CHAPTER II

PROVISIONS RELATING TO THE ARRESTED PERSON

UNDER THE CONSTITUTION

“The People never give up their liberties but under some delusion.
“The true danger is, when liberty is nibbled away, for expedients, and by
parts.”

-Edmund Burke

2.1 INTRODUCTION

The concept of the Human Rights owes its origin, in western thought, to
the Bill of Rights, 1689 which declared for the first time that “excessive bail
ought not to be required nor excessive fine imposed, nor cruel and unusual
punishment inflicted”. The French Declaration on the Rights of Man and the
Citizen also spoke of “freedom from arrest except in conformity with the law”, in
addition to “liberty, property, security and resistance to oppression” which were
declared to be the natural and inalienable rights of man. The first ten amendments
to U.S. Constitution effected in 1791, speak of all the above concepts and more.
The expression was first employed in the Declaration of United Nations signed
by the Allied Powers on January 1, 1942 stated, inter alia, “complete victory over
their enemies is essential to defend life, liberty, independence and religious
freedom and to preserve human rights and justice in their own lands as well as in
other lands”. The several articles of the UN Charter speak of respect for human
rights and fundamental freedoms for all without distinction as to race, sex or
religion24.

The Universal Declaration of Human Rights adopted by the General
Assembly of the United Nations on December 10, 1948 declared that no one shall
be subject to arbitrary arrest, detention or exile (Article 9). Article 12 provided
that the privacy, reputation and honour of every individual shall be protected by

the State. Article 9(1) of the International Covenant on Civil and Political Rights 1966 declares, inter alia, that “everyone has the right to liberty and security of person (and that) no one shall be subject to arbitrary arrest or detention”. Clause (3) of Article 9 declares further that “any one arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that the persons awaiting trial shall be detained in custody but release may be subject to guarantees to appear for trial at any stage of the judicial proceedings and, should occasion arise, for execution of the judgment”. Article 10(1) of the Covenant declares that “all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person”. Article 17 says that the privacy, honour and reputation of an individual shall not be interfered with unlawfully. Article 2(2) of the Covenant creates an obligation upon the ratifying States to enact domestic legislation to give effect to the rights guaranteed by the Covenant. Article 3 creates a further obligation upon such States to ensure that the rights guaranteed by the Covenant are made available to all their citizens25.

2.2 RIGHTS OF THE ACCUSED

The concept of the protection of rights of the people, accused of committing crime and rights of prisoners in the administration of criminal justice has been continually changing and developing over time. In ancient times, in the absence of formal criminal justice apparatus, the accused was deemed as a sinner. Crime was equated with "sin" transgression against God's will. Consequently, a criminal looked upon as a sinner could not claim any right for himself. Though the Medieval Era witnessed striking reforms in the rules in terms of the accused right to self-defence, a new meaning was accorded to the human rights

25 www.humanrightscovenant.in
perspective in the administration of criminal justice with establishment of the Universal Declaration of Human Rights in 1948. The defence of the rights of the accused and convicted prisoners came to be recognized as the legitimate objective of international and national communities. The significant features of the International Covenant were gradually adopted by the legal systems of common-law as well as non-common-law countries of the world. The features contained in the Universal Declaration of Human Rights, 1948, were given added strength by the adoption of the International Covenant on Civil and Political Rights in 1966. Despite the induction of the procedural safeguards of human rights (as set forth by the two International Covenants, into codified laws of most countries of the world), the rights of the accused and the convicted imprisoned offenders in the administration of criminal justice are still being violated in some form or other world-wide.26

2.2.1 Ancient India

The Hindu "Dharmasastras" and the "Arthasastras" and other legal treatises of the past have discovered an amazing system, which, interalia, regulates the duties of Kings, judges, subjects and judicial as well as legal procedures. The central concept is Dharma, the functional focus of which is social order. The message is "Dharma" as the supreme value, which binds kings and citizens, men and women. Human rights gain meaning only when there is an independent judiciary to enforce rights. Here, the Dharmasastras are clear and categorical. The independence of the judiciary was one of the outstanding features of the Hindu judicial system. Even during the days of Hindu monarchy, the administration of justice always remained separate from the executive. It was, as a rule, independent both in form and spirit. It was the Hindu judicial system that first realized and recognized the importance of the separation of the judiciary

from the executive and gave this fundamental principle a practical shape and form. Prince and a private citizen submitted their cases before the law court and the court decided against the Prince. The Prince accepted the decision as a matter of course and as binding on him."27

The evolution of the principle of separation of the judiciary from the executive was largely the result of the Hindu conception of law as binding on the sovereign. Law in Hindu jurisprudence was above the sovereign. It was the "Dharma." The laws were then not regarded as much as a product of supreme Parliaments and Legislatures as at present. Certain laws were regarded as above all human authority. Such, for instance, were the natural laws.

Kautilya, the author of the celebrated political treatise Arthasastra not only affirmed and elaborated the civil and legal rights first formulated by "Manu," but also added a lumber of economic rights. He categorically ordained that the King should also provide the orphan, the aged, the infirm, the afflicted and the helpless with maintenance. He shall provide subsistence to the helpless, the expectant mothers and the children they give birth to. In ancient Indian thought, "there were no acts of Parliament guaranteeing services to the people. The public opinion, the views of eminent writers and the practice of the best Kings created an atmosphere in which it was thought that it was imperative for the King representing the State to encourage learning and to give employment to the unemployed. In the Post-Vedic period, the rise of Buddhism and Jainism were certainly a reaction against the deterioration of the moral order as against the rights of the privileged class. Life was more human and liberal in the Post-Vedic era. After Buddha, Emperor Ashoka protected and secured the most precious of human rights, particularly the right to equality, fraternity, liberty and happiness. Ashoka successfully established a welfare State and made provisions

27 www.dharmaconceptinindia.com
for securing basic freedoms. Ashoka, the champion of civil liberties, allowed even the forest folk in his domain to enjoy security of life, peace of mind and enjoy their life on par with other people in the society. Torture and inhuman treatment of prisoners were prohibited under Ashoka's benign dispensation28.

2.2.2 British in India

In pre-independence India, the British enacted the Indian Evidence Act in 1872, and the Indian Code of Criminal Procedure in 1898. The first one is still in vogue, while the second one has been amended by the Indian government in 1973. As a member of the United Nations, India has incorporated the important features contained in the Universal Declaration of Human Rights, 1948, and the International Covenant on Civil and Political Rights, 1966, into the amended Code of Criminal Procedure in 1973. Also, the Indian Constitution provides significant safeguards to the accused as well as the convicted (e.g. the right to life or personal liberty, freedom from physical torture, freedom from cruel, inhuman or degrading treatment. Even, in 1978, the Indian Supreme Court introduced Due Process (for the accused and the convicted as well) into Article 21 of the Constitution. The Indian Evidence Act, 1872, prohibits torture and spells out that confessions extracted by physical torture are inadmissible in the court of law for prosecuting the accused. Additionally, torture of the accused is prohibited under sections 330 and 331 of the Indian Penal Code. Apparently, all these enactments give an impression to the outside observer that the rights of the accused and the convicted are well-ingrained in the administration of criminal justice in India29.

The modern version of human rights jurisprudence may be said to have taken birth in India at the time of the British rule. When the British ruled India, resistance to foreign rule manifested itself in the form of demand for fundamental

freedoms and the civil and political rights of the people; Indians were humiliated and discriminated against by the Britishers. The freedom movement and the harsh repressive measures of the British rulers encouraged the fight for civil liberties and fundamental freedoms\textsuperscript{30}.

Under the British rule, human rights and democracy were suspect and socialism was an anathema, the British colonial period remains the Indian equivalent of the 'Dark Ages'. Lord Macaulay rejected the ancient Indian legal political system as 'dotages of brahminical superstition', and condemned ancient legal heritage and its inner care as an 'immense apparatus of cruel absurdities'.\textquoteleft Lord Wellesley condemned the Indians as vulgar, ignorant, rude and stupid and Lord Cornwallis described as an axiom that every native of Hindustan is corrupt. The English East India Company debarred Indians from high offices and deprived them of their political, social and economic rights. The impression created in the Indian minds was that their sacred inalienable human rights and vital interests had been ignored, denied, and trampled upon for the sake of England. So far as the civil remedy of damages in torts for a wrongful arrest is concerned, the position is not more gloomy. The law concerning claims for damages for tortious acts of government and its officers in India has been vitiated by the dual character of the East India Company which once ruled this country, i.e., of being both a ruler and a trader. The Government of India Act, 1858, the Government of India Act, 1919 and the Government of India Act, 1935, continued this dual character. These Acts provided that the liability of the Government of India in such matters shall be the same as was obtaining immediately prior to these Acts, which really means the dual character of the East India Company. Unfortunately, even Article 300 of our Constitution too has continued the same position\textsuperscript{31}.

\textsuperscript{30} The Hindu, Custodial Violence and Human Rights, Chennai, India, August 11, 1995.

\textsuperscript{31} www.britishtimeactsofhumanrightsinindia
The criminal jurisprudence adopted by India is a mere reflection of the Victorian legacy left behind by the Britishers. The passage of time has only seen a few amendments once in a while to satisfy pressure groups and vote banks. Probably no thought has been given whether these legislations, which have existed for almost seven decades, have taken into account the plight and the socio-economic conditions of this country which lives in utter poverty. India being a poverty stricken developing country needed anything but a blind copy of the legislations prevalent in developed western countries. The concept of bail, which is an integral part of the criminal jurisprudence, also suffers from the above stated drawbacks. Bail is broadly used to refer to the release of a person charged with an offence, on his providing a security that will ensure his presence before the court or any other authority whenever required. The aim of provision of bail is to restore to individual his liberty pending adjudication of his guilt by the court; it protects non-convicted persons from the hazards of incarceration by granting them the presumption of innocence. Courts have held that bail is a right of which to be arrested person should be informed and the same should be granted without imposing unreasonable conditions32.

Fragmentation of land holdings is a common phenomenon in rural India. A family consisting of around 8 to 10 members depends on a small piece of land for their subsistence, which also is a reason for disguised unemployment. When one of the members of such a family gets charged with an offence, the only way they can secure his release and paying the bail is by either selling off the land or giving it on mortgage. This would further push them more into the jaws of poverty. This is the precise reason why most of the under trials languish in jail instead of being out on bail. Even though the courts in some cases have tried to intervene and also have laid down certain guidelines to be followed but

unfortunately nothing has been done about it. There is also a strong need felt for a complete review of the bait system keeping in mind the socio-economic condition of the majority of our population. While granting bail the court must also look at the socio-economic condition\textsuperscript{33}.

\textbf{2.2.3 Present Scenario:}

The courts are constituted by the state government under the Code and cases are prosecuted by public prosecutors appointed by the state government or the central government as the case may be. Even though the National Crime Records Bureau has been collecting data about the disposal of cases by the courts, the statistics do not seem to be authentic. It has been aptly remarked by a wisecrack that the place of a nation on the civilizational scale is to be determined by the manner in which its criminal laws are enforced. Since all the elements of the public justice system are inter-dependent, even the strictest enforcement of law by the police agency will not deliver the goods unless it is supported by the judicial system by way of prompt disposals\textsuperscript{34}.

The law requires that detainees be informed of the grounds for their arrest, be represented by legal counsel, and, unless held under a preventive detention law, arraigned within 24 hours of arrest, at which time the accused must either be remanded for further investigation or released. However, thousands of criminal suspects remained in detention without charge during the year, adding to already over-crowded prisons. The law provides arrested persons the right to be released on bail, and prompt access to a lawyer; however, those arrested under special security legislation received neither bail nor prompt access to a lawyer in most cases. Court approval of a bail application is mandatory if police do not file charges within 60 to 90 days of arrest\textsuperscript{35}.

\textsuperscript{33} Dr. Ashutosh, Rights of Accused, Universal Law Publishing, 2009,
\textsuperscript{34} Jaishree Jaiswal, human rights of accused and juveniles: delinquent / in conflict with law, Kalpaz Publications, 2005
\textsuperscript{35} www.bailapplicationprovisionsincrpc.in
Right to be informed the ground of arrested person. Section 50 (1) of Cr. P.C.: Every police officer or other person arresting any person without warrant shall forthwith communicate to him full particulars of the offence for which he is arrested or other grounds for such arrest. Obligation of person making arrest to inform about the arrest etc. to a nominated person, Section 50 A of Cr. P.C.: Every police officer or other person making any arrest under this Code shall forthwith give the information regarding such arrest and place where as may be disclosed or nominated by the arrested person for the purpose of giving such information. The police officer shall inform the arrested person of his rights under sub-section (1) as soon as he is brought to the police station. An entry of the fact as to who has been informed of the arrest of such form as may be prescribed in this behalf by the State Government. It shall be the duty of the Magistrate before whom such arrested person produced, to satisfy himself that the requirements of sub-section (2) and sub-section (3) have been complied with in respect of such arrested person. Right to be informed the accused for right to bail. Section 50 (2) of Cr. P.C.: Where a police officer arrests without warrant any person other than a person accused of a non-bailable offence, he shall inform the person arrested that he is entitled to be released on bail and that he may arrange for sureties on his behalf. Right to be produced the accused before the Magistrate without delay. Section 56 of Cr. P.C.: Person arrested to be taken before Magistrate or officer in charge of police station. A police officer making an arrest without warrant shall, without unnecessary delay and subject to the provisions herein contained 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. Right of not being detained accused for more than twenty-four hours. Section 76 of Cr. P.C.: Person arrested to be brought before Court without delay. The police officer or other person executing a warrant of arrest shall

without unnecessary delay bring the person arrested before the Court before which he is required by law to produce such person: Provided that such delay shall not, in any case, exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate’s Court. Right of not being detained accused for more than twenty-four hours without judicial scrutiny. Section 57 of Cr. P.C.: No police officer shall detain in custody a person arrested without warrant for a longer period than under all circumstances of the case is reasonable, and such period shall not, in the absence of 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. Right of not being detained accused for more than twenty-four hours without judicial scrutiny.

The Code of Criminal Procedure classifies the offences mentioned in the IPC into four broad categories, namely, (1) bailable and non-cognizable offences; (2) bailable and cognizable offences; (3) non-bailable-cognizable offences and (4) non-bailable-noncognizable offences (e.g., sections 466, 467 (first part), 476, 477 and 505 (first part) etc.) (There is a fifth category of offences e.g., sections 116 to 120, where the cognizability and non-bailability depends upon the nature of the main crime. This category travels along with the main crime and will be dealt with accordingly.) In the light of the recommendations of the Third Report of National Police Commission and the ratio and the spirit underlying the decisions in Joginder Kumar and D.K. Basu and the decisions of the Supreme Court on the significance of personal liberty guaranteed by Article 21, a question arises whether would it not be advisable to amend the Criminal Procedure Code. No person shall be arrested for offences which are at present treated as bailable and non-cognizable; in other words, a court shall not issue an arrest warrant in respect of these offences. Only a summons to be served through a court process-server or by other means (but not through a policeman) may be issued. For this

purpose, the very expression “bailable” may have to be changed. The expression “bailable” implies an arrest and an automatic bail by the police/court. There appears no reason to arrest a person accused of what is now categorized as bailable- non-cognizable offences. It is true that in case of non-cognizable offences, police cannot arrest without warrant as would be evident from clause (a) of section 41 but there are other clauses in section 41 which may empower this. For example, clause (b) provides that any person found in possession of “any implement of house breaking” is liable to be arrested unless he proves that there is lawful excuse for such possession. Instead of calling/categorizing them as “bailable offences”, they can simply be categorized as non-cognizable offences and it must be expressly provided that no arrest shall be made by the police in case of these offences and no court shall issue an arrest warrant38.

The court may issue a summons to be served in the manner indicated above. Annexure-III to this consultation paper sets out such offences, along with a description of the offences, for easy reference. In respect of offences at present treated as bailable and cognizable, no arrest shall be made, but what may be called an “appearance notice” be served upon the person directing him to appear at the Police Station or before the magistrate as and when called upon to do so, unless there are strong grounds to believe - which should be reduced into writing and communicated to the higher Police officials as well as to the concerned magistrate - that the accused is likely to disappear and that it would be very difficult to apprehend him or that he is a habitual offender. (In case of the latter ground, material in support of such ground shall be recorded.) Accordingly, the expression “bailable” shall be omitted in respect of these offences and they should be termed simply as cognizable offences. Section 41 may be amended appropriately to provide that in case of these offences, no arrest shall be made.

except in the situation mentioned above. Certain offences “excluded” from this annexure shall continue to be treated as bailable-cognizable. In respect of offences punishable with seven years imprisonment or less which are mentioned in Annexure-V (from which annexure, offences punishable under sections 124, 152, 216-A, 231, 233, 234, 237, 256, 257, 258, 260, 295 to 298, 403 to 408, 420, 466, 468, 477-A and 489-C, have been excluded) – and which are at present treated by the Code of Criminal Procedure as non-bailable– cognizable offences – should be treated as bailable-cognizable offences and dealt with accordingly. So far the offences excluded from this category are concerned (namely, offences punishable under section 124 and others mentioned above), they shall continue to be treated as non-bailable-cognizable, as at present. In respect of non-bailable-cognizable offences punishable with more than seven years imprisonment, no change is proposed in the existing law. So far as non-bailable-non-cognizable offences punishable up to seven years are concerned, they are placed in the category of offences in Annexure-V, having regard to the nature of offences, though they are treated by law as non-cognizable. General principles to be observed in the matter of arrest. The following general principles shall be observed in the matter of arrest for offences (other than those offences for which the punishment is life imprisonment or death but not offences where the punishment can extend up to life imprisonment\textsuperscript{39}.

Arrest shall be effected (a) where it is necessary to arrest the accused to bring his movements under restraint to infuse confidence among the terror-stricken victims or where the accused is likely to abscond and evade the process of law; (b) where the accused is given to violent behaviour and is likely to commit further offences unless his movements are brought under restraint or the accused is a habitual offender and unless kept in custody is likely to commit

\textsuperscript{39} Dr. Ashutosh, Rights of Accused, Universal Law Publishing, 2009
similar offences again; (c) where the arrest of the persons is necessary to protect
the arrested person himself; or (d) where such arrest is necessary to secure or
preserve evidence of or relating to the offence; or (e) where such arrest is
necessary to obtain evidence from the person concerned in an offence punishable
with seven years or more, by questioning him. In this connection, reference may
be made to section 157 of Code of Criminal Procedure which says that where a
police officer proceeds to investigate the facts and circumstances of a case, he
shall arrest the offender, only where it is “necessary”. Subsection (1) of section
157, insofar as: “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”40

Merely on suspicion of complicity in an offence, no arrest to be made.-
The law must provide expressly, by amending section 41 and other relevant
sections, if any, that merely on the suspicion of complicity in an offence, no
person should be arrested. The Police Officer must be satisfied prima facie on the
basis of the material before him that such person is involved in a crime/offence,
for which he can be arrested without a warrant. In this connection, reference
maybe made to the decision of the European Court of Human Rights in Fox,
Campbell and Hartley v. U.K. delivered on 30th August, 1990 declaring that
section 11 of Northern Ireland (Emergency Provisions) Act, 1978 is violation of

40 Jain kapur rymbai, Human rights of Accused – an Indian perspective, BBPM law associates, new delhi 2001
Article 5(1) of the European Convention on Human Rights. The section empowered a police officer to arrest a person if he is “suspected of being a terrorist”. The Court (by majority) held that mere suspicion, however bona fide held, cannot be a ground for arrest. Pursuant to the decision, the aforesaid words were replaced by the words “has been concerned in the commission, preparation or instigation of acts of terrorism”. This decision is in accord with the modern concept of human rights, which are implicit in Part III of our Constitution. Statutorily incorporation of safeguards contained in D.K. Basu’s case.- It is equally necessary to give legislative recognition to the safeguards contained in the decision of the Supreme Court in D.K.Basu. The safeguards to be incorporated have been set out hereinafore. Representatives of registered NGOs to be entitled to visit police stations.- A common complaint often heard in this connection is that quite often a person is detained in Police custody without registering the crime and without making any record of such detention/arrest. Persons are kept for number of days in such unlawful custody and quite often subjected to ill-treatment and third-degree methods. To check this illegal practice, there should be a specific provision in the Code of Criminal Procedure creating an obligation upon the officer in-charge of the Police Station to permit representatives of registered non-government organizations to visit the Police Station at any time of their choice to check and ensure that no persons are kept in the Police Stations without keeping a record of such arrest and to ensure further that the provisions of the Constitution and the Code of Criminal Procedure are being observed.

Necessity to increase compound ability of offences and incorporate the concept of plea bargaining. It is equally necessary to increase the number of compoundable offences. It must be remembered that quite a few offences in the

---

IPC are essentially of civil nature. There must be a massive de-criminalization of law. The concept of plea bargaining, which has been recommended in the 154th Report of the Law Commission on Code of Criminal Procedure, should be incorporated in the Code. Indeed, early steps need to be taken upon the said Report. Bail should be granted as a matter of course except in the serious offences and in certain circumstances.- In respect of all offences except the serious offences like murder, dacoit, robbery, rape and offences against the State, the bailable provisions should be made liberal and bail should be granted almost as a matter of course except where it is apprehended that the accused may disappear and evade arrest or where it is necessary to prevent him from committing further offences. The provisions in Cr.PC relating to grant of bail may be amended suitably. No arrest or detention for questioning. It is also necessary to provide that no person shall be arrested or detained by police merely for the purpose of questioning. Such arrest or detention, it is obvious, amounts to unwarranted and unlawful interference with the personal liberty guaranteed by Article 21 of the Constitution. Ensuring the safety and well being of the detainee is the responsibility of the detaining authority.- It should also be provided by law expressly that once a person is arrested, it is the responsibility of the arresting and detaining authority to ensure the safety and well being of the detainee. The recommendation of National Police Commission regarding mandatory medical examination of the arrested person deserves implementation. In this connection, the decision of A.P. High Court in Challa Ramkonda Reddy v. State of A.P.AIR 1989 AP 235, which has recently affirmed by the Supreme Court in AIR 2000 SC 2083 and the examples given therein, wherein the State would be liable for damages for the negligent or indifferent conduct of police/jail authorities should be kept in mind. To put briefly, take a case where a person is arrested for simple theft or simple rioting; he is a heart patient; he is not allowed to take his medicines with him at the time of his arrest and no medicines are provided to him
in spite of his asking and he dies. Where such a person suffers a heart attack and no reasonably prompt steps are taken for providing medical aid to him by the concerned authorities and he dies. It is obvious that had he not been arrested, his family and friends would have taken care of him. It would be too big a punishment. In such cases, State would be liable for damages. Police custody of accused record is maintained at every police station\textsuperscript{42}.

The law should also provide that every police station maintain a custody record which shall be open to inspection by members of Bar and the representatives of the registered NGOs interested in Human Rights containing particulars. Name and address of the person arrested name, rank and badge number of the arresting officer and any accompanying officers; the time and date of arrest and when was the person brought to police station; reasons/grounds on which arrest was effected; was any property recovered from or at the instance of the person arrested/detained; and names of the persons friends or relatives of the person arrested who were informed of the arrest. It may be clarified that the safeguards mentioned above are in addition to those required to be provided by the decision of the Supreme Court in D.K. Basu which must be given legislative recognition by making necessary amendments.

Tortious liability of State is another aspect, which needs notice in this behalf is the decision of the Supreme Court in Kasturlal v. State of U.P. (1965 SC 1039). In this case, the gold recovered from the person arrested was kept in the Malkhana of the police station but was misappropriated by the concerned police officer. The person arrested was released but the gold could not be restored to him. When the person filed a suit for recovery of the gold or its value, he was non-suited by the Supreme Court on the ground that no suit lies in respect of tortious acts of government servants which are relatable to sovereign powers of

\textsuperscript{42} M.P.RAJU, P.O. Mathew "legal news and views", vol.20- 5 , may, 2006.
the State. This was so held relying upon Article 300 of the Constitution which preserves the right and liability of the State to sue and be sued obtaining prior to the commencement of the Constitution. Indeed, Article 300 says that the said rule shall continue until a law is made by the Parliament or the State Legislature, as the case may be, laying down the situations in which the State shall be liable for the tortious acts of its servants and where it shall not be liable on the ground that that act was done in exercise of the sovereign powers of State43.

The distinction between sovereign and non-sovereign functions also needs to be clarified in view of the conflict between the judgments of the Supreme Court. Strict compliance with section 172, CrPC called for.- Sub-section (1) of section 172 of the Code of Criminal Procedure requires that (1) “every police officer making an investigation under this chapter shall day-by-day enter his proceedings in the investigation in a diary setting forth the time at which the information reached him, the time at which he began and closed his investigation, the place or places visited by him and a statement of the circumstances ascertained through his investigation”. Inasmuch as such diary would also record and reflect the time, place and circumstances of arrest, it is necessary that the provisions of this sub-section should be strictly complied with. In this behalf, however, it would be relevant to notice the following observations of the Supreme Court in Shamshul Kanwar v. State44 where the court pointed out the vagueness prevailing in the country in the matter of maintaining the diary under section 172. The court referred, in the first instance, to the fact that in every State there are Police Regulations/Police Standing Orders prescribing the manner in which such diaries are to be maintained and that there is no uniformity among them. The court pointed out that in some States like Uttar Pradesh, the diary under section 172 is known as ‘special diary’ or ‘case diary’ and in some other

44 (AIR 1993 SC 1748)
States like Andhra Pradesh and Tamilnadu, it is known as ‘case diary’. The basis for distinction between ‘special diary’ and ‘case diary’, the court pointed out, may owe its origin to the words “police diary or otherwise” occurring in section 162 CrPC. The court also pointed out that the use of expression ‘case diary’ in A.P. Regulations and in the Regulations of some other States like J&K and Kerala may indicate that it is something different than a “general diary”. In some other States there appear to be Police Standing Orders directing that the diary under section 172 be maintained in two parts, first part relating to steps taken during the course of investigation by the police officer with particular reference to time at which police received the information and the further steps taken during the investigation and the second part containing statement of circumstances. Such an amendment would also go to ensure that the time, place and circumstances of the arrest of an accused are also properly recorded and reflected by such record, which is indeed a statutory record, Ascertained during the investigation which obviously relate to statements recorded by the officer in terms of section 161 and other relevant material gathered during the investigation. In view of this state of affairs, the Supreme Court suggested a legislative change to rectify this confusion and vagueness in the matter of maintenance of diary under section 172. It is therefore appropriate that section 172 be amended appropriately indicating the manner in which the diary under section 172 is to be maintained, its contents and the manner in which its contents are communicated to the court and the superior officers45.

The Free Legal Aid scheme is to provide means by which the principle of equality before law on which the edifice of our legal system is based. It also means financial Aid provided to a person in matter of legal disputes. In the absence of Free Legal Aid to the poor and needy, Fundamental Rights and

45 www.andhrapolice.gov.in
Human Freedoms guaranteed by the respective Constitution and International Human Rights covenants have no value.

Though, the Constitution of India does not expressly provide the Right to Legal Aid, but the judiciary has shown its favour towards poor prisoners because of their poverty and are not in a position to engage the lawyer of their own choice. The 42nd Amendment Act, 1976 has included Free Legal Aid as one of the Directive Principles of State Policy under Article 39A in the Constitution. This is the most important and direct Article of the Constitution which speaks of Free Legal Aid. Though, this Article finds place in part-IV of the Constitution as one of the Directive Principle of State Policy and though this Article is not enforceable by courts, the principle laid down there in are fundamental in the governance of the country. Article 37 of the Constitution casts a duty on the state to apply these principles in making laws. While Article 38 imposes a duty on the state to promote the welfare of the people by securing and protecting as effectively as it many a social order in which justice, social, economic and political, shall inform all the institutions of the national life. The parliament has enacted Legal Services Authorities Act, 1987 under which legal Aid is guaranteed and various state governments had established legal Aid and Advice Board and framed schemes for Free Legal Aid and incidental matter to give effect to the Constitutional mandate of Article 39-A. Under the Indian Human Rights jurisprudence, Legal Aid is of wider amplitude and it is not only available in criminal cases but also in civil, revenue and administrative cases.

Maneka Gandhi vs. Union of India\(^46\) case was a catalyst which laid down a foundation for interpreting Articles 39-A and 21, widely to cover the whole panorama of Free Legal Aid. In the instant case the Supreme Court held that procedure established by law in Article 21 means fair, just and reasonable

\(^{46}\) AIR 1978 SC P597
procedure. In Madhav Hayawadan Rao Hosket vs. State of Maharashtra\(^{47}\), a three judges bench (V.R.Krishna Iyer, D.A.Desai and O.Chinnappa Reddy, JJ) of the Supreme Court reading Articles 21 and 39-A, along with Article 142 and section 304 of Cr.PC together declared that the Government was under duty to provide legal services to the accused persons. Justice Krishna Iyer observed that Indian socio legal milieu makes free legal services, at trial and higher levels, an imperative procedural piece of criminal justice. The Supreme Court decided the point of Legal Aid in appeal cases as follows “If a prisoner sentenced to imprisonment is virtually unable to exercise his Constitutional and statutory right of appeal, inclusive of special leave to appeal, for want of legal assistance, there is implicit in the court under Article 142 read with Articles 21 and 39 A of the Constitution, power to assign counsel for such imprisoned individual for doing complete justice”. The court further added that legal Aid in such cases is state’s duty and not Government’s charity.

The speedy trial of offences is one of the basic objectives of the criminal justice delivery system. Once the cognizance of the accusation is taken by the court then the trial has to be conducted expeditiously so as to punish the guilty and to absolve the innocent. Everyone is presumed to be innocent until the guilty is proved. So, the quality or innocence of the accused has to be determined as quickly as possible. It is therefore, incumbent on the court to see that no guilty person escapes, it is still more its duty to see that justice is not delayed and the accused persons are not indefinitely harassed. It is pertinent to mention that “delay in trail by itself constitute denial of justice” which is said to be “justice delayed is justice denied”. It is absolutely necessary that the persons accused of offences should be speedily tried so that in cases where the bail is refused, the accused persons have not to remain in jail longer than is absolutely necessary\(^{48}\).

\(^{47}\) AIR 1978 SC 1548
\(^{48}\) VARSHNI’s, *Criminal trial and Judgement*, Eastern Book Company - Lucknow- 226001.
The right to speedy trial has become a universally recognized human right. In United States of America, the speedy trial is one of the Constitutionally guaranteed rights. In India, the right to speedy trial is not specifically enumerated as one of the Fundamental Rights in the Constitution since 1978, there have been sea-saw changes in the judicial interpretation of the Constitutional provisions. In Maneka Gandhi vs. Union of India AIR 1978 SC 597, the Supreme Court has widened the concept of life and Personal Liberty under Article 21 of the Constitution. In this case, the court established that the law and procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Articles 14 and 19. It also establishes that the procedure established by law within the meaning of Article 21 must be right, just and fair but not arbitrary, fanciful or oppressive.

Taking the principle of fairness and reasonableness evolved in Maneka Gandhis cases, the Supreme Court in Hussainara Khatoon (I) VS. Home secretary49 case held that “Obviously procedure prescribed by law for depriving a person of his liberty cannot be reasonable, fair, or just unless that procedure ensures a speedy trial for determination of the guilty of such person. No procedure which does not ensure a reasonably quick trial can be regarded as reasonable, fair or just and it would fall foul of Article 21. There can be no doubt that speedy trail and by speedy trail we mean reasonably expeditious trial, is an integral and essential part of the Fundamental Right to Life and Liberty enshrined in Article 21. Thus, the right to speedy trial is implicit in broad sweep and content of Article 21 of the Constitution. Hence any accused who is denied this right of speedy trial is entitled to approach the Supreme Court for the purpose of enforcing such right.

49 (1980) I SCC 81,
2.3 Rights of Accused under Indian Constitution

The Indian society is fragmented into many religious, cultural and linguistic groups and hence it was necessary for the constitution framers to declare fundamental rights to give to the people the essence of security and confidence. The Fundamental Rights in the Indian Constitution have been grouped Right to Equality comprising Article 14 to 18, of which Article 14 is the most important, Right to Freedom comprising Article 19 to 22 which guarantee several freedoms, the most important of which is the freedom of speech. Right against Exploitation consists of Article 23 and 24. Right to Freedom of Religion is guaranteed by Articles 25 to 28. Cultural and Educational Rights are guaranteed by Articles 29 to 30. Right to property is now very much diluted and is secured to some extent by Articles 30-A, 31-A, 31-B, and 31-C. Right to Constitutional Remedies is secured by Article 32 to 35.

These Articles provide the remedies to enforce the Fundamental Rights, and of these the most important is Article 32. Constitutional provisions dealing with criminal jurisprudence can be found in the fundamental rights chapter. Article 20, 21 and 22, of the Constitution dealing with fundamental rights are important right to an accused person.

These provisions embody very important values, which have been secured by the people for the people over long periods of struggle. The working of the Constitution over the last fifty years exemplifies the struggle between rights of the people and the power of authority to subvert them by subjugating people through bad governance controlling crime is only a part of governance. "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."Thus there are two expressions used in Article 14 which are "Equality before the law" and Equal protection of law."'Equality before law' means all are equal before law so there will not be special
privilege in favor of any individual by reason of birth, creed, religion or sex etc. It means that among equals the law should be equal and should be equally administered, that like should be treated alike. According to Dicey\textsuperscript{50}. The guarantee of equality before the law' is the aspect of rule of law in England. It means that no man is above the law and that every person, whatever be his rank or condition, is subject to the jurisdiction of ordinary Courts.

In India, the Constitution is the Supreme law and all laws passed by the legislatives must be consistent with the provisions of the Constitution. 'Equal Protection of the Laws' means that all Person in similarly circumstances shall be treated alike both in the privileges conferred and liabilities imposed by the laws. Equal law should be applied to all in same situation and there should be no discrimination between one person and another.

Article 14 protects the accused against any arbitrary power of the state Constitution. Under Article 14 'Equality before law' and Equal Protection of Law in criminal justice administration came before the Supreme Court at several juncture.

Protection and remedies available to an accused person Article 20 are Post Facto Law- Article 20(1), Double Jeopardy - Article 20(2), Prohibition against self-incrimination- Article 20(3). Article 20(1) says that "No person shall be convicted of any offence except for violation of law in force at the time of the Commission of the Act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the Commission of the offence." So according to Article 20(1) no criminal law can be retrospective.

This means that if an act is not an offence at the date of its commission it cannot be an offence at the subsequent date to its commission. The prohibition under this clause is just for conviction and sentence only and not for the prosecution and trial under a retrospective law. In this regard the Supreme Court held that Section 5(3), Prevention of Corruption Act, 1947, did not create a new offence. It merely prescribed a rule of evidence for proving an offence of criminal misconduct as defined in Section 5(1) of Prevention of Corruption Act, 1947, for which an accused person was already under trial. The second part of Article 20(1) protects a person from 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 Kedar Nath v. State of West Bengal\(^5\) where the offence was committed in 1947, but in 1949 the punishment for the same offence was enhanced The Supreme Court held that the enhanced punishment could not be applicable to the offence committed by the accused in 1947.

Under the provisions of ex post facto law the enhanced punishment cannot be imposed by the amended act, but the accused can take the advantage of the beneficial provisions of the ex post fact law where it should be applied to mitigate the rigors of the previous law on the same subject. Such a law will not be affected by Article 20(1). Thus in case of Ratantal v. State of Punjab\(^6\) a boy of 16 years was convicted for committing an offence of house trespass and outraging the modesty of a girl aged 7 years. He was sentenced for six months rigorous imprisonment and fine. After the pronouncement of judgment, the Probation of Offender Act, 1958 came into force. Under this Act the provision was that a person below 21 years of age should not ordinarily be sentenced to imprisonment. The Supreme Court held that the rule of beneficial provision could

\(^5\) AIR 1953 SC 404  
\(^6\) AIR 1965 SC 444
be applied to reduce the punishment under ex post facto law. So an ex post facto law which is beneficial to the accused is not prohibited by clause (1) of Article 20.

Article 20(2) of constitutional says that "No person shall be prosecuted and punished for the same offence more than once." This clause is based on the common law maxim "Nemo debet vis vexari" which means that no man should be put twice in peril for the same offence, means if a person is prosecuted again for the same offence for which he has already been prosecuted he can take complete defense of his former acquittal or conviction. The American constitution also provides the same provision in Fifth Amendment that "No person shall be twice put in jeopardy of life or limb."

So under Article 20(2) the protection to accused is narrower than British and American constitution. Under Article 20(2) the Protection to accused is available only when the accused has not only been 'Prosecuted' but also 'punished'. Thus the following are the essentials for the application of double jeopardy rule under Article 20(2). The person must be accused of an 'offence'. The proceeding or the prosecution must have taken place before a 'Court' or 'Judicial Tribunal. The person must have been 'Prosecuted and punished in the previous proceeding. The 'Offence must be the same for which he was prosecuted and punished in the previous proceedings.

When can a person be called "Prosecuted" and "Punished" for an "Offence" with the meaning of Article 20(2), this was the only question before the Supreme Court in Maqbool Hussain v. State of Bombay case53. In this case the applicant brought some gold in India which he did not declare to customs authorities on the airport. He was in possession of 107.2 tolas of gold in contravention of a notification of Government of India. The custom authorities

---

53 AIR 1961 SC, 578
confiscated the gold under the Sea Custom Act, giving to the owner of the gold and option to pay a fine of Rs. 12,000/- No body claimed ownership of the gold. Later on the appellant was charged for having committed an offence under the Foreign Exchange Regulation Act

The Appellant contended that second prosecution was in violation of Article 20(2), as it was for the same offence, i.e. for importing gold in contravention of Government Notification for which gold he had already been confiscated by the customs authorities. The Supreme Court held that the sea custom authorities were not a Court or judicial tribunal and the adjudging of confiscation under the Sea Customs Act did not constitute a judgment of judicial character necessary to take the plea of the 'Double Jeopardy1. Hence the prosecution under the Foreign Exchange Regulation Act is not barred". So the requirement of Article 20(2) is that the person must have been prosecuted and punished is conjunctive and not disjunctive. This act doesn't apply, where for lack of sanction the prosecution was nullified and the accused was discharged, for where an accused was discharged for want of sanction there was no punishment, and where a man was punished departmentally, there was no prosecution.

The Second prosecution and punishment barred under Article 20(2) must be for the same offence. The offence whose ingredients are held by Supreme Court that ingredients of the offence under Section 105 of Insurance Act and under Section 409 Indian Penal Code were not the same. So it was held that the accused were not punished for the same offence twice but for two distinct offences constituting of different ingredients. So Article 20(2) did not apply.

Article 20(3) says that "No person accused of any offence shall be compelled to be a witness against himself." This prohibition against self-incrimination is based on the cardinal principle of Criminal Law which is really
the bedrock of English Jurisprudence is that 'an accused must be presumed to be innocent till the contrary is proved'. It is the duty of the prosecutor to prove the offence; the accused need not make any admission or statement against his own free will. Thus this guarantee under Article 20(3) extends to any person accuse of an offence and prohibits all kinds of compulsions to make him witness against himself.

Supreme Court explained the scope of Art.20(3) M.P. Sharma v. Satish Chandra54 by observing that this right embodies. It is a right pertaining to a person who is 'accused of an offence'. It is protection against 'compulsion to be a witness. It is a protection against such compulsion relating to his giving evidence 'against himself.' As to the meaning to be given to the words 'Accused of an offence1 in Article 20(3). Krishna lyer J. accepted the view there expressed in the case of Raja Narayanlal Bansilal v. Maneck Phiroze Mistry55 namely, that a person is said to be accused when an FIR has bee lodged against him in respect of an offence before an officer competent to investigate it or when complaint was made relating to the commisr'on of an offence before a Magistrate competent to try or send to another Magistrate for trial of the offence.

'In M.P, Sharma's case the Supreme Court interpreted the expression "To be a witness" To be a witness is not merely in respect of testimonial compulsion in the Court room but may well extend to compelled testimony previously obtained from him. It is available therefore to a person against whom a formal accusation relating to the commission of an offence has been leveled which in the normal course may result in prosecution. Thus the expression "To be a Witness" has been interpreted very widely so as to include oral, documentary and testimonial evidence. But in Safe of Bombay v. Kathi Kalu56 the Supreme Court

54 AIR 1954 SC 300
55 AIR 1961 SC 708
56 AIR 1961 SC 1808
held that "to be a witness" is not equivalent to "furnishing evidence" that is to say, as including not merely making of oral or written statements but also production or documents or giving materials which may be relevant at a trial to determine the guilt or innocence of the accused. Thus when a person gives his finger impression or specimen writing or signature, though it may amount to furnishing evidence in the larger sense is not included within the expression "To be a witness" Here the Court held that neither seizures made under search warrant nor the compulsory taking of photographs, finger prints or specimen writing of an accused would come within the prohibition of Article 20(3) as they are not any personal testimony, by merely material for comparison. Thus under Article 20(3) what is Protection to an accused is that to compel him to say something from his personal knowledge relating to the charge against him.

The protection under Article 20(3) is available to an accused person against the compulsion to give evidence "against himself." Here it is left to himself that he may voluntarily wave his privilege by entering into the witness box or by giving evidence voluntarily on request. Request implies no compulsion.

To attract the protection of Article 20(3) it must be shown that accused was compelled to make the statement likely to be in criminative of himself. In Nandini Satpathy v. P.L. Dani\(^{57}\) the appellant was a former Chief Minister of Orissa. Certain charges of corruption were leveled against her and in the course of certain inquiries she as called upon to attend at a police station and to answer certain written questions. The appellant refused to answer question and claimed the protection of Article 20(3). Then she was prosecuted for refusing to answer questions put by a lawful authority.

\(^{57}\) AIR 1977 SC 1025
State of Bombay v. Kathi Kalu Oghad\textsuperscript{58} in this case the Supreme Court held that self-incrimination is less than 'Relevant' and more than confessional. So the accused person cannot be forced to answer questions merely because the answers thereto are not implicative when viewed in isolation and confined to that particular case so as to be compelled testimony, Krishna Iyer J.

"In order to bring the evidence within the inhibition of clause 3 of Article 20 it must be shown that not only the person making the statement was an accused at the time he made it and that it had a material bearing on the criminality of the maker of the statement, but also that he was compelled to make that statement/ "Compulsion" in the context must mean what in law is called "Duress" which is not limited to physical torture or coercion, but extends also to techniques of psychological interrogation which can cause mental torture or mental compulsion in a person subjected to such interrogation."

Thus the protection under Article 20(3) compulsion to give evidence against himself extends where an accused has a reasonable prospect of exposing him to guilt in same or some other accusation, actual or imminent. However, he is bound to answer where there is no tendency to incriminate. The right to silence is a fundamental right guaranteed to the citizen under Article 20(3) of the Constitution, which says that no person accused of any offence, shall be compelled to be a witness against himself. The accused is in most cases the best source of information, yet investigating agencies cannot subject the accused to any duress or force. The right to silence and its companion right against self-incrimination are two important aspects of fair trial. The right to fair trial is the basic premise of all procedural laws. In law, any statement or confession made to a police officer is not admissible, Right to silence is mainly concerned about confession. Breaking of silence by the accused can be before a Magistrate but

\textsuperscript{58} AIR 1961 SC 1808
should be voluntary and without any duress or inducement. To ensure the truthfulness and reliability of the facts stated before the Magistrate, it is required that the court takes several precautions.\textsuperscript{59}

We have inherited as part of our legacy a dual system of jurisprudence. This is a general procedure for trying ordinary offences. But with the rise of terrorism and other popular movements and forms of discontent, special laws providing for special procedures have been enacted which abridge the rights and privileges of accused. Right to silence and the right against self-incrimination have been watered down quite considerably by interpretation than by legislation. Now a days, the accused if he so desires, can be a witness in his trial. His confession outside the court either to the police officer under POTA or the Magistrate is admissible. He is expected to explain every adverse circumstance to the court at the conclusion of evidence with the court having jurisdiction to draw adverse inference while appreciating the evidence against him. If the right against self incrimination is to be considered as one of the fundamental tenets of a fair trial, it has been argued that certain peculiarities necessarily associated with this right such as the narrow construction of the term "to be a witness" and the distinction between real and testimonial evidence are unnecessary to achieve the equilibrium between society's need to control crime and the conviction of the guilty vis-a-vis the protection of the individual from unlawful and unfair treatment.\textsuperscript{60}

Article 21. Protection of Life and Liberty: Article 21 of Indian Constitution says that "No person shall be deprived of his life or personal liberty except according to procedure established by law." Meaning of Personal Liberty: The meaning of 'Personal Liberty has been interpreted very narrowly prior to Maneka Gandhi's case and has been very widely interpreted after Maneka

\textsuperscript{60} A.K. Gopalan v. State of Tamil Nadu, AIR 1995 SC 264
Gandhi's case. Prior to Maneka Gandhi's Case: immediately after the commencement Supreme Court was faced with the task of interpreting the concept of personal liberty in the very first case on the fundamental right. in the case the discussion on the concept of 'Personal Liberty was centered round the various forms of 'Personal Liberties' guaranteed under.

Article 19 vis-a-vis Article 21 particularly the freedom of movement guaranteed under Article 19(1) (d). The Judge was confronted with this difficult tasks and all the six judges delivered separate judgments. The majority view was represented in the opinion of Kania, CJ. and Patanjali Sastri, M.C. Mahajan, B.K. Mukherjee and S.R. Das, JJ. The majority in Gopalan case did net connect the right to personal liberty with the right to freedom of movement and held that these two fundamental rights were separately guaranteed by our Constitution.

Further in Kharak Singh's case, the question of 'Personal Liberty' was again before the Supreme Court. Supreme Court struck down the regulation 236(6) of the UP Police regulations as violative of Article 21, which was held unauthorized intrusion into one's residence and held that domiciliary visit at nigh was violative of right 'Sleep' and 'Comfort' included in the expression of personal liberty But it did not concede the right of privacy. Thus the Court made a little forward move in developing the concept of personal liberty. The right to privacy which was not conceded in Kharak Singh's case the Supreme Court did not follow the restricted view of Kharak Singh's case\textsuperscript{61}. In Govind's case the Court included the right to privacy into 'Personal Liberty' and held that "The right to privacy in any event will necessarily have to go through a case by case development.

The right to privacy of prisoners was considered by the Supreme Court in Auto Shankar's case, where the State wanted to prevent the publication of

\textsuperscript{61} AIR 1963 SC 1295
autobiography of Auto Shanker. The Court held that: "The right to privacy is implicit in the right to life and personal liberty guaranteed under Article 21. It is a 'Right to be let alone.' A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child bearing and education among other matters."

Further in the case of Hussainara Khatoon v. State of Bihar\textsuperscript{62} the Supreme Court further widely interpreted the 'Personal Liberty 1 in Article 21 to embrace the right to speedy trial, which is not specifically enumerated as a fundamental right in our constitution. Bhagwati. J pointed out "No procedure which docs not ensure a reasonably quick trial can be regarded as Reasonable, fair or just' and it would fall of Article 21. Thus the right to speedy trial was evolved as an essential element of fair procedure." Further Justice Bhagwati pointed out that: "The State cannot avoid its constitutional obligation to provide speedy trial to the accused by pleading financial or administrative inability." Safeguards Against Arbitrary Arrest And Detention Article 22. The protection of the individual from oppression and abuse by the police and other enforcement officers is a major interest in a free society. Arrest and detention in police lock-up may be very traumatic for a person. It can cause him incalculable harm by way of loss of his reputation. Denying a person of his liberty is a serious matter.

The Supreme Court has clarified in Joginder Kumar v. State of Uttar Pradesh\textsuperscript{63}, that no arrest can be made because it is lawful for the police officer to do so. The existence of the power of arrest is one thing, the justification for its exercise is quite another. The police officer must be able to justify the arrest apart from his power to do so'. Accordingly, the Court has laid down the following guidelines in this regard for the police to follow: " No arrest can be made in a routine manner on a mere allegation of commission of an offence made against a

\textsuperscript{62} AI R 1979 SC 1360
\textsuperscript{63} AIR 1994 (4) SC 260
person. It would be prudent for a police officer in the interest of protection of the constitutional rights of a citizen and perhaps in his own interest that not arrest should be made without a reasonable satisfaction reached after some investigation as to the genuineness and bona fide of a complaint and a reasonable belief both as to the person's complicity and even so as to the need to effect arrest."

Article 22 guarantees the minimum rights which any person who is arrested will enjoy. Clauses (1) and (2) of Article 22 ensure the following four safeguards for a person. He is not to be detained in custody with [Art.22(I)]. He shall not be denied the right to consult, and to be defended by, a legal practitioner of his choice [Art.22 (2)]. A person arrested and detained in custody is to be produced before the nearest magistrate within a period of twenty-four hours of his arrest excluding the time necessary for the journey from the place of arrest to the magistrate's court[Art.22(2)]. No such person is to be detained in custody beyond this period without the authority of a magistrate[Art. 22(2)].

The reason behind the rule requiring communication of grounds to the person arrested is to enable him to prepare his defence, and to move the court for bail, or for a writ of habeas corpus. In State of Madhya Pradesh v. Shobharam\textsuperscript{64} the supreme court ruled out that a person's personal liberty cannot be curtailed by arrest without informing him, as soon as it possible, why he is arrested. Failure to inform the person arrested of the reasons for his arrest would entitle him to be released. If information is delayed, there must be some reasonable grounds justified by the circumstances.

The court can go into the question of sufficiency of the information supplied to the arrested person and if it finds the information to be insufficient,

\textsuperscript{64} AIR 1966 SC 1910
the arrest becomes unlawful. Merely telling a person that he is being arrested under some section of some enactment does not give him sufficient information, The need to tell a person as why he has been arrested does not come to an end by releasing him on bail. For the purpose of this rule, it is not necessary to furnish him with full details of the offence but the information should be sufficient to enable him to understand why he has been arrested and to give him idea of the offence which he is alleged to have committed. The grounds given to the arrested person should be intelligible. Rule 2- Right to engage a lawyer of his own choice.

In case of an accusation against the person arrested against which he should be enabled to defend himself by engaging a legal practitioner of his choice. This is mandatory. In State of Madhya Pradesh v. Shobharam, the Supreme Court held that a person arrested on accusation of a crime becomes entitled to be defended by a counsel at the trial and this right is not lost even if he is released on bail, or is tried by a court which has no power to impose a sentence of imprisonment. Thus, a provision barring a lawyer from appearing before a Nyaya Panchayat would be void to the extent it denies a person arrested the right to be defended by a lawyer of his choice in a trial for the crime for which he has been arrested. If, however, no request for being represented by a lawyer has been made, and so no such request has turned down, then there is not breach of the Fundamental Right contained in Art. 22(1).

The Supreme Court has observed that the arrested person has a right, upon request, to have someone informed and to consult privately with a lawyer. These rights are inherent in Art.21 and 22(2) of the Constitution. The court has directed that those rights of the arrestee be "recognized and scrupulously protected". The court has laid down certain guidelines for the effective enforcement of these Fundamental Rights. In Motibai v. State of Rajasthan\(^65\), the court held that a right

\(^65\) AIR 1954 RAJ 241
to consult a legal practitioner starts from the day of arrest. The arises as soon as a person is arrested. In order to effectuate the right to consult a lawyer of his choice properly and reasonably, it is necessary that such legal practitioner is allowed the facility to consult the accused without the hearing of the police. The police may, however, be present so as to ensure that the accused does not abscond from custody, or do anything which may be objectionable.

According to Justice lyer, in Nandini Satpathy, 

Art. 22(1) does not mean that a person who is not under arrest or custody can be denied the right to consult an advocate of his choice. The spirit and sense 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. Right against self-incrimination is best promoted by conceding to the accused the right to consult a legal practitioner of his choice. Article 20(3) and 20 (1) together, it will be prudent for the police to permit the advocate of the accused, if there be one, to be presented at the time he is examined. If an accused person expressed the wish to have his lawyer by his side when his examination goes on, this facility should not be denied to him.

A person who is arrested has a right to consult and be defended by a legal practitioner of his choice. This provision does not say that this right is lost no sooner than he is released on bail. The word "defended' clearly includes the exercise of the right of the right so long as the effect of the arrested continues. In Shobharam case the Supreme Court ruled out that the constitution lays down a fight to be defended by one's own counsel, and this right cannot be taken away by an ordinary law. It is not sufficient to say that a person who is exposed to fine and is not in danger of losing his personal liberty has no right to be defended by a lawyer. "Personal liberty is invaded by arrest and continues to be restrained

---

during the period a person is on bail and it matter not whether there is or is not a possibility of imprisonment. A person arrested and put on his defence against a criminal charge which may result in penalty, is entitled to the right to defend himself with the aid of a counsel and any law that takes away this right offends against the Constitution."

The Court further declared unconstitutional a provision in the State Act which barred an arrested person to be defended by a lawyer of his choice. In this case, the person concerned was arrested by the police on the charge of trespass, an offence under Section 447, IPC. He was then released on bail and was later brought for trial before the Nyaya Panchayat. The Panchayat imposed a fine on him as the Panchayat had not power to impose the punishment of imprisonment on him67.

Considering the above provision, he could not be defended by a lawyer before the Nyaya Panchayat He challenged the provision. By majority, the provision was declared unconstitutional. A liberal view was taken of Art. 22(1). Once a person is arrested, and even if released on bail, he has a constitutional right to be defended by a lawyer although his personal liberty may not be in jeopardy. Initially, this rule was not followed in India except to the extent that, where in capital cases the accused had no means to defend himself, a counsel was to be provided to defend him. There was no rule of law that in every capital case where the accused was unrepresented, the trial would be vitiates. A court of appeal or revision could interfere if it found that the accused was so much handicapped for want of legal aid that the proceedings against him could be said to be a negation of fair trail. These rules were derived from S.340, Cr.P.C., and the rules and circulars of the High Courts.

In the U.S.A., under the impact of the due process of law clause in the Constitution, there prevails a rule that in a criminal case where the defendant is unable to employ a counsel, and is himself incapable of adequately defending himself because of ignorance, feeble mindedness, illiteracy, etc., it is the duty of the court, whether requested or not, to assign a counsel for him.

In Janardhan Reddy v. State of Hyderabad the Supreme Court taking the traditional view of Art. 22(1) ruled that "the right to be defended by a legal practitioner of his choice" could only mean a right of the accused to have the opportunity to engage a lawyer and does not guarantee an absolute right to be supplied with a lawyer by the state. Since then, Art.39A, a Directive Principle, has been added to the Constitution by the 42nd Constitution Amendment. Section 403(1), Cr.P.C., 1973, has now been enacted, and the Supreme Court has adopted a new stance as to the interpretation of Art.21. This has also led to a new judicial view as to providing legal aid to an accused at his trial.

A person arrested to be produced before a magistrate within 24 hours of his arrest. Thus it ensures that a judicial mind is applied immediately to the legal authority of the person making the arrest and regularity of the procedure adopted by him. In Ram Manohar Lohia v. Supdt. Central Prison, the court held that Art - 22(2) was held to have been fulfilled as the arrest had not been made under the orders or supervision of the magistrate before whom the arrested person was produced.

A station officer arrested a person without a warrant on his own authority. Within a few minutes, the city magistrate came there in his executive capacity. The arrested person was produced before him and he remanded him to jail custody. In Hariharanand v. Jailor the court held that the policy of the law is

---

68 AIR 1951 SC 271
69 AIR 1955 ALL 193
70 AIR 1954 All 601
that the magistrate before whom a prisoner is produced must be in a position to bring an independent judgment to bear on the matter. In Prabhakar v. Dist. Mag\textsuperscript{71}, the court held that it is immaterial whether the magistrate sits in a Court or not at the time the arrested person is produced before him. In State of Uttar Pradesh v, Abdul Samad\textsuperscript{72}, the court held that this is a mandatory provision. Where a person is arrested by a magistrate without a warrant, it is not sufficient for the purposes of Art. 22(2) to produce the person arrested before the same magistrate who arrested him. The reason is that such a magistrate could not apply a judicial mind to the facts of the case as he would be like a judge in his own cause.

If the police does not think fit to take bail the arrested person has to be taken to the magistrate having jurisdiction. Rule 4- Person detained must be brought before magistrate within 24 hours. In Gunpati v. Nafisul Hasan\textsuperscript{73}, it was a clear breach of the peremptory provisions of Art. 22(2) and hence the petitioner was released. A person was arrested in Bombay on a warrant issued by the Speaker of the U.P. Legislative Assembly and was taken to Lucknow in custody to be produced before the Speaker to answer a charge of breach of privilege of the House. He was not produced before a magistrate within 24 hours of his arrest. On a reading of sec-57 CrPC it is evident that no police officer can detain in custody a person arrested without a warrant for a period longer than 24 hours besides the time taken for journey. Article 22(3) makes two exceptions. Articles; 32(1) and 22(2) To persons arrested or detained under a law providing for preventive detention.

These Articles do not apply in cases where arrest is not related with an accusation of an offence. Arrest of a Judgment - debtor in execution of a decree under the Civil Procedure Code where the arrested person is produced not before

\textsuperscript{71} AIR 1960 All 467
\textsuperscript{72} AIR 1962 SC 1506
\textsuperscript{73} AIR 1954 SC 636
a magistrate but the civil court which made the order; Arrest under a revenue recovery legislation to recover arrears of revenue. Arrest of a defendant before judgment. The Supreme Court ruled in State of Punjab v. Ajaib Singh\textsuperscript{74}, that this was not the kind of arrest contemplated by Art. 22, because there was no allegation or accusation of any actual or apprehended commission by that person of any offence of a criminal of quasi-criminal nature.

In Anwar v. State of Jammu and Kashmir\textsuperscript{75} the court held that the foreigner concerned had no right to enter and remain within India. The Constitutional protection against illegal deprivation of personal liberty construed in a practical way cannot entitle non-citizens to remain in India contrary to the law governing the foreigners. Article 22(1) and (2) provide protection against the act of an executive or non-judicial authority. These Articles apply when a person is arrested without, and not under, a court warrant. The reason is that the warrant ex facie sets out the reasons for the arrest, and the arrested person is to be produced before the court issuing the warrant. Thus, a judicial mind has already been applied at the time of issuing the warrant. On the other hand, in case of arrest without warrant, there is need for application of a judicial mind as soon as possible after arrest.

Article 22: Safeguards against arbitrary arrest and detention. According to Article 21 "No person can be deprived of his life or personal liberty except according to procedure established by law". Which means that a person can be deprived of his life or personal liberty provided his depriving is brought about in accordance with the procedure established by law. Now what is that procedures established by law, which must have certain procedural requirement, which must be adopted and included in any procedure enacted by legislature are provided in Article 22. So Article 22 deals with the procedural requirement of any procedure.

\textsuperscript{74} AIR 1953 SCR 254
\textsuperscript{75} AIR 1971 SC 1506
enacted by legislation. If these procedural requirements are not complied with, it would then be deprivation of personal liberty which is not in accordance with the procedure established by law. Article 22 deals with Persons arrested under the ordinary law of crimes, Persons detained under the law of preventive detention.

Person arrested under the ordinary law of Crimes: Article 22(1) and Article 22(2) guarantee rights to an accused person who is arrested for any offence under the ordinary law to both citizens and non-citizens except those who are defined in Article 22(3). Article 22(1) provides that an accused person who is arrested cannot be detained without being informed 'as soon as may be' of ground of such arrest, nor can be denied the right to consult, and to be defended by, a legal practitioner of his choice. Thus this clause enables the accused person who is arrested to know the grounds of his arrest and to prepare for his defense. The words used in Article 22(1) are 'as soon as may be' which means as early as possible as is reasonable in the circumstances of a particular case. Thus in Tarapada v. State of West Bengal 76 where the ground of arrest were delayed and were not informed immediately, the Court held that if the 'ground of arrest' are delayed in communication to accused person then it must be justified by 'Reasonable circumstances'.

Legal Rights of an Accused Person: The right to consult and to be defended by a legal practitioner of his choice: - Prior to Maneka Gandhi's case, the view of the Court was that it was not bound to provide the help of a lawyer unless a request was made by him. But as a result of the ruling of the Supreme Court in Maneka Gandhi's case and decisions in a series of cases followed by it made it clear that the Courts are bound to provide the assistance of a lawyer to an accused person, arrested under an ordinary law also.

76 AIR 1951 SC 174
In Husainara Khatoon v. Home Secretary\textsuperscript{77}, Bihar the Supreme Court has held that it is the constitutional right of every accused person who is unable to engage a lawyer and secure legal services on account of reasons such as poverty, indigence or incommunicado situation, to have free legal services provided to him by the State and the State is under constitutional duty to provide lawyer to such person if the need of Justice of required. Article 22(2) provides that "every person who is arrested and detained in custody must be produced before the nearest Magistrate within twenty four hours of his arrest, and no such person shall be detained in custody beyond that period without the authority of Magistrate.

No detention beyond 24 hours except by order of the Magistrate: It means that if there is necessity of detention beyond 24 hours it is only possible under judicial custody. The expression "arrest and detention in Article 22(1) & (2) was held not to apply to a person arrested under a warrant issued by the Court on a criminal or quasi-criminal complaint. Here in Article 22(1) & (2) the expression "Arrest and detention" is designed to give protection against the Act of the executive or order of non-judicial authorities and applies to a person who is accused of a crime or of offence of criminal or quasi criminal nature.

Thus this enables the speedy trial to an accused person. This means that if there is failure to produce the accused person before the nearest Magistrate within 24 hours it would make the arrest illegal. In case, when investigation cannot be completed with 24 hours of arrest of an accused the judicial Magistrate can authorize the detention of accused in such custody, either police or judicial.

In C.B.I.v. Anupam 3. Kulkarni's\textsuperscript{78} cases the Supreme Court has laid down detailed guidelines for this. According to this the total period of detention in police custody cannot be more than 15 days. After expiry of first 15 days, it

\textsuperscript{77} AIR 1979 SC 1377
\textsuperscript{78} AIR 1990 SC 140
should be only judicial custody and if the investigation is not completed with in 90 days or 60 days then the accused has to be released on bail. The decision of the Supreme Court saved many under trial prisoners from police atrocities as they cannot be keep more than 15 days in police custody in Lock-ups and also helped in speedy investigation of crimes. Thus the assistance of a legal practitioner and the authority of Magistrate are interposed between the accused who is arrested and those arresting him. Article 22(1) and (2) imposes fetters on legislative power because no procedure can be validly prescribed contrary to the requirements of Article 22(1) and (2). When these requirements are complied with they will be valuable safeguards for a fair procedure.

Article 22(3) - Exceptions Article 22(3) provides tow exceptions to the rule contained in Clauses (1) and (2). As we have studied that rights under Article 22(1) and (2) are available to citizens and non-citizens. Article 22(3) provides two exceptions to this, to whom these rights are not available they are, an alien enemy, A person who is arrested and detained under a preventive detention law. For persons who are arrested and detained under a preventive detention law, procedure is laid down under Article 22(4) to (7).

An enemy alien also may seek the protection under clause (4) and (5) of Article 22 if arrested under a law of preventive detention, but subject to the law passed by the Parliament. Protection and remedies available to a person arrested under preventive detention are laid down in 'Preventive Detention Laws'. Under these clause, the procedure is laid down which is to be followed if a person is arrested under the law of "Preventive Detention". The Preventive Detention is not punitive in sense but a preventive measure. The sole justification of such detention is suspicion or reasonable probability of the detenue committing some act likely to cause harm to the society or endanger the security of the Government, and not criminal conviction which can only be warranted by legal evidence.
Explaining the necessity of 'Preventive Detention' in the case of Gopalan v. State of Madras, Patanjali Shastri J. said "the sinister looking feature, so strongly out of place in democratic constitution, which invests personal liberty with the scarce sanctity of a fundamental right and so incompatible with the promises of its preamble, is doubtless designed to prevent the abuse of freedom by anti-social and subversive elements which might imperil the national welfare of the infant Republic,"

Constitutional Safeguards against Prevention Detention Laws, though the constitutions has recognized the necessity of laws as to preventive detention, it has also provided safeguards to mitigate their harshness by placing fetters on legislative power conferred on legislature. Article 22(4) to (7) guarantee the following safeguards to a person arrested under preventive detention law”, Review by Advisory Board, Communication of ground of detention to detenu and Detainee's right of representation.

"No law providing for preventive detention shall authorize the detention of a person for a longer period than 'three months' unless an advisory board constituted of persons who are or have been qualified to be High Court judge has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention. Though the maximum period of detention for which a person may be detained without obtaining the opinion of advisory board has been reduced from three months to two months in the 44th (Amendment) Act, 1978, the Act has not been brought into force. Thus if in the opinion of advisory board the detention was not justified, the Government was bound to revoke the detention order. If the advisory board reports that the detention is justified then the detaining authority till determine the period of detention. However, "the period of detention cannot exceed in any case beyond the maximum period prescribed by any law made by Parliament for that class of detenue."

79 AIR 1950 SC 27
In Sattar Habib v. K.S. Dilip Singhji case, where the Advisory Board did not give clear opinion that there was sufficient cause for the continued detention of detenue, the Court held that the detention of detenue for more than one year was without legal sanction and hence illegal. The Advisory Board is bound to submit its report before the expiration of the said period of three months. Failure to do so would render the detention illegal. Article 22(4) of the Constitution as well as Section 167(2) of Cr.P.C expects that an arrested person shall not be kept in custody for any unreasonable time and the investigation must be completed as far as possible within 24 hours. But realizing that it may not be possible to complete the investigation in every case within 24 hours, Parliament enacted the provision under Section 167(2) by providing extension to one year when Public Prosecutor demands for specific reason. Thus in case of Hitendra Vishnu Thakur v. State of Maharashtra. Where the police had failed to complete the investigation within the prescribed period under Section 20(4) (b) of TADA. The Court held that the accused, who was arrested under TADA, was entitled to be released on bail.

"The authority making the order of detention must as soon as may be possible communicate to the person detained the grounds of his arrest, that is, the grounds which led to be subjective satisfaction of the detaining authority. Thus Article 22 clause (5) imposes an obligation on the detaining authority to furnish to the detenue the grounds for detention as soon as possible. The word "Communicate" means that sufficient knowledge of the basic facts constituting the ground should be imparted effectively and fully to the detenue in writing in a language which he understands. Thus in case of Lallubhai Josibhai Patel v. Union of India, the detenue did not know English and the grounds of detention were drawn in English and the detaining order stated that the Police Inspector while

---

80 AIR 1994 (4) SCC 602
81 AIR 1981 SCC 2
82 AIR 1975 SC 223
serving the grounds of detention fully explained the grounds in Gujarati to the detenue, but no translation of the grounds of detention into Gujarati was given to the detenue, the court held that there was no sufficient compliance of Article 22(5) and hence the order of detention was invalid.

The detention was based on distinct and separate grounds and if any of the grounds was vague or irrelevant the entire order was violative of Article 22(5) and must be set aside. The grounds supplied to detenue must not be vague, irrelevant or non-existent. If the grounds are vague, irrelevant or non-existent to the object of preventive detention laws, then the right of detenue is violated under Article 22(5). "To give the detenue the earliest opportunity of making a representation against the order of detention is to be furnished with sufficient particulars to enable him to make representation" Thus the right is given to detenue that he should be given the earliest opportunity of making a representation against detention order. For this the detenue must be furnished with sufficient particulars of ground of his detention to enable him to make a representation which on being considered may give him relief. The meaning of grounds in Article 22(5) is that: "All basis facts" and material which have been taken into account by the detaining authority in making the order of detention and these all basis facts and material must be communicated to the detenue, which will enable the detenue to afford the earliest opportunity of making representation against the order of detention.

In Kamala v. State of Maharashtra\(^8\), where the documents and materials were not supplied along with the detention order and also there was an unexplained delay of 25 days in disposing of the representation of the detenue, the Supreme Court declared the order of detention void. Further the Supreme Court has expressed great concern about the non-compliance of constitutional

---

\(^8\) AIR 1981 SC 814
safeguards contained in Article 22(5) by the detaining authority. The Court suggested that "whenever a detention is struck down by the courts, the detaining authority or officer concerned who are associated with the preparation of the grounds of detention must be held personally responsible and action should be taken against them for not complying with the constitutional requirement contained in Article 22(5)."

Article 22(6) is exception to Article 22(5) and Article 22(4). Under Article 22(6) disclosure of facts which are considered to be against public interest may not be furnished to detenue. Hence it follows that both the obligation to furnish particulars and the duty to consider whether the disclosure of any facts involved therein, is against public interest are vested in the detaining authority, not in any Court.

Thus in Saraswathi Seshagiri v. State of Kerala84 the Court held that "Normally the Court will not interfere with the decision of the detaining authority, whether the grounds given in the detaining order are sufficient or not. The power of detention under preventive detention laws was to be exercised on the subjective satisfaction of the detaining authority. However, the subjective satisfaction of the detaining authority is not wholly immune from judicial scrutiny. The basic postulate on which the Courts have proceeded is that subjective satisfaction being a condition precedent for the exercise of the power conferred on the executive, the Courts can always examine whether the requisite satisfaction is arrived at by the authority, if it is not condition precedent to the exercise of the power would not be fulfilled and the exercise of power would be bad. Right to Constitutional Remedies is secured under Article 32 to go to supreme court directly. These Article provide the remedies to enforce the Fundamental Rights. Under Art 226 to approach High court by filing various

84 AIR 1982 SC 165
writs. of these the most important is Article 32. These Articles embody very important values, which have been secured by the people for the people over long periods of struggle. The working of the Constitution over the last sixty four years exemplifies the struggle between rights of the people and the power of authority to subvert them by subjugating people through bad governance controlling crime is only a part of governance.