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Subject: **Law**

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- Content for Post Graduate Courses

Paper : **Criminal Justice Administration**

Module : **Constitutional Foundations of the Criminal Justice Administration**

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DESCRIPTION OF MODULE

Items	Description of Module
Subject Name	Law
Paper Name	Criminal Justice Administration
Module Name/Title	Constitutional Foundations of the Criminal Justice Administration
Module Id	Law/CJA/I
Objectives	Learning Outcome: • To locate and expound the constitutional norms that relate to CJA • To present a comprehensive understanding of the substantive, procedural and adjective issues that are shaped by the constitutional guarantees • To create an understanding of the large scale non-compliance with the guarantees in reality • To understand the role of judicial rulings that impact the Criminal Justice Administration realities.

Prerequisites	General understanding of the provisions of Constitution of India, Code of Criminal Procedure
Key words	Constitutional foundations, linkages, non-compliance, criminal justice administration, constitutional guarantees, juridical reality and existential reality.

INTRODUCTION

The most vital and enduring transformation in the nature of the Rule of Law in India occurred in the 1950ôs, with the coming into force of the Constitution of India, 1950. The Constitution provided legitimacy to the pre-independence British lawôs such as the Indian Penal Code, 1860, the Indian Evidence Act, 1872 and the Criminal Procedure Code, 1898, on the one hand, and served as the legal touchstone for all the future criminal justice laws, on the other. Such a close and integral relationship between the Constitutional guarantees and the constituent laws comprising the CJA has hitherto remained unexplored and ignored, by and large. Mr A.G. Noorani, has lamented this tendency in these words (in the Foreword to Handbook of Human Rights and Criminal Justice in India, SAHRDC, O.U.P., 2007): ñWhile every work on British constitutional law discusses at length the status and powers of police, books on Constitution of India ignore the profound importance of the police is a polity governed by the rule of law.ò (p. xii). Similar disconnect obtains in the text books on criminal law and criminal procedure laws too, when, unlike most of the modern British text books, our books do neither care to cite nor recognize the constitutional guarantees as the foundations of the CJA principles and policies. The implementation level realities strengthens the state of dis-connect between the constitutional norms and the CJA further, thereby broadening the disjuncture between the juridical reality and the existential reality. The present module endeavors to remind the readers of the close link between the constitutional guarantees and CJA norms and explore also the reasons for the growing gap between the normative promises and the existential realities.

What – provisions constitute the 'Constitutional Foundations'

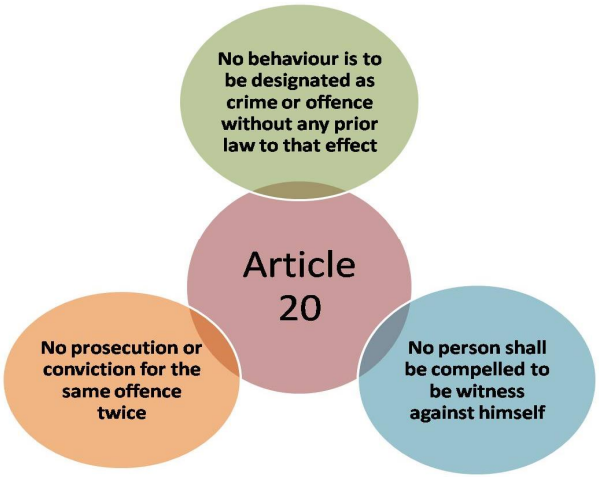
The Constitution of India as the basic law of the land confers wide range of powers on the state officials to preserve the social peace and order and at the same time recognizes and guarantees certain rights and freedoms to the citizens, as well as non-citizens, including accused persons.The balancing of the apparently conflicting interests is reflected in the measures such as Article 372 that provides for the adaptation all the existing substantive and procedural criminal laws and other civil liabilities laws that confer powers on the state and its functionaries to criminalize behaviors and subject the suspects to the duly laid down procedure for guilt determination and award of punishments. Such wide and sweeping powers in the hands of the stats are counter-balanced by the Fundamental Rights enshrined in Part- III. In particular the basic balancing principle laid down in clause (1) and (2). Article 13(1) lays down that all the existing and enforced laws shall be subjected to a test for inconsistency with the Fundamental Rights and any such inconsistency shall render the law void to the extent of the inconsistency. Similarly Article 13(2) prohibits the state from making any law that tends to abrogate or abridge any fundamental right and by virtue of 13(2) that shall be rendered as void. Thus, the wide range of Fundamental Rights guaranteed in the Part III of the Constitution constitute the bulwark of individual freedoms. The following Fundamental Rights can be specially discussed in terms of their ófoundationalô character:

(i) Right to life and personal liberty

Article 21 lays down: ñNo person shall be deprived of his life or personal liberty except according to procedure established by lawò. The provision ensures that the life or personal liberty of any person, citizen or non-citizen, may not be taken away or interfered with and that such taking or interference may be permissible only if the authorities have followed a procedure laid down by law. This means ipso facto every event of taking of life or interference with liberty is unconstitutional. But such unconstitutional charge can be rebutted by showing that the taking or interference was after following a legal procedure. Since originally the constitution makers never intended to introduce the idea of the óqualityô of the legal procedure in question, the burden of those who were required to take life or interfere with the liberty was lighter. The offending party was only required to show that they have acted per a legally established procedure. But the post- emergency interpretation given to ólegal procedureô by the Supreme Court in Maneka Gandhi ((1978) 1 SCC 248) has even made the issue of quality of legal procedure a constitutional question. Now the procedure has to be a ófairô and ójustô procedure and not ó*any*ô procedure. Thus, wherever the ótakingô and óinterferenceô is arbitrary, discriminatory, undignified, de-humanizing etc. it shall fall foul of Article 21, thereby, making this constitutional provision as the ómother of all actionsô or foundations.

(ii) Right against diverse modes of accusations

The adversarial system of Justice confers wide powers on the prosecution party to accuse persons of crimes and subject them to the various criminal justice processes such as arrest, charging for offences, trial etc.. Article 20 that is titled as ñProtection in Respect of Conviction for Offencesò accords recognition to the three basic postulates of criminal liability, namely (a) Prohibition against ex post facto laws, (b) Prohibition again double jeopardy and (c) Prohibition against self- incrimination. Article 20(1) reads: ñNo person shall be convicted of any offence except for the violation of the law inform at the time of the commission of the act charges as offenceé ò This provision re-iterates the classic Criminal Law Maxim: Nulla poena sine lege and Nulla crimin sine lege, that means there cannot be any crime without an existing law that criminalizes behavior. Article 20(2): ñNo person shall be prosecuted and prosecuted for the same offence more than onceò. The guarantee envisages to prohibit repeat penalization first, at the initial stage of prosecution/ framing of charges and later, at the stage of sentencing. The idea is that no criminal ought to suffer for the crime he has committed in perpetuity. Similarly Article 20(3) lays down: ñNo person accused of an offence shall be compelled to be a witness against himselfò. The guarantee prohibits ócompelled self- incrimination, but not voluntary confession that is legally permissible as a piece of evidence. Similarly taking of blood sample with the permission of the court is not a violation of clause (3) of Article 20.



(iii) Rights against indiscriminate arrest and lack of legal defence

Since every arrest involves interference with the personal liberty, but the constitution makers preferred to create a separate provision for arrest and the conditions under which it can be effected legally by enacting a distinct provision Article 22. Clauses (1) and (2) of this Article expressly lay down three vital limitations on the powers of the state to arrest, namely , First, that every arrestee who is detained in custody shall be communicated the grounds of his arrest, second, no arrestee shall be denied the right to consult and be defended by a lawyer of his choice, and third, the person in custody must be produced before a Magistrate within 24 hours of arrest/ coming into custody. The foundational provision relating to rights against indiscriminate arrest laid down in 1950 has undergone significant legislative and judicial transformations and the present arrest law is infused with much greater civil liberty orientation.

(iv) Right to Equality

A fair and just criminal justice administration shall ensure that the powers to criminalize and the procedures of criminalization are evenly exercised, without any kind of discrimination. This basic principle of egalitarian order assumes much greater significance in a society like ours that suffers from multiple kinds of inequalities. The Constitution begins the Fundamental Rights discourse with

Article 14 on ñEquality before Lawò that reads: ñThe State shall not deny to any person equality before the law or the equal protection of the laws within the territory of Indiaò. The guarantee ensures that neither equality before the law shall be denied by the State, nor the State will discriminate between persons in matters of administration of laws. This guarantee prohibits discriminatory criminalization, differential administration of criminal justice and different punishment for the same crime. However, does not prohibit reasonable classification based on intelligible differentia test.

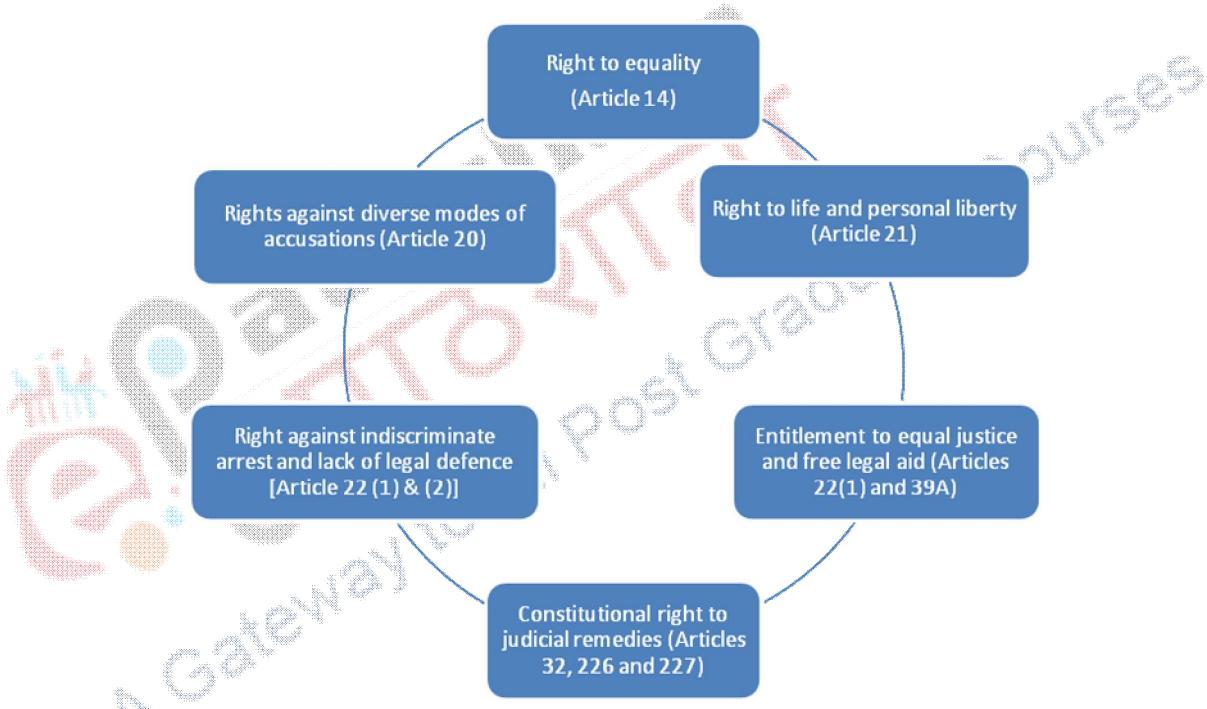
(v) Entitlement to Equal Justice and Free Legal Aid

Realizing that the poor and resource- lessget a raw deal from the legal system the 42nd Constitutional (Amendment) 1976 incorporated 39A that: directs the State to ensure that the operation of the legal system promotes justice by providing equality of opportunity to all the persons to have equal access to justice. Such equal access is denied when there are limited justice forums, or the claimants of justice are located in far- away places like the hills, forests and desert areas, or are totally resource-less and completely lack awareness. The Directive in Article 39-A requires the State to of set the access to justice needs of the resource-less by organizing facilities for free legal aid. The directive for free legal aid has been partly complied by the organization of the National Legal Services regime all over the country in terms the National Legal Services Authorities Act, 1987. As a consequence at the

formal level the legal service need of the resource-less are envisaged to be delivered through the National Legal Services Authority at the Central and State level Legal Services Authorities ..

(vi) Constitutional Right to Judicial Remedies

A unique feature of the Fundamental Rights is their enforceability by the superior judicial agencies such as the Supreme Court and the High Courts. Article 32(1) expressly provides thatò The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this part is guaranteedò. Such right to constitutional remedies may be exercised by the Supreme Court by the issuance of directions or orders or writs and such right shall not be suspended except as provided by the Constitution itself. The State High Courts, also enjoy similar powers within their jurisdiction to, issue directions, orders or writs for the enforcement of rights conferred by Part III or for any other purpose under Article 226. Both the Articles 32 and 226 confer the right to seek remedies through appropriate proceedings in the constitutional Courts.



Six Constitutional Guarantees

Statutory Law Framework Relating to Criminal Justice

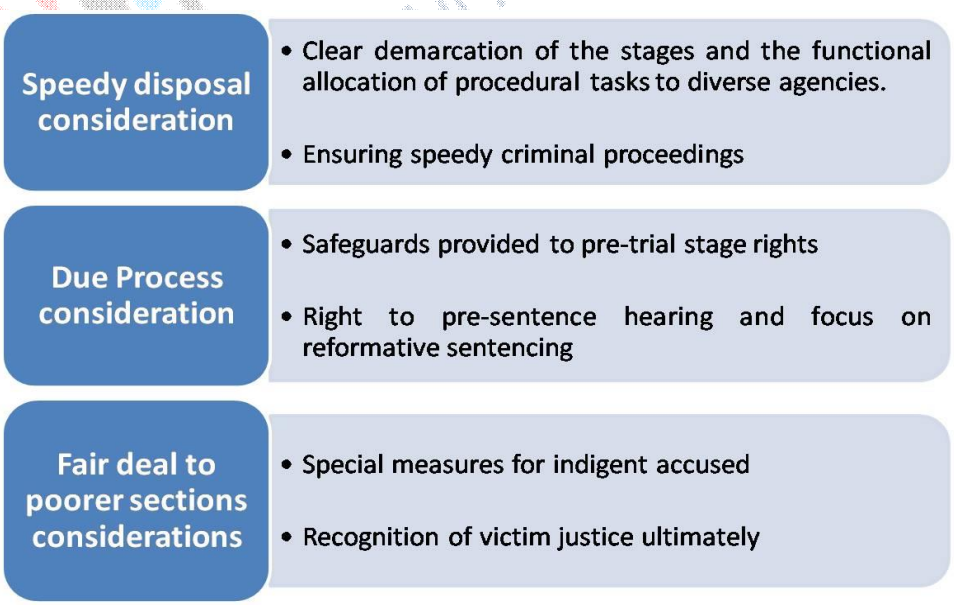
The statutory law framework that constitutes the legal basis for the CJA mainly comprises of the substantive laws and the procedural laws. The substantive law is largely composed of the Indian Penal Code, 1860 and hoard of other penal statutes on diverse subjects, while as the procedural law is mainly drawn from the Code of Criminal Procedure, 1973 and the Indian Evidence Act, 1872.

(i) The substantive law plank mainly inspired by the mid nineteenth century criminal justice philosophy enshrined in the Penal Code, as interpreted by the High Courts and the Supreme Court from time to time, has certain inherent features that can be described as hall-mark of the Indian Criminal Justice. Lord Babington Macaulay, whose Benthamite thinking profoundly influenced

the basic features of the Penal Code, had this to say: ñWe know that India cannot have a free government. But she must have the next best thing ï a firm and imperial despotism, the worst state in which she can possibly be placed is that in which the memorialists would place her. They call on us to recognize them as a privileged order of freemen in the midst of slaves. It was for the purpose of averting this great evil the Parliament, at the same time at which it suffered English men to settle in India, armed us with those large powers which, in my opinion, we will deserve to possess if we have not the spirit to use them nowò. (Lord Macaulayôs Legislative Minutes,Geoffrey Cumberlege, OUP (1946) selected by C.D. Dharkar, The Black Act, No. 10 (no date) p. 180). Macaulayôs strong desire to enact a strong and uniform criminal law for all the Indians, rich and poor, privileged or unprivileged is again epitomized in his this observation: ñA privilege enjoyed by a few individuals in the midst of vast population is not freedom, it is tyrannyò. (Macaulayôs Legislative Minutes p.133). Macaulayôs such obsession with the principle of uniformity and the outright rejection of caste and class privilege in matters of codification of the criminal law makes equality foundation as the bed rock of the Indian Criminal Justice idea, though in reality the things may be far more in-egalitarian than normatively provided for..

(ii) The 1898 Criminal Procedure Code constituted the basic procedural law till the enactment of the new Code in 1973. In the two post-constitutional decades of 1950ôs and 60ôs the constitutional guarantees had started making impact on the CJA and its constituents. This is clearly evidenced by the first phase of criminal law reforms undertaken in the late 1960ôs, in which the first in the line of reform was the criminal procedure law that needed to be brought in tune with the current liberal, constitutional ethos. That is the Code of Criminal Procedure Bill, 1971 did not impart amendments to the existing law, but envisaged to come out with a new procedure law itself. The Bill was moved in the Parliament with the three basic consideration in, mind, namely:

- Speedy disposal consideration
- Due process consideration, and
- Fair deal to poorer sections consideration



The aforesaid three considerations were duly reflected in the provisions of the Code of Criminal Procedure. 1973 that aims at providing expeditions, fair and just and non discriminatory criminal

proceedings. These aims are particularly reflected in the following salient features of the new Code of Criminal Procedure:

a) Clearer demarcations of the stages of criminal proceedings and functions of the agencies assigned the procedural tasks

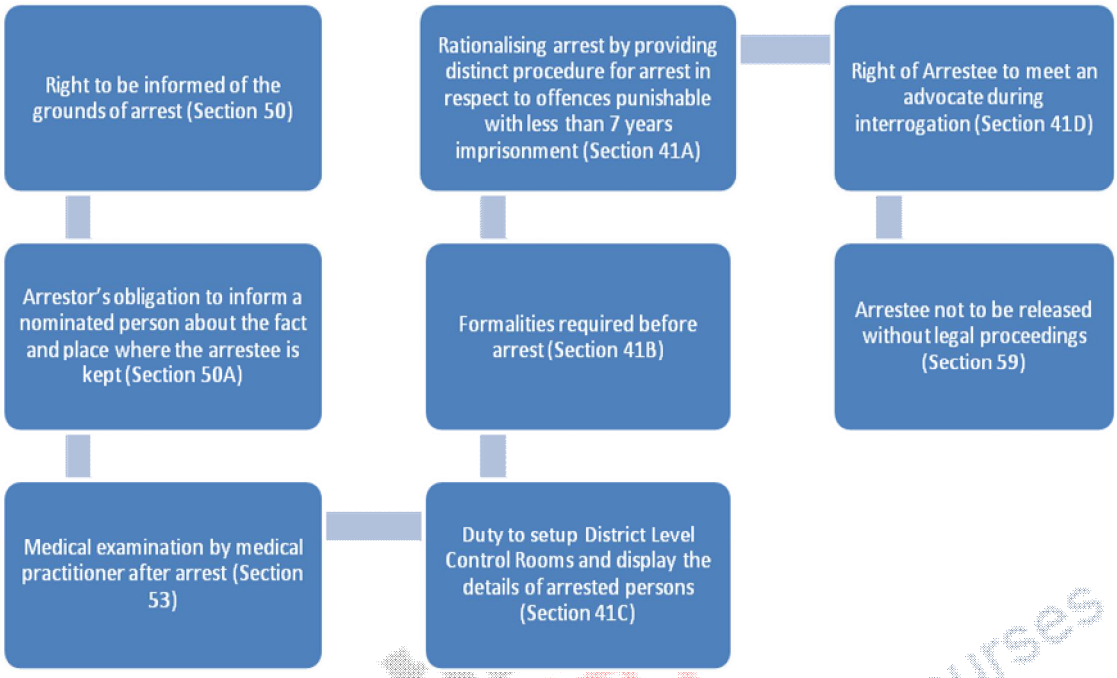
Chapter XII begins with providing information about the crime to the police under Sections 154 &155,can also be described as the pre-investigation stage that serves as the prelude to Investigation Stage. The stage commences with Section 156 and concludes in Section 173(2).The eighteen Sections confer powers on the Executive multifaceted functions that may be necessary for a detailed and scientific establishment of the truth of the accusations. Since the Code assigns the investigation function mainly to the Police agency, no other agency such as Prosecution or the Judiciary may ordinarily assume the functions of investigation of offences .However, a significant feature of the new Code is that it has tried to clearly demarcate the Stages and Functions of the agencies, particularly in respect to Police and Prosecution, by incorporating introducing new Sections 24 &25 that expressly require a distinct cadre for the prosecution. The idea enshrined in the original sections has been lent support by the later Amendments that envisage a distinct Directorate of Prosecution in every State.. The idea is that a clear demarcation of functions would ultimately improve the quality of criminal justice.

b) Measures for expeditions criminal proceedings

Section 57 prohibits police custody for more than 24 hours and requires the Police Officer to obtain remand order from a Magistrate in cases of longer detention. Similarly under Section 167 that gives powers to the Magistrate to pass orders regarding Police Custody remand (maximum for 15 days) or judicial custody remand (15 days at a time), but even judicial custody remand shall not be given for a period beyond 90 days in case of investigation for offences punishable with imprisonment above 10 years to death and not more than 60 days if the investigation relates to any other offence. Thus, the arrestee shall have a right to be released on bail the moment the time period fixed for investigation about the concerned offence is over. Similarly the provisions relating to discharge proceedings under Sections 227, 239, 245 and 258 of the Cr.P.C. are also aimed at expedition in criminal proceedings.

c) Better safeguards for the pre-trial stage rights of the accused

Power conferred on the Police to arrest, whether without warrant or with warrant, constitutes the most important means of regulation and control over the deviant population. Often this power is put to abusive use against political dissenters and other undesirable sections of the society at the behest of the political masters. As a consequence hoard of unemployed youths, minorities and *dalits* are regularly subjected to arrest proceedings in most of the States today.



Realizing the abusive potential of the arrest powers the code has provided section 49 to 60 containing vital pre-trial rights of the accused, soon after the general provisions relating to arrest of persons. Particularly notable in this respect are Section 49 (No unnecessary restraint), Section 50 (Right to be informed of grounds of arrest) Section 50A (Obligation of the arrestor to inform a nominated person about the fact of arrest and the place of custody), Section 53 (Examination of the accused by medical practitioner), Section 59 (Arrestee not to be released without legal proceedings). It is a happy augury that the due process consideration continues to inspire the law makers even after four decades. When the Criminal Procedure (Amendment) Act, 2008, inserted Sections 41A, 41B, 41B and 41D and Section 60A (That rationalized the arrest powers by requiring the Police to follow certain conditions in case of arrest for every offence punishable with less than seven years imprisonment and obligates the police to put out detailed information about all the arrests in the public domain).

d) Creating a right to pre-sentence hearing and turning the focus on reformative sentencing

Right from the time of the enactment of the Penal Code celebrated authors such and Sir Hari Singh Gaur had critiqued the draconian nature of punishments provided under the code in these words: ñNo civilized country today imposes such heavy sentences as does the Penal Code. Heavy sentences have long gone out of fashion in England and odour of sanctity and perfection attaching to the Penal Code should not deter indigenous legislature to thoroughly revise the sentences and bring them in conformity with modern civilized standards,ò (The Penal Law of British India, 4th Edn. Vol.1 p.330). apart from the draconian character, sentencing also suffered on account of arbitrariness at the determination and aplication, solely on the basis of externalities relating to harm and the criminal conduct. The mitigating circumstances relating to criminal and his conditions were more or less ignored. Sections 235(2) and 248(2) for the first time obligated the judge to accord a hearing to the accused before passing the sentence. Similarly Sections 360 and 361 obligated the judiciary to reformatory sentencing measures such as release on probation and disposition under the Juvenile Justice Laws. The underlying constitutional philosophy of

sentencing reforms has been responsible for bringing about significant impacts on the Death Penalty law in the later years.

e) Special measures for indigent accused

Poor and indigent persons come on the receiving end of the Criminal Justice or face its wrath, either because of his conditions of poverty or resourcelessness compels him to indulge in criminal acts more often or because of his social status,the functionaries find it inconsequential to rope them in. Keeping such a reality in mind Section 436 proviso accords a discretion to a concerned officer or Court to release an indigent person unable to furnish a surety on his executing a personal bond, instead of taking a bail. The significant pro-poor measure has been considerably strengthened by the addition of an explanation appended to the Proviso through the Criminal Procedure (Amendment) Act, 2005 which reads: ñWhere a person is unable to give bail within a week of his arrest ,it shall be sufficient ground for the officer or the Court to presume that he is an indigent person for the purpose of this provisoò.

f) Recognizing 'Victim Justice' ultimately

The CJA has been often criticized for pro-accused and a weak victim justice orientation. The growing international and the U.N. initiatives in the field of victim justice created a pro-victim environment. Furthermore, the creative victim-centric rulings of the Apex Court in the eightees and the nineties, supported by the strong recommendations of the Malimath Committee on Criminal Justice Reforms, 2003 motivated significant reforms in the Code of Criminal Procedure and Penal Code in 2009. The Criminal Procedure (Amendment) Act, 2009 for the first time incorporated a definition of victim Section 2(Wa)), Special right to appeal (Section 372 Provio) Impalement in Plea Bargaining proceedings (Section 265C, by Amendment Act 2006), Special right and procedure for receiving compensation and treatment (Sections 357A, 357B, 357C). The aforesaid victim justice measures are backed by the special accountability provision under Section 166B of the Penal Code that creates for the first time an offence, punishable up to one year sentence, not to extend medical treatment to a victim.

Constitution Foundations and Judicial Process

The Indian judiciary, particularly at the Appellate Court level, has been considerably responsive to the constitutional foundations leading to a substantial body of case law that have not only interpreted the provisions in strict legal sense but also expanded the ambit of the foundational law by their creativity; In the following pages a few notable authorities concerning vital criminal justice issues such as Death Penalty, Criminalization of attempted suicide, offence of Homo- sexuality, essentials of a fair trial, compliance with the amended law of arrest, equality in matters of investigation procedure and pro-active delivery of custodial justice:

(i) Constitutionality of Death Penalty

As a legally recognized form of punishment for some heinous offences Death Penalty remains the most controversial punishment the world over today. In India to the constitutional challenge to Death Penalty goes back to Jagmohan Singh (1973), follow by the Constitutional Bench ruling in Bachan Singh (1980), Treveniben (1989) etcé the Apex Court upheld the constitutional validity of Death Penalty. Though the majority ruling in Bachan Singhupheld the constitutional validity, but it did create two significant limitations, namely: First, Death Penalty should be awarded in órarest of rareô cases and

Second, the exercise of discretion in Death Penalty cases shall be subjected to a fair just and reasonable procedure by balancing the aggregating and mitigating circumstances. Apart from these lead cases there are hoards for Apex Court decisions in which mandatory Death Penalty for murder by life convict (Mithu (1983) 2 SCC 277) or Section 27(3) of the Arms Act (Dalbir Singh (2012) Cr. App. 117 dated Feb. 1, 2012). Similarly, in Lachima Devi (1989) Suppl (1) SCC 264) the court held the High Court decision that had recommended hanging in public view as unconstitutional.Two very recent rulings on Death Penalty namely Shatrughan Chauhan (2014) 3SCC 1 and Mohd. Arif & Ors decided by Five Judge Bench of the Supreme Court on 2.9.2014 have upheld the petitions on diverse constitutional grounds. In Shatrughan Chauhan case petitions of fifteen convicts in death row cases, after the presidential rejection of mercy petitions, were upheld on grounds of undue, inordinate and unreasonable delay in disposal, mental illness on account of solitary confinement. The Supreme Court also ruled that no destination can be made in upholding or refection of Mercy Petition between cases convicted for terror charges or for charges in respect to ordinary offences. In Mohd. Arif the six Petitionshad challenged Order XL Rule 13 of the Supreme Court Rules 1966 that stipulates that on application for review of D.P. decision shall be disposed of by Circulation without any oral arguments. Though Justice Chelameswar upheld the constitutionally of the Rule, but Justice Rohington Nariman (writing the Majority Secession for Chief Justice Lodha and Justice J.S.Kehar , A.K.Sikari and himself) held that: ñWe feel that the fundamental right to life and irreversibility of death sentence mandate that oral hearing be given in the review stage in death sentence cases, as a just, fair and stage reasonable procedure under Article 21 mandates such hearing, and cannot give way to the severe stress of the workload of the Supreme Courtò (Para 40)

(ii) Questioning the Continued Criminalization of Attempted Suicide

Criminalization of attempted Suicide under Section 309, was a product of mid nineteenth century colonial mindset that found enough reasons for the propagation of the Christian technological ideas of total submission to divine dictates. The modern state found this form of criminalization in their best interest , because it gave them an opportunity to come down heavily on all kinds of political and social protests, particularly those that espoused political causes under the threat of hunger strikes or fasts unto death. However, the decline of Christian religious orthodoxy in the west and the unceasing dominances of enlightened individualismgave rise to a trendof abolition of suicide in the U.K. in early 1980s. Under the influence of the western thinking several Indian High Courts in mid 1980s handed down decision critiquing the retention of the offence under section 309. The main plank of attack was violation of the constitutional guarantee of right to life and personal liberty. In Maruti Sripati Dubal Vs.State of Maharashtra) Justice Savant of the Bombay High Court (1986 Bombay Law Reporter Vol. LXXXIII) observed this way ñArticle 21 spells out not only a protection against an arbitrative deprivation of life or personal liberty but also positive right to enable an individual to live with human dignityò (p. 593) the Supreme Court ruling in P.Rathinam Vs. Union of India (1994) 3SCC 394) categorically held that Section 309 was an irrational provision that was violative of article 21 of the constitution. However, a later Constitutional Bench Gian Kaur Vs. State of Punjab ((1996) 2 SCC 648) upheld the constitutional validity of section 309.

(iii) De- criminalization of Voluntary Adult Homosexually

The colonial State enjoyed even moral supremacy and subjected human sexuality to strict regulation. No form of sexuality other then heterosexual relationship

within matrimonial bond was permissible. Under such environment of sexual expression all forms of homosexual relationship was brought under the ambit of section 377 that strictly prohibited all forms of carnal intercourse against the order of nature with any man women or animal as a heinous offence punishable up to 10 years imprisonment. This widely couched offence criminalized vast section of men and women, born with or socialized under alternative sexual orientation.Much more than actual criminalization, the people with alternative sexual- orientation were not only social stigmatized but also subjected to harassment and indignities at the hands of the law enforcement officials. Emboldened by the growing impact of constitutionalism on the Indian Polity the LHBT community filed a constitutional challenge against Section 377 under the Title Naz Foundation Vs NCT Delhi (2009,160 DLT 277). The Delhi High Court held the Section 377 in sofar it criminalizes consensual sexual acts of adults in private as violative of Article 21, 14 and 15 of the Constitution. The judgment of Justice A.P.Shah was as follows : ñIn the constitution the right to live with dignity and the right to privacy are recognized as dimensions of Article 21. Section 377 IPC denies a personôs dignity and criminalizes his or her core identity solely on account of his or her sexuality and thus violates Article 21 of the Constitution.As it stands, 377 IPC denims a gay person a right to full personhood which is implicit in note on of life under Article 21 of the constitutionò.The Naz Foundation ruling evoked strong pro and anti-reaction only in the community but also amidst religious orthodoxy of Hinduism, Islam and Christianity. However , the Supreme Court in Suresh Kumar Kaushal Vs.Naz. Foundation and Ors. (2014) 1 SCC 1) reversed the constitutionality challenge and upheld the validity of Section 377, thereby restoring the conservative pro-law position ounce again. But a later Supreme Court ruling in National Legal Service Authority Vs. Union of India (Civil W.P decided on 15/4/2014) that has recognized distinct and constitutional identity of Hijras , a TG community, the Naz Foundation story seems to have revived.

(iv) Essentials of a Fair Trial

Right to be accorded a fair trial is one of the essential conditions for a constitutionally ordained CJA. It has several dimensions such as equal access by providing adequate forums for adjudication, making right to counsel available in cases of undigent and resourceless, opportunity to cross examine the opposite side witness etc. Among few recent cases Mohd. Hussain Vs. NCT, Delhi (2012(8) SCALE 308) stands out, because on the same fact situation of lack of counsel and denial of opportunity to cross examine prosecution witness to it evoked three different responses from the Apex Court Judges. The earlier Two Judge Bench, hearing the appeal against High Court decision upholding the Trial Court conviction and sentence had agreed that at the trial state the accused had remained unrepresented by a lawyer, but Justice Datta felt that the lecune could be cured by ordering re-trial Justice C.K. Prasad felt that the Trial lacune could not be cured and the conviction and sentence is illegal leading to release of accused from the prison and deportation to Pakistan, the country of his origin.Hearing the split decision verdict, Justice Lodha expressed strong reservations against re-trial that tends to prolong the period of trial and opined that speedy trial is equally important consideration like the fair trial.But according to his view speedy trial consideration has to be balanced with the protection of society concern.Therefore, he supported Justice Dathes re-trial opinion.

(v) Strict Compliance with the Amended Law of Arrest

The power to arrest has been identified as the hallmark of State power, not only in the colonial Indian but even the contemporary Indian social and political order.

Excessive powers of arrest were called to question in Joginder Kumar (1994), followd by D.K. Basu (1997) by the Apex Court. Finally, the legislature picked up the queue in the Criminal Procedure (Amendment) Act, 2008 and substantially reformed the pro-authority arrest law by infusing vital measures for creating accountability for arrest. Recently the Supreme Court in Arunesh Kumar Vs. Stat of Bihar ((2014) 8 SCC 273). Writing the judgment Justic Chandramauli Kr. Prasad (Justice Pinaki C. Ghose concurring) with a view to ensuring strict compliance with the amended arrest law has issued eight Directions for the Police and Magistracy that are of general nature applicable in respect to arrest in all cases involving offences punishable up to seven years imprisonment.

(vi) Equality in matters of Investigation Process

Equality as one of the foundational elements has received the attention of the Apex Court in several criminal cases. Two notable recent Apex Court decisions on equality are State Vs. Indian Hotel and Rest. Assn. & Ors ((2013) 8 SCC 519) and Subraminiam Swamy Vs. Director CBI ((2014) 8 SCC 682). In the first case differential consequences under Sections 33A and 33B of the Bombay Police Act in respect to dance in Bars and Restaurants and dance in Five Stare Hotels was struck down as invidious and blatantly discriminatory and a violation of Article 14. In the second case Section 6A of the Delhi Special Police Establishment Act, 1946, required previous approval of the Central Government to conduct any inquiry or investigation in respect to offences under the Prevention of Corruption Act, 1988 committed by the employees above the rank of Joint Secretary in the employment of the Central Government or Corporations established under any Central Act. The petitioners had challenged the constitutional validity of Section 6A. The Supreme Court raised a pertinent question, namely: ñHow can two public servants against whom there are allegations of corruption or graft or bribe taking or criminal misconduct under the P.C. Act, 1988 can be made to be treated differently because one happends to be junior officer and the other, a senior decision maker.ò (p.730). Writing the judgment R.M. Lodha C.J. (Justices A.K. Patnaik, S.J. Mkhopadhaya, Dipak Misra an dF.M. Ibrahim Khalifulla concurring) held as follows: ñCriminal Justice System mandates that any investigation into the crime should be fair, in accordance with law and should not be tainted. It is equally important that interested or influential persons are not able to misdirect or hijack the investigation so as to throttle a fair investigation resulting in the offender escaping the punitive course of law. These are important facets of rule of law. Breach of rule of law, in our opinion, amounts to negation of equality under Article 14ò. (p.736)

(vii) Pro-active delivery of custodial justice

Realizing the inherent injustice involved in indiscriminate arrests, mindless passing of judicial custody orders and inability of the large percentage of under trials, the legislature in 2005 inserted a measure Section 436|A that was aimed at giving custodial justice to one who had spent half the period of the maximum entailed for the offence. The measure directed that such under trial shall have a right, to be released on his personal bond without sureties. The benevolent measure remained either unused or sparingly used because there was no institutional system for bringing the cases of prisoners who were entitled to get the benefit before the appropriate court that had to be invoked by someone on behalf of the under trial languishing in various prisons all over the country. On September 5, 2014 a Three Judge Bench of the Supreme Court constituted by the Chief Justice, Justice Kurian Joseph and Justice Rohington Fali Nariman passed an Order in Writ Petition (Criminal) in Bhim Singh Vs. Union of India that sets a landmark for the

delivery of justice to the hopeless and ignored under trial prisoner. The Bench Order, perhaps for the first time directed that:òJurisdictional Magistrate/ Chief Judicial Magistrate/ Sessions Judge shall hold one sitting in a week in each jail/prison for two months commencing from 1st October, 2014 for the purposes of effective implementation of 436A of the Code of Criminal Procedure.

ñIn the sittings in Jails, the above judicial officers shall identify the under trial prisoners who have completed half period of the maximum period of imprisonment provided for the said offence under the law and after complying with the procedure prescribed under Section 436A pass an appropriate order in jail itself for release of such under trial prisoners who fulfill the requirement of the Section 436A for their release immediately.

ñSuch Jurisdictional Magistrate/ Chief Judicial Magistrate/ Sessions Judge shall submit the report of each such sitting to the Registrar General of the High Court and at the end of two months, the Registrar General of each High Court shall submit the report to the Secretary General of this court without any delay.

ñTo facilitate the compliance of the above Order, we direct the Jail Superintendent of each Jail/ Prison to provide all necessary facilities for holding the court sitting by the above officer.

Thus, the Order has required the court officers to assume a pro-active role in the delivery of custodial justice. It is hoped that such pro-active-orientation will spread to other processes as well.