, As Established by Protocol No.11, Signed on 11 May 1994", 15 *HRLJ* (1994) 81.

Fawcett, J.E.S., *The Application of the European Convention on Human Rights*, (Oxford: Clarendon Press 1987).

Gajendragadkar, P.B., "The Constitution of India : Its Philosophy and Basic Postulates" (Oxford University Press1970).

Goonesekere, R.K.W., 'Some aspects of the Law of Arrest', Tivanka Wickramasinghe Memorial Lecture, Delivered in January 1998, *The Bar Association Law Journal (1998) Vol.I Part.II*, p.51.

Golsong, H., "The Control Machinery of The European Convention on Human Rights" in *The European Convention on Human Rights*, (London: Stevens & Sons Ltd. 1965).

Gupta, Bhabani Sen (editor), "Regional Cooperation and Development in South Asia" (New Delhi: South Asia Publishers1986).

Gupta, U.N., *Constitutional Protection of Personal Liberty in India - A Comparative and Case Law Study* (University of Allahabad 1970).

Hansaria, B.L., *Right to Life and Liberty Under the Constitution* (Bombay: N.M.Tripathi Private Ltd. 1993).

Harris, D.J., O'Boyle, M. and Warbrick, C., *Law of the European Convention on Human Rights*, (London: Butterworths, 1995).

Hood Phillips, O. and Jackson, Paul, "O.Hood Phillips' Constitutional and Administrative Law", Seventh edition (London: Sweet & Maxwell1987).

Hussain, Muhammed Sohul, *Cr.P.C Today*, third edition (1996).

Hyndman, Patricia, 'Sri Lanka : A Study in Microcosm of Regional Problems and the Need for More Effective Protection of Human Rights', *Denver Journal of International Law and Policy*, Vol.20:2 (1992) 269.

Islam, Mahmudul, *Constitutional law of Bangladesh* (Dacca: Bangladesh Institute of Law and International Affairs 1995).

Iyre, V.R.Krishna, *Access to Justice - A Case for Basic Change* (Delhi: B.R.Publishing Corporation 1993).

Jacobs, F.G. and White, R.C.A., *The European Convention on Human Rights*, Second Edition (Oxford: Claredon Press 1996)

Jennings, Ivor, "The Approach to Self-Government" (Cambridge University Press1956).

Jois, M.Rama, "Legal and Constitutional History of India" (Bombay: N.M.Tripathi Pvt. Ltd. 1990).

Kelkar, R.V., *Lectures on Criminal Procedure*, 2nd Edition, revised by Dr.K.N.Chandrasekharan Pillai, (Lucknow: Eastern Book Company, 1990).

Khatri, Sridar K. (editor), "Regional Security in South Asia" (Kathmandu: Centre for Nepal and Asian Studies, Tribhuvan University 1987).

Khoder, Mohammad, *Human Rights in Islam*, edited and translated by Dr.Zaid A. Al-Husain (1988).

Kusum Shrestha, 'Fundamental Rights in Nepal', *Essays on Constitutional Law*, Vol.15 (1993), Nepal Law Society, Kathmandu, 1 p.27.

Mahmood, Dilwar M.,"The Law of Preventive Detention", second edition (Lahore: Ifran Law Book House 1992)

Miller, C J, *Contempt of Court*, Second Edition (Oxford: Clarendon Press 1989).

Mishra, Pramod Kumar, "South Asia : Conflicts and Cooperation" (Delhi: Kalinga Publications 1997).

Monir, *Principles and digest of the Law of Evidence* (The University Book Agency 1967).

Munim, F.K.M.A., *Rights of the Citizens Under the Constitution and Law* (Dacca: Bangladesh Institute of Law and International Affairs 1975).

Munir, Muhammad, *Constitution of the Islamic Republic of Pakistan*, Vol.I (Lahore: P.L.D. Publishers 1996).

Murdoch, Jim, 'Safeguarding the liberty of the person: Recent Strasbourg Jurisprudence', 42 *ICLQ* (1993) 494.

Nigam, K.K, 'Due Process of Law : A Comparative Study of Procedural Guarantees Against Deprivation of Personal Liberty in the United States and India', *Journal of Indian Law Institute*, Vol.4 (1962) 99.

Nyaupane, Gunanidhi, 'A Critical Appraisal of Due Process of Law Under the Napalese Constitution', *Essays on Constitutional Law*, Vol.17 (1994) Nepal Law Society, Kathmandu, p.28,.

Osborne, Craig, 'Hearsay and the European Court of Human Rights', 1993 *Criminal Law Review* 255.

Patwari, A.B.M.Mafizul Islam, *Liberty of the People : Britain and Bangladesh*, (Dhaka: Institute of Human Rights and Legal Affairs 1987).

Patwari, A.B.M.Mafizul Islam, *State of Fundamental Right to Personal Liberty* (Thesis submitted for the Degree of Doctor of Philosophy in the University of Dhaka 1985).

Peiris, G.L., "Criminal Procedure in Sri Lanka", second edition (Pannipitiya: Stamford Lanka Pvt. Ltd.1998).

Pirzada, S.Sharifuddin, *Fundamental Rights and Constitutional Remedies in Pakistan* (Lahore: P.L.D. Publishers).

Ramachandran, V.G., *Fundamental Rights and Constitutional Remedies*, Vol.II, second edition (Lucknow: Eastern Book Company 1982).

Ramakant and P.L.Bhola (editors) "Post Cold War Developments in South Asia" (Jaipur: RBSA Publishers 1995).

Ramkant and Upreti, B.C. (editors), "Nation Building in South-Asia" (New Delhi: South-Asian Publishers1991).

Ratanlal Ranchhoddas and Dhirajlal Keshavlal Thakore, *Ratanlal & Dhirajlal's The Code of Criminal Procedure*, 15th edition (New Delhi: Wadhwa and Co. 1997).

Robertson, A.H. and Merrills, J.G., *Human Rights in Europe*, 3rd Edition (Manchester: Manchester University Press 1994).

Schermers, Henry G., "The Eleventh Protocol to the European Convention on Human Rights", 19 *ELR* (1994) 367.

Seervai, H.M., *Constitutional law of India : A Critical Commentary*, Second edition, Vol.I (Bombay: N.M.Tripathi Pvt. Ltd. 1975).

Sharma, S.N., *Personal Liberty Under Indian Constitution* (New Delhi: Deep & Deep Publications 1991).

Sharvananda, S., *Fundamental Rights in Sri Lanka - A Commentary* (1993).

Shrestha, Amir Ratna, 'An Overview of the Fundamental Rights Relating to Criminal Justice in the Constitutional Law of Nepal', *Essays on Constitutional Law*, Vol.22 (1996), Nepal Law Society, Kathmandu, p.57.

Shrestha, Amir Ratna, 'Constitutional Criminal Jurisprudence in Nepal', *Essays on Constitutional Law*, Vol.14 (1993), Nepal Law Society, Kathmandu, 23.

Shrestha, Amir Ratna, 'Constitutional Rights Relating to Criminal Justice in Constitutional System of Nepal' in *Essays on Constitutional Law,* Vol.18 (1994), Nepal Law Society, Kathmandu, p.47.

Shrestha, Kusum, 'Fundamental Rights in Nepal', *Essays on Constitutional Law*, Vol.15 (1993), Nepal Law Society, Kathmandu, 1.

Shrestha, Kusum, 'Our Judiciary in Limbo', in *Essays an Constitutional Law*, Vol.7 (1991), Nepal Law Socisty, Kathmandu, p.56.

Siddiqui, Fakhar-ud-Din, *The Code of Criminal Procedure*(Lahore: Punjab Law House 1996).

Stavros, Stephanos, *The Guarantees for Accused Persons Under Article 6 of the European Convention on Human Rights*, (London: Matinus Nijhoff Publishers 1993).

Sudhakar, E., *SAARC : Origin, Growth & Future* (New Delhi: Gyan Publishing House, 1994).

Tanca, Antonio, 'Human Rights, Terrorism and Police Custody: The Brogan Case', 1 *EJIL* (1990) 269.

Thapa, Dhruba Bar Singh, 'Crisis in Constitutionalism', in *Essays on Constitutional Law*", Vol.22 (1996) 1.

The Commentary on Article 3, Explanatory Report of the European Convention on the International Validity of Criminal Judgments, as quoted in the Explanatory Report Relating to Protocol No.7, 6-7 *HRLJ* (1985/86) 82 p.85 para.22.

Trechsel, Stefan, 'The Right to Liberty and Security of the Person - Article 5 of the European Convention on Human Rights in the Strasbourg Case Law', 1 *HRLJ* 88.

Tripathi, Hari Bansh, 'The Preambular Promise of Our Constitution', in *Essays on Constitutional Law*, Vol.14 (1993), Nepal Law Society, Kathmandu, p.1.

U.S. Department of State, Nepal Country Report on Human Rights Practices for 1998, Released by the Bureau of Democracy, Human Rights, and Labor, February 26, 1999.

Ullah, Al Haj Mahomed, *The Administration of Justice in Islam : An Introduction to the Muslim Conception of the State*, (Lahore: Law Publishing Company).

Van dijk, P. and van Hoof, G.J.H., *The Theory and Practice of the European Convention on Human Rights*, second edition (Deventer: Kluwer Law and Taxation Publishers 1990).

Wagner, Christian, *Regional Cooperation in Europe and South Asia : Can the European Union Serve as a Model for SAARC*, (Kathmandu: Nepal Foundation for Advanced Studies).

Wheare, K.C., "Modern Constitutions" (London: Oxford University Press1956).

Wickramaratne, Jayampathy, *Fundamental Rights in Sri Lanka* (New Delhi: Navrang Booksellers and Publishers 1996).

Wilkins, Leslie T., "The Relative Nature of Deviance", in "Crime and Justice", Vol.I, "The Criminal in Society", edited by Leon Radzinowicz and Marvin E.Wolfgang (London: Basic Books Inc. Publishers 1971).

Zaffar, Emmanuel, *Constitution of the Islamic Republic of Pakistan 1973*, Vol.I (Lahore: Ifran Law Book House 1992/93).