CHAPTER- II

HUMAN RIGHTS OF ARRESTED PERSONS IN HISTORICAL PERSPECTIVE

2.1 Introductory

Since the evolution of a civilized society a man has aimed at creating humane society and this is an age old desire embedded in its very nature. The concept continued to develop even with the development of society and evolution of State. No doubt, the concept of government had changed from ancient period to current state of civilization routing through many channels. A primary purpose of any government was to enforce law and order throughout ages and it persists in modern context also. The Centre and the State governments of India, for example, grant certain powers to government officials so that they can maintain an orderly society and protect the lives, property and rights of the people. These governmental agencies have the duty of preventing some individuals from harming others through some acts designated as crime. There are, however, constitutional limits on the power of government officials in order to prevent them from abusing the rights of individuals, including those accused of criminal behavior. The present criminal administration of justice in India has its roots in colonial rule by British and till the present, the criminal jurisprudence runs on the presumptions that “It is better for 99 guilty persons to go free than for one innocent person to be punished.” In India, a person accused of a crime is presumed
innocent until proved guilty. The burden of proving the suspect guilty is upon the prosecution.

However, the challenges which are alarming before the present governments are to keep balance as to make people safe and secure on one hand and on the other hand enforce law in such a manner so that humanity is not subjugated. Whereas the question of the rights of the accused is concerned, no doubt with the development of human rights laws at international and national level, a lot of efforts have been made in this regard but the basic instinct towards these rights still finds its evolution in ancient laws. Among other primary role the state had its important duty to protect the society from the criminals and detect the offenders. In this course of formulation of coercive measures in the investigative process, a balance has to be struck between the rights of an individual and the imperative needs in the interest of society for the protection and punishment of crime. This was not and still is not an easy task as to formulate regulations in this behalf and the challenge is plagued with difficulties. There are in conflict two competing interests; the interest of the citizen to be protected from invasion of his physical privacy and the interest of the State to secure evidence which has a bearing upon the commission of the crime. Reconciliation of the two is the basic problem. Privacy indicates those values which civilized society would like to cherish for protecting the human desire for secrecy and anonymity as also for freedom from physical interference. Such rights are in all amplitude recognized in Indian Law.

Regarding the rights of arrested persons or general humanistic rights in ancient India there are very rare evidences in laid down manner but the state of affairs can be drawn by the existing set ups
at that time. The study of the provisions relating to rights of arrested persons in ancient time requires a brief look into the system which has prevailed through journey of civilizations. This includes the terms crimes, police administration, administration of justice and of course the laws to deal with.

2.2 Law in Ancient India

Like in every civilized society, socio-economic and political conditions prevailing during different phases of the history of India influenced its evolution of law. Accordingly, the objectives of the criminal justice and methods of its administration changed from time to time and from one period of history to another. The rulers at different times had different setup of administration of justice. Initially, the Law or Dharma, as propounded in the Vedas was considered supreme in ancient India for the King had no legislative power. But gradually, this situation changed and the King started making laws and regulations keeping in view the customs and local usages.¹ There is no doubt that in early history of ancient India Hindu law dominated which was based on Hinduism. Hinduism was a way of life with considerable freedom of belief. It was a family of four Vedas, eighteen Puranas, one hundred & eight Upnishads, two epics (Mahabharta and Ramayana), various Neetis, Bhagavad Gita, Manu Samhita (or Smiriti), comparatively recent Kautilya’s Arthshastra and other big and small texts with regional flavours of the same grand narration to which the concept of dharma remained central.² The concept of Dharma or law in ancient India was inspired

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¹ Dalbir Bharti, The Constitution and Criminal Justice Administration, 42(APH Pub. Delhi, 2002)
by the Vedas which contained rules of conduct and rites compiled in Dharma Sutras, which were being practiced in a number of branches of the Vedic schools. Their principal contents address the duties of people at various stages of life, the rights and duties of the kings and juridical matters. These were basis of Hindu Law. The earliest document throwing light on the theory of jurisprudence, which forms part of practical governance, is the Arthashastra of Kautilya dating back to 300 B.C. After coming into existence of Christian era, there evolved a number of Dharmashastras which dealt extensively with Dharma like, Manu, Yajnavalkya, Narda and Parashara smiritis etc.

Dharma is a code of conduct supported by the general conscience of the people. It is not subjective in the sense that the conscience of the individual imposes it, nor external in the sense that the law enforces it. Dharma does not force men into virtue, but trains them for it. It is not a fixed code of mechanical rules, but a living spirit, which grows and moves in response to the development of society. The authority of dharma, which was moral and not legal, was kept alive by Indian scholars and jurists called Brahmins, however, the King through royal decree could translate dharma into law.

The Vedas were an act of revealing or communicating divine truth or revealed texts gathered directly by inspired savants or rishis. Different schools have interpreted the philosophy of Vedas but the Vedas themselves did not contain any prescriptive rules of behaviour, but only 'references to usage' which constituted dharma,

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3 S. Radhakrishnan, The Heart of Hindustan, 24 (Natesan & Co. Madras, 1932)
commentaries and treatises contained numerous precepts, which prescribed rules for governing behaviour⁴.

Generally Dharma was supposed to override the all other sources of law but Kautilya's Arthshastra mentions Royal commands were the supreme. ⁵ Therefore the state performed its duty of protection of society and the individual through coercive enforcement of the standards of justice, which are reduced for the purpose into the ins and outs of positive law known as behaviour (vyavahaara). Early codes of law, covering every aspect of life, are preserved in the voluminous Dharmasaastra literature, of which perhaps the Laws of Manu is the most well-known.

So long as the territory was small, the form of administration was more or less democratic; but as the size of the territory grew large, it was found necessary to adopt a system in which political powers were concentrated in the hands of the Head of the State assisted by a Council of Ministers and a trained bureaucracy.⁶ In many ancient Countries the State, in the earlier stages of its development, was theocratic; but in India, although the social organisation contained within its bosom the Brahmanic theocracy and was to a large extent dominated by it, the State itself never became a theocracy in the proper sense of the term. This becomes evident when we consider a few broad facts. First, the ruler was never regarded as the head of religion. Secondly, the primary object of the State was not spiritual salvation, but social well-being. Thirdly, law, mingled as it was with

⁵ A. L. Basham, *The Wonder that was India*, 114 (Rupa & Co., New Delhi, Third Revised Edition)
⁶ Pramathanath Banerjea, *Public Administration in Ancient India*, 31 (Mcmillan & Co. 1916)
religion and morality, was the chief source of the authority of the State. And lastly, the political status of individuals was independent of their religious beliefs and convictions. The sphere of State-action was in the earliest period very limited. The State was then, in fact, what political scientists' term a Police-State. Therefore in nutshell it can be asserted that in ancient India the King was the law giver and as consequence of struggle for political power between king and people the royal authority was denuded of its powers of law giving.

2.2.1 Concept of Crime

The history of crime is as old as mankind itself. This evil has existed since the dawn of civilization. The primitive societies had some basic customs and prohibitions which were respected by all members of the society. The respect for the customs and prohibitions was actuated by the belief that anyone who violated the custom would be punished by God. "A tooth for tooth" and "eye for an eye" - the theory of retaliation - which often led to bloodshed, was also prevalent in some primitive societies. Crime in present day context is understood to be an offence against the public at large and State works as a guardian against the criminal and therefore State as a guardian is under obligation to protect the society from law breakers. Crime was not unknown in epic period. However there was ambiguity in using the term crime as generally the term wrongs were used. The systematic efforts to classify crime were made in this period. Among the serious crime mentioned in the epics period (1400-800 BC) were perjury, criminal misappropriation, theft,

7 Id., at 39
8 Satya Prakash Dash, Constitutional and Political Dynamics of India, 140 (Sarup and Sons Delhi, 2004)
robbery arson and poisoning of water supply.\textsuperscript{9} Though not necessary
to draw lines between civil and criminal cases but Brihaspati Smriti
shows in its contents some passage where demarcation has been
mentioned as law suits originating in wealth and injury.\textsuperscript{10}

Many ancient writers have also mentioned certain crimes which
were at rampant. This included forgery, false weight and measures
and counterfeit coins and had mentioned of severe punishments for
these crimes. \textsuperscript{11} The offences were classified under three heads,
namely, (1) Crimes against God, (2) Crimes against the State and (3)
Crimes against private individuals.\textsuperscript{12}

Henry Maine who had firsthand knowledge about legal system of
many countries through their literature has mentioned that
classification regarding civil and criminal law was not clear in
ancient times. He found none of such classification among the most
developed civilization of Ancient Greek, Roman and India. He did
not recognise the criminal law of ancient times rather classifies it as
law of wrongs or torts.\textsuperscript{13} The crimes were not considered as wrongs
against state but against individuals and wrong doer were supposed
to compound his wrong and state worked as arbitrator between two
litigants.\textsuperscript{14} While civil wrongs related mainly to disputes arising over
wealth, the concept of sin was the standard against which crime was
to be defined. The administration of legal justice and redressive

\begin{itemize}
  \item \textsuperscript{9} S. Venugopal Rao, \textit{Facets of Crime in India}, 9 (Allied Publishers Bombay,
  1967)
  \item \textsuperscript{10} Brihaspati II at 5 Quoted by Pramathanath Banerjea, (1916) \textit{supra} note 6 at
  153.
  \item \textsuperscript{11} S. Das, \textit{Crime and Punishment in Ancient India}, 23-24 (Abhinav Publication
  Delhi 1990)
  \item \textsuperscript{12} V. D. Kulshreshtha, \textit{Landmarks in Indian Legal and Constitutional History}, 23
  (Eastern Book Co. eighth ed., 2005)
  \item \textsuperscript{13} Henry Sumner Maine, \textit{Ancient Law}, 358 (Charles Scribner New York, 1864)
  \item \textsuperscript{14} Theodore W. Dwight, \textit{Introduction to Henry Sumner Maine}, LXVI (Ancient
  Law).
\end{itemize}
punishment was not performed mechanically or indiscriminately without respect for persons, however.

2.2.2 Administration of Justice

From the Vedic period onward, the perennial attitude of Indian culture has been that justice and righteousness among men are microcosmic reflections of the natural order and harmony of the macrocosmic universe. The cosmos is instinct with an inherent structure and functional pattern in which men at their best willingly participate. Justice, then, in the Indian context, is a human expression of a wider universal principle of nature and if man was entirely true to nature; his actions would be spontaneously just.\(^\text{15}\)

Justice, in the sense of a distributive equity, was experienced by men in three major guises: as moral justice, social justice and legal justice. The individual required maintenance, protection and help even for spiritual realization and therefore, the economic, political and legal organizations of society are deemed necessary. It is the duty of the ideal state to create conditions and opportunities that will gradually help man overcome his ignorance, selfishness, and immoral tendencies, so that a harmonious community may evolve in which every individual can advance toward the supreme goal of spiritual freedom from ignorance and selfishness and all the vices that follow there from.\(^\text{16}\)

Administration of justice did not form the part of state's duty in early times. The aggrieved party had to take recourse to get his wrong redressed. In India we also find that authorities like Manusmriti, recognising the use of force, stratagem, dharna by the


\(^{16}\) *Id.*, at 280.
plaintiff as a normal mode of redressal even when the law courts had been established. For a long time even murders were not regarded as offence against state but as simple torts, where mere compensation had to be given to the relative of the deceased party. 17 Manu, as a realist, insists in his discussion of the role of the king that if he does not inflict punishment on those worthy to be punished, the stronger would roast the weaker like fish on a spit. 18 Having fully considered the time and the place (of the offence), the strength and knowledge (of the offender), let him justly inflict that punishment on men who act unjustly. 19 The exercise of the coercive power of danda with regard to law-enforcement is considered just in the highest sense, since particularistic legal codes are considered to be concrete and detailed embodiments of the more abstract and illustrious principles of justice which are fundamental to the universe.

The laws regarding punishment were not uniform as it varied according to circumstances of the particular case and victims. It was only because of these reasons that the state later on decided to form laws to punish criminals and criminal adjudication started with the delegation of power to a commission to try criminal case in ancient Roman civilization. 20 It was only in 149 BC that true criminal law came into existence with the appointment of permanent commission to hear or try criminal cases. 21 The earlier criminal tribunals were just committees of legislature. The persons tried before one

17 A. S. Altekar, *State and Government in Ancient India*, 245-246 (Motilal Banarsidass Delhi, 2001)
19 *Ibid*
20 *Supra* note 13 at 369-370.
21 *Supra* note 5 at 371.
commission, were not to be tried before other commission for the same offences. This practice continued for long till Emperor handed over the criminal administration to the magistrates appointed directly and the place of senate was taken by Imperial Privy council which later on became court of Appeal. This Roman view was adopted by many civilizations.

In ancient India crimes against persons were adjudicated with reference to the class-status of the victim. The penalty for a crime was increasingly severe the higher the varna of the victim. The same underlying idea is reflected more positively in the legal administration of Indian justice through the notion that the more elevated a man is in terms of varna, the more responsibility he should bear for his misdeeds. Thus Manu says: When another common man would be fined one kaarshaapana, the king shall be fined one thousand; that is the settled rule. In (a case of) theft the guilt of a 'Suudra shall be eight-fold, that of a Vai'sya sixteenfold, that of a Kshatriya two-and-thirty fold, that of a Braahma.na sixty-four fold, or quite a hundred fold, or (even) twice four-and-sixtyfold; (each of them) knowing the nature of the offence. The system of awarding punishments on the basis of varna contravened the concept of equality of all human beings as propounded by the Vedas. The discriminatory system of inflicting punishments and contradictory provisions in different legal literature made the criminal justice system defective and confusing.

\[22 \text{ Id. at 378-379.} \]
\[23 \text{ Id. at 382} \]
\[24 \text{ Supra note 18 at 313.} \]
\[25 \text{ Supra note 1} \]
To discourage crime and to punish the criminals, Indians from very early times gave very special powers to rulers of the state. But it is impossible to check such tendencies absolutely and for various reasons social, economic and political, people challenged the norms of the society. The ancient Hindu Law givers laid down that punishment must be regulated by consideration of the motive and nature of the offence, the time and place, the strength, age, conduct, learning and economic position of the offender and above all, by the fact whether the offence was repeated. Dharamshastra and Arthashastra show to us a more full fledged judiciary. Dharamshastra and Nitishastra find the King as a fountain of justice. He had to spare a certain time to adjudicate the cases.

The essential duty of government was the maintenance of law and order. This was broadly defined to include the maintenance of social order as well as preventing and punishing criminal activity. An integral part of the Arthashastra was the dandaniti, the enforcement of laws through sanctions or punishments, which was a primary responsibility of the state. While this may seem to reflect the principles of the modern 'positivist' state, other references of Kautilya to the legal 'process' confirm his links to the traditional legal system. Any matter in dispute was to be judged according to the four bases of justice. These, in order of increasing importance, were Dharma, Evidence, Custom, Royal edicts or promulgations.

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26 Supra note 11 at 13.
27 P. K. Sen, Penology Old and New, 112 (London : Longmans, Green, 1943)
28 Supra note 17 at 247.
30 Verse 3.1.39,40 of Kautilya's Arthashastra, cited in Rangarajan, Id. at 380.
In the event of a disagreement between custom and the Dharmastra, or between the evidence and the Shastras, the matter, according to Kautilya, was to be decided in accordance with Dharma. Whenever there was a conflict between the Shastras and the written law based on Dharma, then the written law was to prevail.31

Verse 3.1.38 of Kautilya's Arthashastra also laid down that Judges were called 'Dharmastha' upholder of Dharma, indicating that the ultimate source of all law is Dharma. Kautilya also recognized that the customary law of a people or a region was also relevant, in addition to which was law as promulgated by the king. 'When all traditional codes of conduct cease to operate due to disuse or disobedience, the king can promulgate written laws through his edicts, because he alone is the guardian of the right conduct of this world'. 32

Therefore, it can be summerised that the institutions of the criminal justice administration had taken their roots during the Vedic period in India. The system gradually developed and during the Mauryan period a well-defined criminal justice system had come into existence as described in the Arthashastra. The punishments during ancient India were cruel, barbarous and inhuman. As regards the procedure and quantum of the punishments there were contradictions between various Smritis and in certain cases even among the provisions found in one Smriti itself.33 Later on it was the institution of state which took control of administration and as a guardian of the people took upon itself the right to punish the

31 Verse 3.1.43-45, Ibid.
32 Supra note 29, at 378.
33 Supra note 1
offender. Crime began to be classified and penal laws were enacted to deal with criminals.

2.2.3 Mughal Period

During the Muslim rule in India, Islamic law or Shara was followed by all the heads known as Sultans and Mughal Emperors. The holy Quran was the main source of law, which was applied in deciding both civil and criminal cases. Muslim criminal law as applied in India, was supposed to have been defined once for all in the Quran as revealed to the Arabian Prophet and his traditional sayings (hadin). The Muslims followed the principle of equality for men and they had no faith in the graded or sanctified inequality of caste system. Muslim religion places every man on an equal footing before God, overriding distinctions of class, nationality, race and colour. However, this concept of equality was applicable only to the Muslims. Under the Muslim law, non-Muslims did not enjoy all the rights and privileges which the Muslims did. They were not treated as equal to Muslims in law and were called “zimmis”. Their evidence was inadmissible in the courts against the Muslims. They had to pay an additional tax called ‘jizya’ and as regards other normal taxes also they had to pay at double the rate than what a Muslim paid. Muslim law of punishment was horrible. Drunkenness and adultery were considered offences against God whereas murder, robbery, was considered offence against man. Punishments in the form of stoning, cutting hand, retaliation by way of inflicting some injury on wrong doer were prevalent.

35 Supra note 12 at 28.
36 Devi Dayal Aggarwal, Jurisprudence in India: Through the Ages, 208-209 (Kalpaz Pub. Delhi, 2002)
A special feature of the Muslim law was that the Muslim criminal jurisprudence treated criminal law as a branch of private law rather than of public law. The principle governing the law was more in the nature of providing relief to the person injured in civil matters rather than to impose penalty for the offence committed. It was for the private persons to move the State machinery against such offences and the State would not *suo-moto* take cognizance of the same.\(^37\)

In medieval India, the religious leaders endeavoured to transform Islam into a religion of law, but as custodian of justice, the rulers made the Sharia, a court subservient to their sovereign power. Theoretically the rulers had to be obedient to the Sharia and history speaks about certain cases where Sovereigns unhesitantly submitted to the Qazi’s decision. The rulers sat in a Court known as Mazalim (complaints). According to Ibn Battuta, Muhammad bin Tughalaq, ruler of Tughalaq dynasty, heard complaints each Monday and Thursday. From 13\(^{th}\) century onwards, an officer known as Amir-i- dad presided over the secular Court in sultan’s absence. He was also responsible for implementing Qazis’ decisions and for drawing their attention to the cases which constituted miscarriage of justice.\(^38\)

Under Muslim rule, the judicial system remained a plural one. Muslim populations were governed by Muslim law in criminal, civil and family matters and disputes settled before royal courts established in cities and administrative centre. Hindus were generally allowed their own tribunals in civil matters. When such

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\(^{38}\) [http://www.supremecourtofindia.nic.in/scm/m2.pdf](http://www.supremecourtofindia.nic.in/scm/m2.pdf) (visited on 12th May 2010).
matters came before royal courts, Hindu law was applied and sustained by the sanctions of the State. While there was a hierarchy of courts and rights of appeal, there was no supervision of lower courts. No attempt was made to control the administration of law in the villages.\textsuperscript{39}

2.2.4 British Period

When the British began to conquer India they found two great systems of customary law in existence, the Muslim and the Hindu. There were considerable branches of law practically non-existent. There was hardly any law of civil and criminal procedure, because the methods of justice were primitive and would have been cheap, but for the prevalence of corruption among judges as well as witnesses. There was very little of the law of Torts or Civil Wrongs; and in the law of property, of contracts, and of crimes, some departments were wanting or in a rudimentary condition. Of a law relating to public and constitutional rights there could of course be no question, since no such rights existed.\textsuperscript{40}

The first hundred years of British rule in India saw a number of remarkable changes in the system of criminal justice administration. With the East India Company's interference in the country's administration, laws were revised to suit the imperial needs. Warren Hastings suggested the first major amendments in 1772, when he prepared a detailed note indicating the remedial measures necessary to maintain law and order in Bengal.

\textsuperscript{39} Galanter, Marc, \textit{The Displacement of Traditional Law in Modern India in Law and Society in Modern India}, 16 (Oxford University Press, 1989)

\textsuperscript{40} James Bryce, \textit{The Ancient Roman Empire and the British Empire in India, The Diffusion of Roman and English Law throughout the World: Two Historical Studies}, 105-107 (Oxford University Press London, 1914)
After the fall of Mughal Empire, the English Criminal Law as modified by several Acts was administered in the Presidency towns of Calcutta, Madras and Bombay. However, in the Mofussil towns, the Courts were mainly guided by the Mohammadan Criminal Law. The system of administration of justice in the Presidency town of Bombay was revised in the year 1827 and from that time, the law administered by the Criminal Courts was in accordance with the law laid down in Regulation XIV of 1827 but in the remaining Presidencies of Calcutta and Madras, the Mohammadan Criminal Law remained operative till the Indian Penal Code came into force. The Company's new charter of 1833 completely transformed the Government of India's law-making structure. In 1833, Thomas Macaulay was appointed as India's first Law Member and head of its first Law Commission. The legal system he inherited was complex, pluralistic, and in some respects unmanageable as it suffered from “vices of vagueness.”

The Indian Penal Code came into operation on 1st January, 1862. It was drafted by the First Indian Law Commission of which Lord Macaulay was the President. The draft code was placed before the Governor General of India in Council in the year 1837 and it was revised by Sir Barnes Peacock, Sir J.W. Colville and others. After its completion in the year 1850, it was presented before the legislative council in the year 1856 and ultimately it was passed on 6th October, 1860. The Indian Penal Code was thus given effect to on 1st January, 1862. In the Indian Penal Code, the Criminal law of India

41 Elizabeth Kolsky, Codification and the Rule of Colonial Difference: Criminal Procedure in British India, 23 LHR 639 (2005)
has been codified. It deals specifically with offences, being the substantive law.\textsuperscript{42}

For the proper trial of offences provided under the Indian Penal Code, procedural law was necessary but prior to the year 1887, there was no uniform consolidated criminal procedure for the whole of British India. There were few separate Acts for the Presidency Towns and Provinces. Having realised the necessity of a Uniform law of Criminal procedure, a uniform law was introduced in the year 1882 for the whole of British India. Thus, a uniform Criminal Procedure Code was passed in 1882. Thereafter, came the Criminal Procedure Code of 1898 which remained operative till the present Criminal Procedure Code (Code of Criminal Procedure 1973) was enacted.

The Criminal Procedure Code got the assent of the President of India on 25\textsuperscript{th} January, 1974 and it came into force on 1\textsuperscript{st} April, 1974. It has been laid down in section 4 of the Code that all offences under the India Penal Code shall be investigated, inquired into, tried and otherwise dealt with in accordance with the provisions contained therein.

\textbf{2.3 Police Administration in India}

It is an integral part of any administration to protect and detect the crime. The investigation is therefore the important aspect of the criminal jurisprudence for which certain agencies in the form of Police, Central Bureau of Investigation (CBI), and Criminal Investigation Agency (CIA) etc. are working as a part of the administration. While implementing the criminal law, one thing

\textsuperscript{42} \textit{Id.}, at 658-660.
which is very important, is to make a balance between the society on one hand and individual liberty on the other. Therefore an individual require personal liberty and social security both as fundamental guarantee and need respectively. This is required to be followed at every stage of the implementation of the process laid down under criminal jurisprudence. Almost all countries’ laws provide for these types of safeguards now in fundamental laws or procedural laws. One of the processes that impose a major threat to the liberty of the individual is that of arrest.

The word 'police' as we understand in modern context have its origin in different terms such as The Latin word “Politia”, the Greek word “Polis”, the Spanish word “Policia” and the French word “Police”. The word Police is derived from all these words, which mean citizenship, government, capital and city. Since ages in order to keep law and order, to prevent crimes, to find out criminals, to execute punishment, to ensure law, discipline and morality, and to provide security among the subjects, the ruling class sought the services of a group of persons evolving into police force. The development of the police administration has been widely acknowledged to the reason of development of the civilization. Historically police were not respected by any community due to their involvement with rampant corruption. The first police force comparable to the present-day police was established in 1667 under King Louis XIV in France; After that the first modern police force was established in 1829 by Sir Robert Peel (commonly said to be the London Metropolitan Police), which promoted the preventive role of police as a deterrent to urban crime and disorder; In the United States, police departments were

first established in Boston and New York City in 1838 and in 1844 respectively. The notion that police are primarily concerned with enforcing criminal law was popularized in the 1930s with the rise of the Federal Bureau of Investigation (FBI) as the pre-eminent 'law enforcement agency' in the United States.\textsuperscript{44} In India the Criminal Procedure Code permits the use of force by the Police to disperse an unlawful assembly that threatens public peace. A police officer acting under this legal authority cannot be prosecuted except with the sanction of the Government. The use of deadly force is permitted as a final resort against an individual accused of an offense punishable with death or with life imprisonment if he forcibly resists or attempts to evade an arrest. But a person in custody in any civilized society cannot be reduced to the status of non person only because of the reason of being in police custody. Any use of force, threat, psychological pressure or coercion in any manner against the person in custody is termed as custodial torture and is a naked violation of humanistic rights. The working of police authorities are under scanner for recent past as deaths, rapes or other brutalities in custody is made to look like a suicide or an accident and even sometimes the body of deceased is disposed off quickly without performing formalities of postmortem etc. There are repeated circumstances of manipulation of evidential records being destroyed and protecting faulty police personals. The victims or relatives are unable to get justice which either is denied or delayed. The most common cause of police or custodial torture occurs while trying to extract confession from the suspected person or arrested persons during investigations or interrogations. Perfect place for the

\textsuperscript{44} Khan Ferdousour Rahman, Criminal Justice System and Human Rights, \textit{The Daily Star}, May 10, 2008 available at http://www.thedailystar.net/law/2008/05/02/index.htm (visited on 11\textsuperscript{th} July, 2010).
criminals is behind the bars but it does not affect his status as human being and he certainly enjoys some rights.

The study of the evolution of police administration is necessary to understand the rights of the arrested persons in ancient period because this is the agency with which the offender first comes into the contact after committing offence.

2.3.1 Police Administration in Ancient India

The philosophical averments can be drawn that the existence of police in India is as old as the nation herself. Social life was the first civilized development made by the ancient man realizing its advantages. Of course, social life gave him the courage to hunt the animals down, to protect him from their attack and to control the nature to a large extent. But animal instincts of man carried to follow him in spite of being residing or leading social life. To come over those instincts it was only the control or conscience so that others are not harmed, which worked as policing in itself. There is a saying that man is a social animal. Man and animal both have instincts for hunger, sleep, fear and sex but it is only the power of analysis which helped man develop and departed from animal instincts. Religion, social codes and ethical values developing with the passage of time helped human beings to develop socially to a stage which we can sense in the form of modern civilization. In a civilized society the policing instincts were embedded in many forms whether it be father restraining son, mother advising the daughter, a teacher teaching the students or a preacher teaching the religion, all acting as social policemen on behalf of the family or society.45 Hence

45 Kamal Kishore Mishra, *Police Administration in Ancient India*, 3 (Mittal Publication Delhi, 1987)
the birth of policeman in man is to be traced to earliest times when man started emerging from his savage animal hood and, using his power of reasoning and thought, realised the need for self implement and the benefits of family and corporate life. It is the policeman in man which has guided him through the vicissitudes and sufferings over thousands of years and helped him to develop both individually and as an integral part of the society.46

There is a general notion that the Indian Police System is a creation of the British rule in India but a study of the ancient Indian history shows the origin and development of the law enforcement institutions since the Vedic period. With the development of societal civilization the need for codes and convention was felt necessary and rigidity was given either by force of law or religion. The necessity was felt as a course that if codes were not enforced, the society would disintegrate. Thus it becomes evident that requirement of leader as head was felt and later on which developed from society to larger area and so on, ultimately the form of State. With the advent of state and King the beginning of legislative, executive and judicial functions started and continued to develop with the pace of the society. Apart from these three organs which form the integral part of governmental machinery since the formation of state, one fact which cannot be ignored is the role of policing mechanism. The state is inseparable from its police functions and cannot exist without these functions; and when a state can't perform these functions it fails.47

46 Ibid
47 Id. at 6
The organisation of police department was one of the important aspects of administration in ancient India. It was the duty of the State to maintain peace, law and order and protect all by deterring evil minded persons from commission of crime and deviation from the normal path of duty.\textsuperscript{48} However the inference from ancient literature only shows that state preferred to protect rather detects crime. Under the Mauryan Empire there is a clear mention of the police set up. The police as a department had become a well established administrative institution during the Maurya Empire. With the passage of time, the responsibility of the police widened and different organizations had to be necessarily created in order to effectively implement the law and enforce order, and bring the criminals to justice. Principles of internal security, the moral and ethical responsibilities of the king and the system of policing developed in ancient towns and villages were effectively followed and improved by the successive Hindu kings. When the concept of the state emerged, the Police shouldered more responsibility and meaningfulness. Preventing criminal instincts, maintaining the unity and security of the society, striving for the upliftment of the state etc. became the ultimate aims of the Police. The Police help the Government considerably in preventing the occurrence of crime and obeying the laws strictly. However in ancient India there are no proof to demarcate between police and military officers. The work done by these institutions was interwoven vice versa.

Kautilya, who established an elaborate system of policing and laid down several grades of bureaucracy, could rightly be called the father of the modern concept of police. Ancient India saw police as an instrument under the kings. There were ministers or important

\textsuperscript{48} Kulluka (ed), \textit{Manusmriti}, 14 (Bombay,1929)
individuals who were vested with police functions. But overall conclusion which can be drawn is that no doubt the police administration was an integral part of the administration to protect the person and property of the people. Kautilya in his Arthshastra has mentioned 18 great officers and many of them were discharging police and military duties. To mention of them Dauvarika, Prashsata, Dandapala and Durgapala were doing duties similar to the police administration and Durgapala was the institution which was later on developed as Kotwal which still exists in some states even today. The glimpses of city police organisation are found in Kautilya's *Arthshastra*. Police organisation in the rural areas of India from ancient times was based on the traditional system of local responsibility and another system was framed to towns where whole time salaried regular police were employed. However the institution of spying was even older to that of police. Even Vedas describe about this institution and during the epic and post epic period the spies were deemed to be the eyes of the King. The concept of *danda niti* definitely had two fold purpose, the one being inflicting punishment upon wrongdoer and other to furnish opportunity for him to lead a moral life.

During Asoka's reign also the police set up was not as harsh as in the time of *Mauryas*. It was tempered and moderated by Budhhist philosophy of piety and non violence. During his reign The *Mahamatras* were entrusted with multifarious activities including responsibility for law and order. There seemed to be provision of

49 *Supra* note 45 at 20-21.


preventive detention in ancient India also. The detection was done through the spies.\textsuperscript{52}

Various institutions of the criminal justice system had taken their shape during the Vedic period in India. The system gradually developed and during the Mauryan period a well defined criminal justice system with a specialized agency like that of the present day police to deal with criminals had come into existence.

\textbf{2.3.2 Police Administration in Medieval India}

The next stage in the development of social life was the formation of tribal units. The laws applicable for a small social life were found unsuitable to meet the vastness of the tribal life. Thus in addition to the Police, there needed other controlling authorities. The Police realized their aims in the well-being and the prosperity of the public, the society, and the tribal unit. Its origin may be traced to the feudal obligation of the land owners to maintain, by means of underpaid and disorderly mob the appearance of order on their estates. The indigenous system of police, based upon the responsibility of the landholders or the village communities were gradually modified by the progressive intervention of the state.

During both the Mughals and Marathas the rulers entrusted the powers at the smallest setup of administration i.e. village and Kotwal worked as overall head for that unit. With the advent of the Mughals, policing became a subsidiary aspect of the conqueror's strategic, military and revenue requirements. The age-old community based policing was largely replaced with a mercenary and exotic group of people with official patronage. Even then,

\textsuperscript{52} \textit{Id at 6.}
community policing, either through the medium of the landlords or through the village level panchayats and analogous bodies persisted to a certain extent.

During the Mughal period some kind of organized patterns set into the police system. The *Kotwal* was the police prefect of the city. *Kotwal* was allowed a large establishment and was given salary by the State out of which he had to also maintain his subordinate personnel. The *Kotwal* was a very powerful man who had to be present at all royal durbars. He acted as the chief of the city police, as a magistrate and a municipal officer. His major police functions were to arrange the watch and ward of streets, to post men at places of public gathering, to look out for pick-pockets and mischievous elements, to control distillation and sale of liquor, to look after prisons and also to execute royal sentences. During the Muslim rule in India the policing of the cities and towns was entrusted to *Kotwals* and of the countryside to *Faujdars*. Judiciary and Police were placed under the *Chief Sadr* and *Chief Qazi* both offices being held usually by the same person. The administration of Criminal Justice in India during the time of Muslim reign in India up to the advent of British rulers was based on Islamic Criminal Law which did not recognise principles of correctional method or admonition. Under the large *zamindars* were a number of subordinate tenureholders, all of whom were required. This village responsibility was enforced through the headman, who was always assisted by one or more village watchmen. The latter were the real executive Police of the country. During the medieval period, the rulers developed and

53 Supra note 34 at p. 109
reorganised the judicial system to suit their needs. The nomenclatures such as *Kotwal*, *Fauzdar* and *Daroga*, created during the medieval period, are still used for various ranks of the police.

### 2.3.3 Police Administration during British Period

Under the British period the police administration had developed in two separate faces, one under the East India Company and other when British took control of Indian Territory. When the East India Company took over the administration they continued to govern policing through zamindars till 1792 when some weaknesses were exposed to the court of company directors. The police organization conniving with criminals and harbouring offenders in return for a share of the booty was a challenge to the ingenuity of the foreign traders. The problems of internal security and protection of their commercial establishments invited their best attention. They criticised the set up of police administration and that saw the appointment of Lord Cornwallis as governor general and he immediately separated the judiciary and executive from the revenue set up. They retained the village system but relieved the *Zamindars* of their liability for police duties.\(^55\)

Improvement in the police system during British period really began under the Lord Cornwallis. Superintendent of Police for Calcutta was appointed in 1791 and thereafter, efforts were made to strengthen the *mofussil*. He was of the opinion that the interests of the Company’s government and that of the people were interconnected and therefore, protecting the interests of the people and ensuring the happiness and prosperity of the people was

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necessary to the Government even from the point of view of its own stability and permanency.\textsuperscript{56} He took police powers out of the hands of the \textit{zamindars} of Bengal, Bihar, and Orissa and ordered, in 1793, the District Judge to open a police station for every four hundred square miles and to place a regular police station officer over it. This officer was known as the \textit{Daroga}. The \textit{Kotwal} continued to be in charge of the police in the town.\textsuperscript{57} Lord Cornwallis in 1792 introduced a uniform pattern for the first time, abolished the \textit{Zamindari} and \textit{Thanedari} systems and organized a separate police force under a District Magistrate in Bengal. The districts were now divided into police station jurisdictions and a \textit{Daroga} was appointed by the Government in each of these police stations. A Commissioner of Police was appointed with powers of a justice of peace to preserve law and order, detect crime and apprehend offenders. In the city of Bombay, the system of policing had begun with the establishment of a police out post by the Portuguese in 1661. When the East India Company acquired Bombay in the year 1669, Geral Aungier became the Governor of the City and is considered the founder of the city's present police force.\textsuperscript{58}

They quite laboriously and ingeniously built over a period of time the super-structure of a modern police, without much disturbing the indigenous police system. The police as it exists today took its actual shape during the British period. The police administration was independent wing and further in 1838 police commission was set up to strengthen the structure of police. However there was evident disparity between the systems of policing from one state to another, which were noticed by the British. Realizing the need for a unified

\textsuperscript{56} \textit{Supra} note 34 at 157
\textsuperscript{57} \textit{Id} at p.110
\textsuperscript{58} \textit{Supra} note 55 at 15.
policing system in India, the British by a process of experimentation evolved the existing pattern of Police, modeled on the pattern of the army. The Police personnel were utilized mainly for repressing turbulences by the civil population. This system was the basis for the formation and functioning of all police systems in India. The commission going through the weaknesses recommended the enactment of Police Act of 1861 which showed complete subordination towards executives.\footnote{Supra note 51.} The Governor in Council, under the provisions of the Indian Police Act of 1856 (XIII of 1856) was the supreme power. All these reforms in the major provinces of the country in the pre-mutiny period laid down the foundations of the police organization which was later to forge an identity of its own and grow in stature after the termination of the company rule on Indian soil. The revolt of 1857 drew the attention of the Government of India to the urgency of police reorganization. It made the imperial government realize the inadequacy of police machinery and the urgency of a unified and organized police system for the entire country. Accordingly, a Commission was appointed in 1860 to study exhaustively the police needs of the government. Its main recommendations were embodied in the Police Act of 1861. The aims enshrined in the Act were to re-organize the police and to make it a more efficient instrument for the prevention and detection of crime.\footnote{Supra note 34 at 112}

\subsection*{2.3.4 Police Commission of 1860}

This was the background, in which the Government of India appointed a Commission to enquire into the whole question of police administration in British India and to suggest ways and means for
an increase in police efficiency and to recommend sizeable reduction in the excessive expenditure involved in maintaining the police force. The Police Commission of 1860 brought-forth its report in the course of a few months and its recommendations had a very far-reaching effect.

The Commission recommended retention of village police though it labeled it to be both inefficient and corrupt; the major recommendations of the Police Commission of 1860 were incorporated into a Bill which was passed into a law as Act V of 1861. The basic structure of the police organization as it exists in India today is based on the Police Act of 1861.

2.3.5 Police Commission of 1902-1903

The appointment of the second Police Commission was another significant step taken by the British for developing the police system of India. The shortcomings of the Act of 1861 forced the British administration to appoint another commission in 1902 to remove the ambiguities and deficiencies. Lord Curzon, the Governor-General in Council, with the approval of the Secretary of State for India appointed the All-India Police Commission. The Commission found a great deal to criticize. It observed: "The police is far from efficient; it is defective in training and organization; it is inadequately supervised; it is generally regarded as corrupt and oppressive; and it has utterly failed to secure the confidence and cordial co-operation of the people."61

The main recommendations of the Commission were generally adopted. The British contribution was to put the system of policing

61 Supra note 55 at 18.
on a professional footing and to bring about a large measure of uniformity in its laws, procedures and practices. The Present Policing System in the country is based on the Police Act, 1861. Report of The First Police Commission, appointed on 17th August 1860, contained detailed guidelines for the desired system of police in India. The Second Police Commission (1902-1903) went into details of the organizational structure of police at the district level, functioning of the railway police and the river police, recruitment, training and pay structure of different subordinate ranks of police. The police system modified and improved on the basis of the recommendations of the Police Commission of 1902-03 continued when the British left India on 15 August 1947. On independence in 1947, India inherited a well defined police system, mainly developed during the British period. But, the situation changed after the Constitution of India came into force on 26 January 1950 as protection of the Fundamental Rights of the people became one of the most important functions of the police.

2.3.6 Working of Police

During the British rule in India, the police developed into a well trained and specialized agency. When the British took control of India, to run the police administration they had the experience of having a well trained police force in Britain and wanted to set up a police system in India almost on the same pattern. They eliminated the indigenous system of police system and introduced new standards of discipline, uniform, training and command, and passed new laws and framed rules for proper police administration in India. However, it took some time to streamline the police system in India but through some systematic enactments and setting up of
 commissions they finally succeeded in setting up police administration as we do have presently. Thus, the police which we see today has its roots in the very foundation of the State and passing through various phases of history it has evolved to its present status as a specialized agency without which even in a democracy the rulers cannot imagine to run the State. But as the British idea was imperialist and they had taken control of Indian Territory, the police atrocities towards Indians were warranted. The Indian police in the colonial era were paramilitary in operation. Geared toward quelling anti-British “disturbances” and general lawlessness rather than preventing and investigating particular crimes, the police developed large armed constabulary forces.\textsuperscript{62} A military ethos and distrust of the “native” population meant that the constabulary, the lowest rank comprising at least 80 percent of the police and staffed with Indians, was entrusted with only menial tasks and charged with instilling fear in the public, rather than seeking its cooperation.\textsuperscript{63}

Willey, a judge during British reign in Calcutta of the Court of small causes had clearly mentioned in his book that “The police can oppress with impunity. The visit of a police darogah (officer) to a native villager is a calamity. If a robbery is committed, the poor are afraid to complain; if anyone is wanted as a witness, he is taken for several days from his labour and treated as a prisoner; if a criminal, or suspected criminal, is arrested, he is at once presumed to be guilty, and is very probably tortured to confess.... The insecurity of property induces all who can afford it, to hire watchman, in fact,

\begin{footnotes}
\item[63] Ibid.
\end{footnotes}
bludgeon men, of their own; and these, whenever occasion requires, are of course used as agents of any amount of violence and oppression.... The people sink under the weight of fear, and their natural cowardice is increased by a sense of hopelessness of resistance. Justice is to a large extent, practically denied them; the land-holders and the police are chief powers they know; and they are hunted by both, till they surrender themselves to servility, to despair.”  

Criminal investigations in the past involved forcing suspects to prove their innocence by undergoing tests of innocence such as dipping their hands into boiling oil or embers. In British India, the earliest evidence of custodial death was reported in Madras in 1678 when Thomas Savage, a soldier, abused his superior officer and was tied to a cot, bound by the neck and heels. He died. The Governor, Sir William Langhorne, ordered his body to be inspected. The superior officers (a sergeant and a corporal) were sent to England to stand trial for the crime.

The role of the police in efforts to suppress the nationalist movement intensified during the 1920s and 1930s, peaking during the civil disobedience campaign in between 1930-33, and the overall clout of the police within the colonial bureaucracy also increased during this period.

64 Mcleod Wylie, *Bengal as a Field of Missions*, 286 (Thacker Spink & Co. Calcutta, 1854)
2.4 Rights of Arrested Persons in Ancient India

However, there are not many direct evidences of the laws regarding the rights of the arrested persons in ancient India but the study of the concepts of state, administration of justice, law and police administration shows some hints of humanistic approach towards the arrested persons or prisoners. The society or individuals as has already been discussed were more inclined towards the righteousness than committing any wrong. The theory of rebirth loomed large in the minds of the people as they believe that all the sins done in this birth will have to be punished in next birth in any way. Therefore they preferred to live moral life as Atharva Veda also describes, Man is not an individual. He is a social organism. God loves him only who serves others being: men, cattle and other creatures. His glory lies in being a member of a big family. On the one hand man is bound by blood kinship his parents, his wife, his children and on the other, he is linked with every individual of society whether near or far. It is given to man to link himself with those who constitute his ancestry and also think of those who could be his posterity.⁶⁷ So far as the Ancient Indian Culture and Civilization is concerned, the Vedas and Smritis speak highly of equality and brotherhood-‘Vasudhaika Kutumbakam (One World One Family)’. "The entire world is a family" was the motto of Vedic civilization. All had equal opportunity in all walks of life in ancient India. The Vedic age was more liberal in providing equal status to the people.

Even ancient criminal jurisprudence recognized that criminals were not born but made. These factors might be corresponding to the

⁶⁷ Quoted by Ashish Kumar Das and Prasant Kumar Mohanty, Human Rights in India, 4 (Sarup and Sons New Delhi, 2007)
modern era such as social and economic, may be due to erosion of moral values by parental neglect, stress of circumstances or doing a criminal activity in spur of heat of a moment. The purpose of penology seemed to make an offender a non-offender. Ancient Smriti writers envisaged these ideas. The ancient Smriti writers appropriately paid consideration to individuality of the offender. The Smriti writers in their writings had referred the release of offenders on account of good conduct and integrity of character, which seems to sustain the recent concept of Probation.

The rights of arrested persons in ancient India can be studied under two different heads-

2.4.1 Humanistic Approach in Ancient India

The great drawback of the State in Ancient India was that the rights of man as man were not fully recognized. Individuals had rights and duties not as component parts of the body politic but as members of estates or classes in society; and consequently, the rights and obligations varied according to the class to which the individuals belonged. The practice of indecent behavior with arrested or suspected persons by law enforcement agencies is an age old phenomenon and has been there in one way or another. Maharshi Ved Vyas's paropkaraya punyam papam parpidanam, meaning thereby promotion of well being of other is virtue and infliction of pain is sin, laid the acid test for explaining punya and paap. These high ideals of life and philosophy of saints and sages were followed in cases of prisoners and accused in ancient India. However

68 Supra note 6 at 41.
in second phase of the ancient Hindu period torture was common and punishment for that was also prescribed in various Hindu scriptures. In fact the penology had its roots in ancient India. It can be traced in the earliest Vedic period of Indian History. It developed under the connotation of Dandaniti which literally means principles of punishment. The concept of rule of law and the administration of justice had been known to exist in India ever since the Vedas come to be recognized on the crazy epitome of Dharma. Police brutalities or torture was common in this period and was practiced by police on prisoners and torture under the order of the King was not uncommon.70 Next was the age of law and philosophy 800-320 BC during which Manu, Yajnavalkya, Kautiliya, Gautam were some important law givers. In the Manuismriti there were enough instances where harsh punishment was prescribed for the violators of law. The ancient literature however also hints at some humanistic approach towards offender as Manu held that after considering the inclination in the offenders, his antecedents and capacity punishment should be given.71 Kautilya in his Arthashastra has also stated that a suspect should not be put under arrest after a lapse of three days from the commission of crime when no direct evidence was found against him.72 The suspects were kept under vigil as the prerogative was to prevent the crime.

King Ashoka, in his Edicts has clearly mentioned that “In affairs of administration there might be some persons who would get imprisonment and coercion, there also might occur accidental death in prison and many imprisoned persons might suffer long. In that

71 Nitai Ray Chaudhary, Indian Prison Law and Correction of Prisoners, 23 (Deep & Deep Pub. Delhi, 2002)
72 Supra Note 45 at 155.
case you must strive to deal with all of them impartially; the attributes which are not conducive to impartial dealings are malignity, irascibility, harshness and hastiness, lack of practice, indolence and weariness. You all must strive, so that these attributes may not be there in you. At the root of all impartial dealings lie the absence of anger and avoidance of hurry....The judicial officer of the capital must strive at all times for this; and they should inflict sudden imprisonment or sudden coercion on people. For this purpose I would be sending on quinquennial tours the Mahamatras who would not be harsh and irascible and would be soft and gentle in dealings.”

Mahamatras were important ministers and were working as censors of public morals. These officers were empowered to reduce penalties and revise the sentences of imprisonments or even grant release on humanitarian grounds.

The ancient India witnessed customs of ordeals also that some times were very brutal in performance. But it was practiced only where the accused person is not identified or there were no evidence against that person. Therefore the ordeals were performed to prove their selves innocent. This traditional experimental jurisprudence remained in existence for long time at remote areas but with the development of concept of governance through King as head and assistance by his ministers and police functions, it was reduced to nullity. However, generally there is a notion that the primitive man had not known anything like human rights. With the advent of civilization one might have hoped that some respect for human rights would emerge which seemed to be have developed with or

relates its development with the Industrial Revolution. A theory prevailed that man is endowed by birth with certain inalienable rights of which right to life, liberty and property are sacrosanct and after the conclusion of the Second World War movement for securing human rights to all gained strength." 74 But going through the ancient literature one thing come to the fore is that concept of human rights was also known even in ancient Hindu legal system. In 1367 B.C. Bahmani and Vijyanagar Kings entered into an agreement for the humane treatment of prisoners of war and sparing their lives if unarmed.75

2.4.2 Rights of an Accused in Ancient Times

Hindu jurisprudence is essentially mixed with religion. Even Manu finds that administration of justice becomes sinner by maladministration. Hindu Law has an origin from divine. Primary sources are Vedas from where certain samhitas and smrities followed. Law is believed to be the voices of deity and its ultimate objective is not merely general happiness but spiritual welfare.76 Manu smriti is the major codification of the laws governing personal and national life - a comprehensive set of civil and criminal code. The Kautilya’s Arthshastra is a science of politics intended to teach a wise king how to govern with elaborate positive international law.77

74 Paras Diwan and Peeyushi Diwan, Human Rights and the Law, Universal and Indian, 1 (Deep & Deep Publication Delhi, 1996)
75 Ashish Kumar Das and Prasant Kumar Mohanty, Human Rights in India, 4 (Sarup and Sons New Delhi, 2007)
76 M. K. Sharan, Court Procedure in Ancient India, 1 (Abhinav Publication, New Delhi, 1978)
77 I. W. Mabbett, The Date of the Arthashastra, 84 (Journal of American Oriental Society), 162-169 April-June (1964)
Ancient Hindu Legal System has the oldest ancestry of any known system of jurisprudence.\(^{78}\) In ancient times the 'Rule of Dharma' was prevailing in India. Indian concept of 'Dharma' was wider than the concept of 'Rule of Law' of England and even wider than American 'Due process clause'. Because it did not only requires what is just and legal but it also requires what is moral and natural as per dicta laid in 'Neeti sashtras'. Our ancient writers had also practically recognized the ideal of perfect development of the individual to the full development of the society when they laid down that it was the business of the state to promote Dharma, Artha, Karma and Moksha.\(^{79}\)

Should there be no ruler to wield punishment on earth, says the Mahabharta (c. B. C. 600-A. D. 200), "the stronger would devour the weak like fishes in water. It is related that in days of yore people were ruined through sovereignlessness, devouring one another like the stronger fishes preying upon the feeble." In the Manu Samhita likewise we are told that "the strong would devour the weak like fishes . . . The Ramayana also describes the non state region as one in which "people ever devour one another like fishes."And a few details about the conditions in this non state are furnished in the Matsya-Purana.\(^{80}\)

Arrest is a judicial process of a court wherein an accused is taken into custody. In ancient India the arrest were of different kinds. There are references of Local arrest, Temporary arrest and arrest amounting to inhibition from travelling and arrest relating to his


\(^{79}\) Supra note 17 at p. 49.

\(^{80}\) Benoy Kumar Sarkar, The Hindu Theory of the State, 36 Pol. Science Quarterly 80 (1921)
work. However there seemed to be humanistic approach in arrest also as certain category of persons were granted immunity from being arrested. Brihaspati mentioned some as:-

1) Engaged in study, 2) about to marry, 3) sick, 4) one afflicted by sorrows, 5) insane, 6) infant, 7) intoxicated, 8) very old man, 9) woman, etc.\(^{81}\)

Even Narada has mentioned that the following persons should not be arrested:

(1) About to marry, 2) tormented by illness, 3) about to offer sacrifice, 4) one afflicted by calamities and 5) minor. \(^{82}\)

Even then sometimes the policemen however were very ruthless in their dealings with persons with suspicious movements and tried to extort confession by showing enormous cruelty which sometimes resulting death of criminals.\(^{83}\) Torture was also a method of punishment. In order to extract truth from the parties the court adopted the policy of persuasion, but if they failed, the accused was beaten with harsh canes. But humanistic approach towards offenders seemed alive as the traces of police officers being punished for violating their duties are found and it included also arresting a wrong person who otherwise should not have been arrested.\(^{84}\) Offences and misconduct committed by police officers, Jail Superintendent and other public servants were taken very seriously

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82 *Narada Legal Procedure* 47 (Quoted by Pramathanath Banerjea), supra note 6 at 166.
83 Supra note 11 at 83, 90.
and severe punishments were prescribed.\textsuperscript{85} It was provided that the judges who passed unjust order, or took bribes, or betrayed the confidence reposed in them, should be banished.\textsuperscript{86}

Kautilya who was having very first hand knowledge regarding working and sorry state of affair has mentioned that the officers of the lock-ups where under trails and convicted persons were kept, who caused unnecessary inconvenience to the prisoners, behaved cruelly and rudely with them and extorted money from them or molested lady inmates were liable to various kinds of punishments. Obstructing prisoners in their daily avocations such as sleeping, sitting, eating or excreting was punishable with fines ranging from three panas and upwards.\textsuperscript{87} Even harassing prisoners in lock ups by removing him frequently from one room to other without informing the proper authority was fined twenty four panas and for torturing unjustly fortyeight panas. Depriving him of food and water with ninty six panas and for death causing by torture, one thousands panas.\textsuperscript{88}

Kautilya prescribed fines for misbehaving with ladies in prison houses also. The punishment was prescribed according to the status of lady molested.\textsuperscript{89}

Immunity from punishment based on humanitarian grounds were applicable irrespective of caste consideration. Yajnavalkya has mentioned that an old man over eighty, a boy below sixteen, woman and persons suffering from diseases were given half prayaschita.

\textsuperscript{85} Supra note 12 at 389.
\textsuperscript{86} Id., at 382
\textsuperscript{87} Kautilya. 4.9.21 quoted by K. K. Mishra supra note 45 at 119
\textsuperscript{88} Kautilya 4,9,23. ibid
\textsuperscript{89} Kautilya 4,9,24. ibid
Likewise a child below five commits no crime.\textsuperscript{90} Kautilya was in favour of granting immunity from punishment to a minor.\textsuperscript{91}

Ashoka emphasised the human aspect of the judicial administration. He called upon the Nagara- Vyavaharakas (city Judges to see that the torture or imprisonment should not lead to accidental death of the accused. He was also of opinion that citizens were not imprisoned or tortured without sufficient reasons.\textsuperscript{92} Even self defence was prevalent as protecting himself, woman and brahman was not an offence. Brihaspati mentions particularly that if anyone kills aggressor to save his life, commits no sin. Even killing in reaction to provocation was not deemed as offence.\textsuperscript{93} Right of self-defence existed during ancient India. The law provided: “A person can slay without hesitation an assassin who approaches him with murderous intent. By killing an assassin the slayer commits no offence. A person has a right to oppose and kill another not only in self-defence but also in defence of women and weak persons who are not in a position to defend themselves against murderous or violent attack. Even killing a Brahmana in exercise of such a right is no offence.”\textsuperscript{94} As per Katyayana no blame is attached to one who kills wicked men who are about to kill a person, but if they have desisted from their evil act of killing, they should be captured and not killed.\textsuperscript{95}

\textsuperscript{90} Supra note 81 at 162
\textsuperscript{91} Supra note 6 at 164
\textsuperscript{92} Supra note 45 at 157-58.
\textsuperscript{93} Supra note 81 at 182.
\textsuperscript{94} Supra note 12 at p. 371
\textsuperscript{95} Ibid
Manu. in Manusmriti\textsuperscript{96} and Brahaspati in his Dandabheda Vyavastha referred that a gentle admonition should be administered to a man for light offence.\textsuperscript{97}

Dr. P. K. Sen has pointed out in his Tagore Law Lectures on "Penology Old and New" \textsuperscript{98} that the directions given by the ancient law-givers in the matter of punishment compare favourably with the advanced modern systems as regards the relevance of the objective circumstances attendant on the commission of the crime and the subjective limitations of offenders.

\textit{Yajnavalkya}, laid down that having ascertained the guilt, the place and time, as also the capacity, the age and means of the offender, the punishment should be determined and if possible the man should be released if after putting into observation maintains good character and conduct. \textit{Kautilya}, in his Arthashastra advised the king to award punishment which should neither be mild nor severe.\textsuperscript{99} Even \textit{Maurya rulers} were in favour of mild punishment. One of the pronouncements of the emperor Ashoka contains provision for remission of punishment. He advised his officers to examine and reduce punishment awarded to prisoners after due consideration of circumstances which substantially coincides with those mentioned by Smriti writers.\textsuperscript{100}

\begin{itemize}
\item \textsuperscript{96} Supra note 27 at 110
\item \textsuperscript{97} Supra note 11 at 57
\item \textsuperscript{98} Supra note 27 at 110
\item \textsuperscript{99} Sunil. K, Bhattacharya, \textit{Juvenile Justice-An Indian Scenario}, 56 (Regency Publication, New Delhi, 2000)
\item \textsuperscript{100} David G. Mandelbaum, \textit{Society in India}, 221 (Popular Prakashan Ltd, Bombay, 1998).
\end{itemize}
Generally going through the procedure prevailing in ancient India it can be said that the following rights were available for individual offender:\footnote{Jaishree Jaiswal, Human Rights of Accused and Juveniles: Delinquent in Conflict with Law, 50-51 (Eastern Books Corporation, 2005)}

1. Right to engage counsel

2. Right to appeal

3. Right to examine witnesses

It was prescribed that the examination of witnesses should not be delayed. A serious defect, namely, miscarriage of justice, would result owing to delay in examination of witnesses.\footnote{Supra note 12 at 544} Witnesses were under legal compulsion to give evidence before the court. Failure to appear before the court entailed heavy penalty. Failure to give evidence amounted to giving false evidence.\footnote{Id., at 542} Perjury, i.e. the act of giving false evidence, was considered a serious offence and punishment was prescribed for it.\footnote{Id., at 385-86} The entire wealth of a person, who cited false witnesses out of greed, would be confiscated by the King, and in addition he would be externed.\footnote{Id., at 388} The party whose witnesses deposed against him could examine further and better witnesses to prove his case as well as to prove that the witnesses examined earlier were guilty of perjury.\footnote{Id., at 550}

If any person was dissatisfied with the judgment, and thought that the case had been decided in a way contrary to justice, he might have it re-tried on payment of a fine. Narada says, “when a lawsuit has been judged without any previous examination of witnesses (or
other evidence), or when it has been decided in an improper manner, or when it has been judged by unauthorised persons, the trial has to be renewed." An appeal also lay from the decision of an inferior court to a higher tribunal, where the whole case was re-tried.107

Fiehan a traveler during the Gupta period has mentioned that king governs without decapitation or other corporeal punishment.

There are still various instances of violations of human rights over well civilized and developed countries inclusive India. Various instances of police arresting a person without warrant in connection with the investigation of an offence without recording the arrest and arrested person being subjected to torture to extract information from him for the purpose of further investigation or brutalities of police towards an accused to make confession have been highlighted despite stringent laws for their protection. It is a well known maxim that justice delayed is justice denied. Refusal to grant bail without reasonable cause is a clear violation of Human Right of a person and would amount to deprivation of personal liberty of an individual.

Section 250 Criminal Procedure Code deals with the compensation to be awarded to the accused person for accusation against them without reasonable cause. Likewise, section 357 Criminal Procedure Code provides award of compensation to the victims of the offence. But the law courts seldom make use of these provisions while deciding the cases.

107 Supra note 6 at 168.
2.5. Global Perspective

The civilizations of Rome, Greek and Germany are considered the most developed along with Indian civilization. In primitive times crime was seen as offence against Gods in almost all of these civilizations. Whatever punishment was awarded, it was seen to appease the anger of the God. There was no concept of State in early societies. A wrong was regarded as a private matter to be avenged by direct retaliation by the victim or his family. In technical sense the term crime was not known but the use of word sin or wrong was prevalent.

The ancient civilizations of Greek, Rome and Germany followed accusatorial system from the beginning. It was entirely oral and based on the notion of equality of arms or level playing field. Under this system wrong committed upon an individual was not an offence against society at large but only against victim. Therefore society left it to the victim or his family to decide what punishment is to be given to the wrongdoer. Roman law is the oldest in the world and almost laws of majority of countries owes indebtedness towards this by borrowing provisions of laws in their domestic laws. The transfer of primitive police functions shifted from god to family, then to community at large and finally to state.

It was only in Middle Ages that concept of secret enquiry to reveal the offender or use of torture to extract confession from the offender, started and that too not by a private member but by State. Nothing is known about the norms governing judicial process in the early

Middle Ages, but from the ninth century onward there is substantial evidence that a defendant's right to a trial was an accepted norm.109

The development of criminal law passed through the Christian Church and medieval era where the ordeals were performed. This system was also community affair. By the second half of the twelfth century, criticism of one form of local justice, the ordeal, was prevalent and persuasive. As the ordo was established as the sole, legitimate mode of proof in ecclesiastical tribunals, jurists in the second half of the twelfth century needed to justify its substitution for other modes of proof. Although they might have pointed to its use by the ancient Romans, they preferred to cite biblical examples. Their reliance on the Bible is another example of its importance for the jurisprudence of the ius commune. The ordeal culture remained in existence till sixteenth century.110 Gradually the concept of state developed worldwide and crime was being understood to be an offence against state. In authoritarian systems, moreover, impunity for abuse is central. Reestablishing accountability through the rule of law is a vital precondition of reform. In a more democratic environment, issues of effectiveness (conviction rates, policing competence and so forth) become clearly issues that need to be addressed in order to promote human rights in a preventive rather than remedial manner.111


110 Ibid.

2.5.1 Magna Carta 1215

The concept of the rights of arrested person can be traced back in the year when Great Charter of liberty also known as Magna Carta was signed by King John of England in 1215. King John was forced into signing the charter because it greatly reduced the power he held as the King of England and allowed for the formation of a powerful parliament. The Magna Carta became the basis for English citizen's rights. The purpose of the Magna Carta was to curb the powers of the King and demonstrated that the power of the king could be limited by a written grant. Among other provisions the certain articles mentioned the rights of the human beings later on being recognized as humanistic rights. It lays down that "For a trivial offence, a free man shall be fined only in proportion to the degree of his offence, and for a serious offence correspondingly, but not so heavily as to deprive him of his livelihood. In the same way, a merchant shall be spared his merchandise, and a husbandman the implements of his husbandry, if they fall upon the mercy of a royal court. None of these fines shall be imposed except by the assessment on oath of reputable men of the neighbourhood." The present notion that the burden of proof lies upon the prosecution and presumption of accused person as innocent till proved guilty can be traced in this document also as it states that No bailiff, on his own simple assertion, shall henceforth any one to his law, without producing faithful witnesses in evidence. Not only this but this document has established the rule of law and debarred the arbitrary arrest and punishment. Article 39 of this Charter mentions that "No freeman shall be taken, or imprisoned, or disseized, or

112 Article 20 Magna Carta The Great Charter of English liberty granted (under considerable duress) by King John at Runnymede on June 15, 1215
113 Id., Article 38
outlawed, or exiled, or in any way harmed—nor will we go upon or send upon him—save by the lawful judgment of his peers or by the law of the land."

The history of Magna Carta is interwined with the struggle against slavery, and in the history of western hemisphere the question of slavery is inseparable from the continent of Africa. Therefore Magna Carta has also played a vital role in black freedom. 114

Its provisions revealed the oppression of women, the aspiration of the bourgeoisie, the mixture of greed and power in the tyranny and this document acknowledged the provisions from where habeas corpus, prohibition of torture, trial by jury and the rule of law are derived.115 The idea of writ of Habeas Corpus has also developed from this charter.116

2.5.2 Constitutional rights of the accused in US

American Constitution has incorporated certain provisions regarding the rights of the accused from two well known legal instruments known as Magna Carta (1215) and the English Bill of Rights (1689). These documents embodied the principles of limited government and the rule of law, which all were bound to obey, even the king. For example, Section 39 of the Magna Carta said that no “freeman” could be put in prison except “by the lawful judgment of peers or the law of the land.” The influence of Magna Carta can be seen in the

114 Peter Linebaugh, Magna Carta Manifesto, Liberties and Commons for all, 18 (University of California Press London 2008)
115 Id., at 28
116 Article 36, Magna Carta, “Henceforth nothing shall be given or taken for a writ of inquest in a matter concerning life or limb; but it shall be conceded gratis, and shall not be denied. Article 40, To none will we sell, to none deny or delay, right or justice.”
The United States from the beginning had incorporated in its Constitution certain rights whereby the arrested persons were protected. The U.S. Constitution in Article 1, Section 9, prohibits government from suspending the privilege of the writ of habeas corpus and also prohibits enactment by the federal government of bills of attainder and ex post facto laws. A bill of attainder is a law that punishes an individual solely by means of legislation, without a trial or fair hearing in a court of law. An ex post facto law makes an action a crime after it was committed.

Article 1, Section 10, prohibits state governments from enacting bills of attainder and ex post facto laws. Article 3, Section 2, provides individuals accused of a crime the right to trial by jury. Article 3, Section 3, protects individuals against arbitrary accusations of treason—an attempt to overthrow the government or to give aid and support to enemies of the United States, such as countries waging war against it. This article also establishes rigorous standards for convicting a person of treason.

2.5.3 American Bill of Rights 1791

Apart from that in 1791 the US adopted ten amendments to its constitution popularly known as Bill of rights 1791. First ten amendments to the constitution of America are known as Bill of Rights 1791. On September 25, 1789, the First Congress of the United States therefore proposed to the state legislatures 12 amendments to the Constitution that met arguments most
frequently advanced against it. Articles 3 to 12, ratified December 15, 1791, by three-fourths of the state legislatures, constitute the first 10 amendments of the Constitution, known as the Bill of Rights. 117 American Bill of Rights played an important role in the development of defendant's rights in American criminal administration of justice. The fourth, fifth sixth and eighth amendments have played an important role in establishment of due process of law in American system of criminal prosecution which is one of the main ideals of American notion of justice. It requires that a person suspected of a crime be accorded certain procedural rights beginning even before arrest, during the trial and after conviction. 118 Some of these amendments protect individuals from wrong or unjust accusations and punishments by law enforcement officials. Amendment 4 protects individuals against unreasonable and unwarranted searches and seizures of their property. It establishes conditions for the lawful issuing and use of search warrants by government officials in order to protect the right of individuals to security in their persons, houses, papers and effects. There must be a probable cause for issuing a warrant to authorize a search or arrest, and the place to be searched, the objects sought, and the person to be arrested must be precisely described.

Amendment 5 states certain legal and procedural rights of individuals. For example, the government may not act against an individual in the following ways:


Hold an individual to answer for a serious crime unless the prosecution presents appropriate evidence to a grand jury that indicates the likely guilt of the individual.

Try an individual more than once for the same offense.

Force an individual to act as a witness against himself in a criminal case.

Deprive an individual of life, liberty, or property without due process of law (fair and proper legal proceedings).

Amendment 6 guarantees people suspected or accused of a crime certain protections against the power of government. It provides these rights to individuals:

- A speedy public trial before an unbiased jury picked from the state and community in which the crime was committed.

- Information about what the individual has been accused of and why the accusation has been made.

- A meeting with witnesses offering testimony against the individual.

- Means of obtaining favorable witnesses, including the right to subpoena, or legally compel, witnesses to testify in court.

- Help from a lawyer.

Amendment 8 protects individuals from overly harsh punishments and excessive fines and bail (the amount of money required to secure a person's release from custody while awaiting trial). Amendment 14 provides general protection for the rights of the
accused against the powers of state governments. This amendment forbids state governments from making and enforcing laws that will deprive any individual of life, liberty, or property “without due process of law”; it also says that a state government may not deny to any person under its authority “the equal protection of the laws.”

2.5.4 Universal Declaration on Human Rights, 1948.

The term individual also refers to the arrested person. Usually a person is first arrested then detained and after that is declared accused. There is now a long list of international or regional conventions whereby accused or arrested persons rights are acknowledged. With the advent of Human rights worldwide a new chapter has begun in human history. However the concept of human rights has very vast sphere but the main issues of maltreatment with prisoners of war and arrested persons are eventually covered under this head. No doubt the civilization of almost every country has these rights in any forms since times but as state activities enhanced the powers were misused frequently by administrative organs and depriving the human beings its natural rights. However there are some traces of human rights in Magna Carta of England in 1215, Petition of Rights, 1628; Bill of Rights, 1689; and Act of settlement, 1701; whereby the inborn rights of people were recognized. After French revolution in 1789 there was demand for equality, fraternity and liberty. The America amended its Constitution in 1791 and inserted Bill of Rights therein. But at international level the voice for these rights rose high only after the man’s barbarism and violent acts during the two world wars where human beings had suffered too much, were treated worse than the animals. As a matter of facts ancient thinkers had been advocating
for such rights. It is universally accepted that the idea of HR was formulated during World War II as a reaction to totalitarian rule and arbitrary action of organs of State. After the horrors of World War II, a broad consensus emerged at the worldwide level demanding that the individual human being be placed under the protection of the international community. In order to make human rights an instrument effectively shaping the lives of individuals and nations, more than just a political proclamation was needed. Hence, from the very outset there was general agreement to the effect that the substance of the Universal Declaration should be translated into the hard legal form of an international treaty. Immediately after the formation of UN some Latin American countries requested that a full code of human rights be included in the Charter of the United Nations itself. Since such an initiative required careful preparation, their motions could not be successful at that stage. Nonetheless, human rights were embraced as a matter of principle. After formation of United Nation in 1945 the member countries collectively passed a declaration in 1948 known as Universal Declaration of Human Rights which the General Assembly adopted on 10 December 1948. The Declaration universalized the global concern for a set of inalienable human rights, including, on the one hand, the so called first generation of human rights, namely civil and political liberties aimed as defense rights against arbitrary use of governmental powers, such as the basic right to life, the right to safety from unfair prosecution, the freedom of thought expression and religion; on the other hand the declaration emphasized the second generation of human rights; i.e. the economic, social and
cultural rights pertaining inter alia to education, marriage, employment and shelter.\textsuperscript{119}

The Universal Declaration of Human Rights 1948 declared in the preamble that recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world. At the very outset of this convention in Article 1, the convention proclaims that all human beings are born free and equal, in dignity and rights. Further it also recognizes the right to life, liberty and security of person.\textsuperscript{120}

This convention while speaking about the rights of the accused or arrested person has clearly mentioned that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.\textsuperscript{121} The presumption of innocence of a person charged with a penal offence until proved guilty as contained in Article 11(1) is meant to insulate him against any high-handed treatment by the authorities dealing with him in the matter. The Declaration also mandates that individual has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.\textsuperscript{122}

After 1948 these rights were incorporated into the constitutions of majority of countries. These rights are meant for the entire human race. After proclamation of United Nations Universal Declaration of Human Rights in 1948, thereafter many declarations were

\textsuperscript{120} Article 3UNDHR 1948.
\textsuperscript{121} \textit{Id.}, Article 5
\textsuperscript{122} \textit{Id.}, Article 8
incorporated at international level recognising the basic human rights. These conventions entail many procedural Human Rights prescribing basic standards with which the conduct of executive must comply.

The following international documents may be cited

1. European convention on Human Rights, 1950


4. International Covenant on Civil and Political Rights, 1966


6. Singapore Declaration, 1971

7. Lusaka Declaration, 1979


10. Declaration on the Right to Development


12. Universal Declaration of Human Rights, Geneva Convention Relative to the Treatment of Prisoners of War (1949),
13. Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1975),


15. Inter-American Convention to Prevent and Punish Torture (1985),


18. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984),


All these and many other conventions touches the issues of human rights in one context or other, however the international documents which touch the issues of arrested person’s rights or humanistic approach has been discussed in brief as follows;

**2.5.5 European Convention on Human Rights -1950**

European Convention on Human Rights was done at Rome on 4th day of November, 1950. The Convention also recognized the basic human rights of the people and apart from other provisions incorporated the themes of UNDHR. The basic rights which were highlighted by this convention were almost the same for which
voices had been raised at international level after UNDHR. This convention also recognized the right to life and personal liberty, rights to be adjudicated by proper jury and prevention against arbitrary arrest and detention. The convention under article 2 acknowledges individual’s right to life and liberty and ensures that the liberty cannot be taken away except only in execution of legal sentence. However doing certain acts it allows use of force which is absolutely necessary. Article 3 in particular adopted the rights of accused in terms that No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Whereas regarding the rights of the arrested or accused person the whole crux of humanistic rights enshrined in this convention can be derived from the language of article 5 which states that

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

   (a) the lawful detention of a person after conviction by a competent court;

   (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfillment of any obligation prescribed by law;

   (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority of reasonable suspicion of having committed and offence or when it is reasonably considered necessary
to prevent his committing an offence or fleeing after having done so;

(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts, or vagrants;

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and the charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this article 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 pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

The convention also laid down the legal rights for fair trial in detail. It mentions procedural aspect which has to be followed to give individual tagged as accused to have certain rights to defend himself. Article 6 states that

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly by the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
(b) to have adequate time and the facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

The convention also prohibits the post facto declaration of any act as crime if that act was not a crime when it was committed. The convention also provides for the laying down effective remedy for violation of any of the rights laid down under this convention even if the violation has been committed by persons acting in an official capacity.

2.5.6 United Nations Convention against Torture, 1984

From the perusals of current approaches towards arrested persons one thing that has been highlighted comes to fore is the application of force and ill treatment. Generally torture and ill-treatment is applied to a prisoner or detained person to obtain confession or admission of a crime, to obtain an information, or simply to impose

123 Article 7 ECHR
124 Article 13 ECHR
pain and suffering as a punishment. The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) is an international treaty that mandates an absolute prohibition of torture worldwide. The UN Convention against Torture was adopted by the UN General Assembly in 1984. It has come into force on 26th June 1987. It has 76 signatories and 146 parties. India had signed this treaty in 14th October 1997 but has not ratified till date.

Countries that are parties to the UNCAT must take effective legislative, administrative, judicial or other measures to prevent acts of torture from occurring on their territories. The Convention defines torture and specifies that states parties must prohibit torture in all circumstances. States must ensure that all acts of torture are offences under its criminal law including complicity and participation in and incitement to such acts. Not only this but The Convention also prohibits under article 19 the forcible return or extradition of a person to another country if there is an apprehension of his or her being subjected to torture. Victims of torture also have a right to redress and adequate compensation. The Convention against Torture also obliges states parties to take effective measures to combat torture. States undertake to train law enforcement and medical personnel, and any other persons who may be involved in the custody, interrogation or treatment of detained individuals, about the prohibition of torture and ill-treatment.

125 Article 2(1), UN Convention against Torture
126 Id., Article 20
127 Id., Art. 14
128 Id., Art. 10
Article 1 of the Convention against Torture sets out an internationally agreed definition of acts that constitute 'torture'. This states that:

“The term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”

While ill-treatment is not properly defined in the conventions, case law and related literature cite that an act that creates “substantial, but not severe suffering, or which causes severe suffering but not to obtain information” (e.g. use of extreme force upon a person resisting arrest) would constitute ill-treatment, not torture. Human rights treaties, although prohibiting torture did not define torture. The collective agreement among members of the international community is that “torture and other forms of cruel, inhuman, or degrading punishment or treatment” can never exist together with the “global order fundamentally committed to basic respect and human dignity”\textsuperscript{129}

Torture "is a powerful institutional expression of state craft, power, and social control". Torture has two concepts, which are: a) inflicting severe pain and suffering by the actor who "dominates and controls", which pain may cause "physical or psychological elements or a combination of both", and b) involves state participation and sanction, a definition confined to the legalistic framework and gives a "social message of intimidation".  

Therefore the objective of this convention is to combat the torture and inhuman treatment. It not only recognizes the physical torture but considers the mental torture as crime against humanity. The mental torture includes intentional exposure to significant mental or physical pain or suffering by or with the consent or acquiescence of the state authorities.

The UNCAT provides for the establishment of an independent, international body, named the Committee against Torture, charged with the task of monitoring and promoting implementation of the treaty and receiving and investigating allegations of torture, with the co-operation of State Parties to the UNCAT. The Committee against Torture is a body of ten independent experts established under the Convention against Torture.

All States Parties to the UNCAT must submit periodic reports to the Committee which inform the recommendations later given by the Committee to the country in question. If the Committee gets reliable information that torture is being systematically practiced in

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law.harvard.edu/students/orgs/hrj/iss14/nagan.html. (visited on 18th September 2010.

130 Id., at 93
131 U. N. Convention against Torture, Art. 17(1)
132 Id., Art. 19
the territory of a State Party to the UNCAT, it may initiate a confidential inquiry of the situation. Such an inquiry will be carried out in cooperation with the country concerned and will include visits to the country in question. 133 This, procedure, however, is rarely used and all country visits require the consent of the State Party in question. In addition, all findings of the Committee yielded from this procedure remain confidential and cooperation of the State Party is sought at all times during the process. The Committee can consider complaints from individuals who claim to be victims of a violation by a State Party to the UNCAT. This may be done only if the country concerned has declared that it recognizes the Committee as qualified to receive and examine such complaints.

India’s refusal to ratify the UN Convention against Torture was primarily based on the contention that its laws were adequate enough to deal with crimes committed by the representatives of the State. Section 330 and 331 of the Indian Penal Code[3] have been enacted to punish those who voluntarily cause hurt or grievous hurt with an object to coerce the sufferer to confess to his guilt or give information respecting the commission of a crime or a misconduct, or to restore property or satisfy any claim or demand respecting thereto. Though the sections are generally worded, the provisions are mostly brought into requisition against police personnel acting in furtherance of obtaining confession through unmoded methods.134 As far as the issue of compensation is concerned, Article 9(5) of the International Covenant on Civil and Political Rights 1966 (ICCPR) provides that “anyone who has been the victim of unlawful

133 Id., Art. 20
arrest or detention shall have enforceable right to compensation". However, India expressed specific reservation to the effect that Indian Legal System did not recognize a right to compensation for victims of unlawful arrest or detention and thus did not become a party to the Covenant. Notwithstanding all this, the Apex Court through judicial activism evolved a right to compensation in cases of established unconstitutional deprivation of personal liberty or life.135

2.5.7 American Convention on Human Rights "Pact of San Jose, Costa Rica"

The Convention in preamble itself acknowledges the importance of rights in individual's life as it states that the essential rights of man are not derived from one's being a national of a certain state, but are based upon attributes of the human personality, and that they therefore justify international protection in the form of a convention reinforcing or complementing the protection provided by the domestic law of the American states;136

This convention also recognized the right to life as basic human right. It particularly mentions that death penalty should not be imposed upon a minor and person above the age of seventy137 and every person condemned to death shall have the right to apply for amnesty, pardon, or commutation of sentence, which may be granted in all cases. Capital punishment shall not be imposed while such a petition is pending decision by the competent authority.138 This Convention has also particularly mentioned about rights against torturous treatment. Article 5 of Convention mentions that:

135 *Id.*, at 128,
136 American Convention on Human Rights, Preamble
137 *Id.*, Article 4 (5)
138 *Id.*, Article 4(6)
1. Every person has the right to have his physical, mental, and moral integrity respected.

2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.

3. Punishment shall not be extended to any person other than the criminal.

4. Accused persons shall, save in exceptional circumstances, be segregated from convicted persons, and shall be subject to separate treatment appropriate to their status as unconvicted persons.

5. Minors while subject to criminal proceedings shall be separated from adults and brought before specialized tribunals, as speedily as possible, so that they may be treated in accordance with their status as minors.

6. Punishments consisting of deprivation of liberty shall have as an essential aim the reform and social readaptation of the prisoners.

Article 7 lays down the Right to Personal Liberty mentions as under-

1. Every person has the right to personal liberty and security.

2. No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto.

3. No one shall be subject to arbitrary arrest or imprisonment.
4. Anyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him.

5. Any person detained 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 be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial.

6. Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful. In States Parties whose laws provide that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. The interested party or another person in his behalf is entitled to seek these remedies.

7. No one shall be detained for debt. This principle shall not limit the orders of a competent judicial authority issued for non fulfillment of duties of support.

Article 8. Right to a Fair Trial

1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against
him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.

2. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:

(a) the right of the accused to be assisted without charge by a translator or interpreter, if he does not understand or does not speak the language of the tribunal or court;

(b) prior notification in detail to the accused of the charges against him;

(c) adequate time and means for the preparation of his defense;

(d) the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel;

(e) the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law;

(f) the right of the defense to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts;

(g) the right not to be compelled to be a witness against himself or to plead guilty; and
(h) the right to appeal the judgment to a higher court.

3. A confession of guilt by the accused shall be valid only if it is made without coercion of any kind.

4. An accused person acquitted by a non appealable judgment shall not be subjected to a new trial for the same cause.

5. Criminal proceedings shall be public, except insofar as may be necessary to protect the interests of justice.

2.5.7.1 **Freedom from Ex Post Facto Laws**

No one shall be convicted of any act or omission that did not constitute a criminal offense, under the applicable law, at the time it was committed. A heavier penalty shall not be imposed than the one that was applicable at the time the criminal offense was committed. If subsequent to the commission of the offense the law provides for the imposition of a lighter punishment, the guilty person shall benefit therefrom.

The Convention in Article 10 has made provision for the compensation as it lays "every person has the right to be compensated in accordance with the law in the event he has been sentenced by a final judgment through a miscarriage of justice." The Convention also imposes obligation to appointment of court having seven judges from member states\(^{139}\) and has the power to award compensation to the injured party accordingly if any of the rights are violated.\(^{140}\)

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139 *Id.*, Article 52
140 *Id.*, Article 63(1)
Accordingly, since the lesson learned was that protective mechanisms at the domestic level alone did not provide sufficiently stable safeguards, it became almost self-evident to entrust the planned new world organization with assuming the role of guarantor of human rights on a universal scale.

2.5.8 International Covenant on Civil and Political Rights 1966

International Covenant on Civil and Political Rights (ICCPR) was presented with the basic assumption that UDHR does not have any binding force and UN commission on human rights proposed this covenant which was adopted in 1966 by the General Assembly resolution 2200A (XXI). However the basic aim of this covenant as the name suggests was to look after the civil and political rights of individuals but it also comprises all of the traditional human rights as they are known from historic documents comprising basic human rights. Part I starts out with the right of self-determination which is considered to be the foundational stone of all human rights (article 1). Part II of this Covenant (articles 2 to 5) contains a number of general principles that apply across the board, among them in particular the prohibition on discrimination.

If the rights or freedom of any individual are violated, this document calls the member to provide an effective remedy irrespective of the fact that the violation is done by person while acting in official capacity.\(^\text{142}\)

The Convention speaks about the abolition of the death penalty especially even if any individual is sentenced by competent law for


\(^{142}\) ICCPR, Article 3
capital punishment, sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women. Well-balanced guarantees of habeas corpus are set forth in article 9 whereby it is clearly laid down that no one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law and article 10 establishes the complementary proviso that all persons deprived of their liberty shall be treated with humanity. Article 7 of the International Covenant on Civil and Political Rights, 1966 covenanted that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. Under Article 10 of the said Covenant all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person and the accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons. The minimum guarantees to which everyone charged with a criminal offence is entitled in full equality covenanted in Art. 14(3), inter alia, provide that no shall be compelled to testify against himself or to confess guilt, which obviously will rule out use of force of any kind on a person accused of any crime.

The rights of individual to have free trial is also recognised by this covenant as under article 14 it has elaborated in detail as under:

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his

143 Id., Article 6.5
rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (order public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

   (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

   (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

   (c) To be tried without undue delay;

   (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing;
to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law,
unless it is proved that the non-disclosure of the unknown fact in
time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an
offence for which he has already been finally convicted or acquitted
in accordance with the law and penal procedure of each country.

The Human Rights Committee consisting of eighteen
members\textsuperscript{144} elected for four years\textsuperscript{145} amongst the member states are
the principal actor at the international level mandated to enforce the
rights enunciated in the ICCPR. States are required to submit at
regular intervals reports which are carefully scrutinized; at the end
of that process, the Committee summarizes its assessment of the
prevailing human rights situation by noting in particular its
concerns in open and straightforward language without any
diplomatic inhibitions. The Committee shall submit to the General
Assembly of the United Nations, through the Economic and Social
Council, an annual report on its activities.\textsuperscript{146} It is at the national
level that the ICCPR has exerted its greatest impact. When today
anywhere in the world a national constitution is framed, the ICCPR
serves as the natural yardstick for the drafting of a section on
fundamental rights. Since this covenant also declares the other civil
and political rights and this along with other sisterly treaty or
convention International Convention on Social, Economic Rights has
gained much of the popular adoptions by many countries and has
been made part and parcel of the national legal order although there
is no general rule of international law that would enjoin States to
embrace a specific method of implementation.

\textsuperscript{144} Id., Art. 29
\textsuperscript{145} Id., Art. 32
\textsuperscript{146} Id., Art. 45
2.5.9 African (Banjul) Charter on Human and Peoples’ Rights

African Charter on Human and Peoples’ Right was adopted on 27th June 1981 and entered into force on 21st October 1986. The most of the human rights violation were there in African countries. Everybody knows the apartheid which was prevalent in African continent. The African community, however were late in recognizing the basic human rights for which international concern had started earlier. But this Charter entails the basic human rights of the people and adopts the norms which were highlighted by almost all other conventions regarding the violation of human rights. The concern for humanistic treatment of the individual has been highlighted by this convention and it has stated straight forwardly that “Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.”\(^ {147}\)

This Charter adopted almost the same laws regarding the humanistic treatment and prohibits against any form of discrimination, slavery and any inhuman treatment including torture.\(^ {148}\)

Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited. Article 6 of the charter incorporates the rule of law maxim and provides the rights of arrested persons. Highlighting the importance of individual liberty and security it

\(^{147}\) *Id.*, Article 4  
\(^{148}\) *Id.*, Article 5
particularly adopts the provisions against arbitrary arrest or detention.

The all other rights which a human regards necessarily inevitable to have free trial are adopted in article 7 which states as under:

1. Every individual shall have the right to have his cause heard. This comprises:

   (a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;

   (b) the right to be presumed innocent until proved guilty by a competent court or tribunal;

   (c) the right to defense, including the right to be defended by counsel of his choice;

   (d) the right to be tried within a reasonable time by an impartial court or tribunal.

2. No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.

2.5.10 Rome Statute of the International Criminal Court

The Rome Statute was adopted on 17th July 1998 at the United Nations Conference of Plenipotentaries on the Establishment of an
International Criminal Court in Rome. The International Criminal Court (ICC), governed by the Rome Statute, is the first permanent, treaty based, international criminal court established to help end impunity for the perpetrators of the most serious crimes of concern to the international community. As of 24 March 2010, 111 countries are States Parties to the Rome Statute of the International Criminal Court. The seat of court is at Hague in Netherlands.

Article 5 of the statute defines the jurisdiction whereby it has mentioned four types of cases to be tried by this court (a) The crime of genocide; (b) Crimes against humanity; (c) War crimes; (d) The crime of aggression.

The Statue has given elaborative definition of all these crimes and covers almost all deadly crimes generally finding its places in indigenous laws of individual countries. But while interpreting crime against humanity it has particularly made mention of torture. In article 7.2 (e) it defines torture as the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions. However, the crimes to which the court has jurisdiction are those defined under the Rome Statute. As defined in the statute, torture is classified under two categories to which the court has jurisdiction, a) torture under crimes against humanity, and b) torture or inhuman treatment including biological experiments under war crimes. However, ICC can prosecute only crimes committed after July 1, 2002. The ICC differs from The International Court of Justice as the latter is one of the organs of the United Nations that has jurisdiction over disputes between states.
while the ICC is a “treaty-based criminal court” that has jurisdiction over specific atrocious crimes committed by individuals. Persons who can be criminally liable for genocide, crimes against humanity or war crimes are those who actually committed the act, those who “intentionally ordered the crimes, incited others to commit them, and assisted others in carrying out the crimes,” as well as “military commanders who failed to exercise control over their forces when they committed such crimes.” Likewise, all individuals, including government officials and leaders may be subject to the jurisdiction of the ICC.

The Rome Statute provides that all persons are presumed innocent until proven guilty beyond reasonable doubt and establishes certain rights of the accused and persons during investigations. The rights of persons during an investigation are provided in Article 55, which lays down:

1. In respect of an investigation under this Statute, a person:

   (a) Shall not be compelled to incriminate himself or herself or to confess guilt;

   (b) Shall not be subjected to any form of coercion, duress or threat, to torture or to any other form of cruel, inhuman or degrading treatment or punishment;

   (c) Shall, if questioned in a language other than a language the person fully understands and speaks, have, free of any cost, the assistance of a competent interpreter and
such translations as are necessary to meet the requirements of fairness; and

(d) Shall not be subjected to arbitrary arrest or detention, and shall not be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established in this Statute.

2. Where there are grounds to believe that a person has committed a crime within the jurisdiction of the Court and that person is about to be questioned either by the Prosecutor, or by national authorities pursuant to a request made under Part 9, that person shall also have the following rights of which he or she shall be informed prior to being questioned:

(a) To be informed, prior to being questioned, that there are grounds to believe that he or she has committed a crime within the jurisdiction of the Court;

(b) To remain silent, without such silence being a consideration in the determination of guilt or innocence;

(c) To have legal assistance of the person's choosing, or, if the person does not have legal assistance, to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by the person in any such case if the person does not have sufficient means to pay for it; and
(d) To be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel.

Rights of the accused are provided in Article 67.

**Article 67: Rights of the accused**

1. In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:

   (a) To be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks;

   (b) To have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused's choosing in confidence;

   (c) To be tried without undue delay;

   (d) Subject to article 63, paragraph 2, to be present at the trial, to conduct the defence in person or through legal assistance of the accused's choosing, to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Court in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it;
(e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her. The accused shall also be entitled to raise defences and to present other evidence admissible under this Statute;

(f) To have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness, if any of the proceedings of or documents presented to the Court are not in a language which the accused fully understands and speaks;

(g) Not to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or innocence;

(h) To make an unsworn oral or written statement in his or her defence; and

(i) Not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal.

2. In addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide.
Article 85: Compensation to an arrested or convicted person

1. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

2. When a person has by a final decision been convicted of a criminal offence, and when subsequently his or her conviction has been reversed on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him or her.

3. In exceptional circumstances, where the Court finds conclusive facts showing that there has been a grave and manifest miscarriage of justice, it may in its discretion award compensation, according to the criteria provided in the Rules of Procedure and Evidence, to a person who has been released from detention following a final decision of acquittal or a termination of the proceedings for that reason.

The establishment of the International Criminal Court in 1998 creates the proper court that has jurisdiction over the trial of international crimes, including torture. With the establishment of a permanent court to try international crimes, this will create a body of case law under international criminal law that would become precedents for future cases with the same elements as those already tried. This would also facilitate the prosecution and trial of those accused of commission of torture and ill-treatment.
2.5.11 Vienna Declaration and Programme of Action World Conference on Human Rights, 1993

Vienna Declaration was made on 14-25 June 1993 in world conference of human rights under the aegis of UN. The conference discussed all aspects of human rights protection and reiterated that Human rights and fundamental freedoms are the birthright of all human beings; their protection and promotion is the first responsibility of Governments.\textsuperscript{152} The Conference admitted that the promotion and protection of human rights is a matter of priority for the international community. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.\textsuperscript{153}

The World Conference on Human Rights reaffirmed that under human rights law and international humanitarian law, freedom from torture is a right which must be protected under all circumstances, including in times of internal or international disturbance or armed conflicts.\textsuperscript{154}

The conference laid stress on effective redressal for human rights violation for which every state must provide framework because without a system for administration of justice in full conformity, it is

\textsuperscript{152} Para 1
\textsuperscript{153} Para 5
\textsuperscript{154} Para 56
not possible to have full non discriminatory realization of human rights.\textsuperscript{155}

The Conference also expressed grave concern for the continuing violation of human rights indifferent parts of the world and lack of sufficient and effective remedies for the victims. Such violations and obstacles include, as well as torture and cruel, inhuman and degrading treatment or punishment, summary and arbitrary executions, disappearances, arbitrary detentions, all forms of racism, racial discrimination and apartheid, foreign occupation and alien domination, xenophobia, poverty, hunger and other denials of economic, social and cultural rights, religious intolerance, terrorism, discrimination against women and lack of the rule of law.\textsuperscript{156} Regarding human rights of accused and convention against torture the Conference showed its pleasure on ratification by many Member States of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and encouraged its speedy ratification by all other Member States who had not ratified.

It was assessed that to eradicate the torture the first and foremost efforts must be done to prevent it and the best method to prevent is to early adoption of CAT which calls for the preventive system also because torture is one of the atrocious violation of human dignity and impairs the capability of the victim to continue their lives.\textsuperscript{157} Even it calls for assistance to victims of torture and ensure more effective remedies for their physical, psychological and social rehabilitation. Providing the necessary resources for this purpose

\textsuperscript{155} Para 27
\textsuperscript{156} Para 30
\textsuperscript{157} Para 55
should be given high priority, inter alia, by additional contributions to the United Nations Voluntary Fund for the Victims of Torture.\textsuperscript{158}

Therefore the basic purpose of this Conference was to have and monitor the implementation of the basic human rights of individuals enshrined in various declarations of United Nations or other International and Regional Conventions. The World Conference on Human Rights therefore urges all States to put an immediate end to the practice of torture and eradicate this evil forever through full implementation of the Universal Declaration of Human Rights as well as the relevant conventions and, where necessary, strengthening of existing mechanisms. The World Conference on Human Rights calls on all States to cooperate fully with the Special Rapporteur on the question of torture in the fulfillment of his mandate. By eradicating torture the Conference wants to establish rule of law in the real sense.

2.6 Development of human rights philosophy in modern perspective in India

In India during the two hundred years rule by the British and also in the native States people were subjected to oppression / violence / repression / atrocities. A demand for some fundamental rights was raised in the report of Motilal Nehru Committee in 1928. The awareness and movement for them continued during the struggle for independence. When the Indian Constitution was on the anvil, the United Nations Universal Declaration for Human Rights, 1948 was adopted. The makers of the Constitution were inspired by it. They incorporated most of the human rights while drafting the provisions regarding the Preamble, Fundamental Rights and the Directive
Principles of the State Policy. They were adopted as an inseparable inherent component of rule of law in India for the establishment of a just social order.

2.7 Sum-up

Therefore, after analyzing the evolution of humanitarian laws in favour of arrested persons in the present day society, the fact which comes to mind in the first instance is that no doubt it was not in the form, we do have in present scenario but evolution dates back to time the concept of society emerged during ancient India. There are not many direct evidences to this effect but from the analysis of many surrounding set ups viz. political, social and economic and moreover the administration of justices, it is evident that the foundation for humanitarian laws was laid in ancient India. Many ancient writings in the form of Smritits, Sahintas along with writings of Kautilya and Narda suggests well organised administrative set up having regard for humanity above all. Indian civilization which is the oldest in the world besides Roman civilization, is reflected in many international civilizations and humanitarian laws which developed worldwide of which the great Magna Carta is the mile stone which paved the way for many international conventions supporting the human rights of the accused or arrested persons all over the world. Ancient India had witnessed a drastic transformation of laws as initially, the Law or Dharma, as propounded in the Vedas was considered supreme in ancient India for the King had no legislative power. But gradually, this situation changed and the King started making laws and regulations keeping in view the customs and local usages.
So long as the territory was small, the form of administration was more or less democratic; but as the size of the territory grew large, it was found necessary to adopt a system in which political powers were concentrated in the hands of the Head of the State assisted by a Council of Ministers and a trained bureaucracy.

Even ancient criminal jurisprudence recognized that criminals were not born but made. The purpose of penology seemed to make an offender a non-offender. Ancient Smriti writers envisaged these ideas. The ancient Smriti writers appropriately paid consideration to individuality of the offender. The Smriti writers in their writings had referred the release of offenders on account of good conduct and integrity of character, which seems to sustain the recent concept of Probation. However there are evidences of torture against the arrested persons or accused persons but the rights of arrested persons in the form of fair trial, right of appeal, right to examine witnesses and right of being represented by a counsel, right against torture are found in many scripts during ancient India. Brihaspati and Narda had mentioned certain grounds where there was immunity from being arrested. Immunity from punishment based on humanitarian grounds was applicable irrespective of caste consideration. Therefore, amidst all other irregularities or harshness of administration of justice, no doubt the humanitarian laws existed since ancient time and developed with the progress of the society.