Chapter – 3
CONSTITUTIONAL RIGHTS OF THE ACCUSED

1. **Introduction**: There is no denying the fact that the Constitution of the India Republic is the product not of a political revolution but of the research and deliberations of a body of distinguished representatives of the people who left no stone unturned in improving the existing system of administration. The constitution of India was framed to foster the achievement of many goals. It is a document in which provisions expressing general principles and humanitarian sentiments were vowed to purpose. The idealism that marks the Constitution was predominantly a product of social content of the Independence Movement, which, in turn, resulted in awareness of the plight of the mass of Indians, and so the practical provisions were largely the result of the Assembly members’ experience in government and of the urgent necessities of the time.

2. **Fundamentalness of Fundamental Rights**: Arrest or detention of a person curtails his freedom which is his fundamental right. It is therefore very necessary to examine, here the power of legislature to make a law which affects such fundamental rights as were envisaged by the founding fathers and as proposed and adumbrated by the Apex court, which is considered to be the champion of the fundamental rights. Honorable Nani A. Palkiwala remarked, that the constitution is not a jellyfish; but a highly evolved organism. It possesses an identity and integrity of its own. It cannot be made to lose its identity in the process of amendment (We the people, p 208) As regards constitutional amendments he said that the will of the parliament is certainly not the will of the people. If we treat parliament as
equivalent to the people, it is to betray complete confusion of thought. While choosing their representatives the electorate considers a vast number of factors which have nothing to do with Constitutional amendments. This has been proved time and again in countries where the people’s will is ascertained on a referendum carried out on parliament’s proposal to alter the Constitution.

3. Procedure established by law: Article 21, says the Supreme Court, is the heart of the constitution (I.R. Coelho Vs. State of Tamil Nadu). This Article commands that no man shall be deprived of his life and liberty except according to procedure established by law. This therefore assumes paramount importance especially in the context of arrest or detention of an individual. Hence, deeper attention is required here.

3.1 Law: Then, what is this law? A formula like definition is not possible. And since, says Benjamin N. Cardozo, a definition is not possible, its description would better serve our purpose. Sir John Salmond details the word law “as the dictate of reason (Natural law), as the command of the sovereign (imperative law), as the practice of the court (legal realism) and as a system of rules.”

3.2 Procedure established by law: Article 13 of the constitution runs thus: Article 13A “law is inconsistent with or in detraction of the fundamental rights: (1) all laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of the part shall, to the extent of such

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1 AIR 2007 SC 861 : JT 2007 (2) SCC 292
inconsistency, be void. (2) The State shall not enact any law which takes away or curtails the rights conferred by this part and any law made in contravention of this clause shall, to the extent of the contravention, be void.”

4. **Right in respect of conviction**: Article 20 of the Constitution is explicitly relevant here and the said Article runs thus: Article 20- protection in respect of conviction for offences: “(1) No person shall be convicted of any offence except for violation of a law in force at the time of the commission of that offence. No person shall be subjected to a penalty greater than given by the law in force at the time of the commission of the offence. (2) No person shall be prosecuted and punished for the same offence twice. (3) No person accused of any offence shall be compelled to be a witness against himself.”

4.1 **Right of the accused against conviction for violation of a law not in force**: Under Article 21 (1), no person accused of violation of a law which is not in force at the time of the commission of the act can be convicted. Since this is a basic principle of criminal jurisprudence, the said right is not conferred on an accused person by Article 21 (1) of the Constitution. The said Article only protects a pre-existing right.

4.2 **Law in force**: The Apex Court in *Rao Shiv Bahadur Singh Vs. State (Vindya Pradesh)*\(^2\), negotiating the contention that the fundamental right under Article 20(1) was not available in case of an act committed prior to the constitution, has observed that, the protection under this article is not

\(^2\) AIR 1953 SC 394
confined to the passing or the validity of the law, but it extends to the conviction or the sentence.

4.3 **Right against double jeopardy**: Article 20 (2) provides that no person shall be convicted of the same offence more than once. Where the second prosecution is carried out for the same offence, the right against double jeopardy is available to the accused.

4.4 **Right against self incrimination**: The celebrated maxim “nemo tenetur seipsum accusare,” says that no man can be compelled to charge himself with a crime. Under article 20 (3) of the Constitution no accused person can be compelled to give evidence against himself (Ramanlal Bhogilal shah Vs. D.K. Guha)\(^3\). But, in order to claim the benefit of the bar erected under this Article it must be shown by the accused, firstly, that he has been an accused in the case and secondly, that he has made a statement under compulsion. The Apex court in Veera Ibrahim Vs. State of Maharastra case,\(^4\) has observed, that only a person against whom a formal accusation relating to the commission of an offence has been leveled which in the normal course may result in his prosecution, would fall within the orbit of the “expression Accused of any offence/Accusation of an offence.”

The Apex court pointed out in K. Joseph Augusthi Vs. M.A. Narayan\(^5\) case, that it is a condition precedent for invocation of the principle embodied in Article 20(3). In the State of Bombay Vs. Khathi Kalu Oghad\(^6\) case, the court has declared that to bring a statement within Article 20 (3) of the

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\(^3\) (1973) 1 SCC 696 : 1973 Cri. LJ 921
\(^4\) AIR 1976 SC 1167 : 1976 Cri. LJ 860
\(^5\) AIR 1964 SC 1552
\(^6\) AIR 1961 SC 1808 : 1961 Cri. LJ 856
Constitution, the accused person must have stood in the character of an accused person at the time when he made it. An accused person, held the court in *Amrit singh Vs. State of Punjab*\(^7\) case, has a right to give his specimen heir or refuse to give. He cannot be made a witness against his will.

5. **Right to life and personal liberty**: As noticed earlier Y.K. Sabharwal, C.J.I in *I.R. Coelho Vs. State of Tamil Nadu*\(^8\), observed that Article 21 is the heart of the Constitution. It reads thus: Article 21—protection of life and personal liberty: No person shall be deprived of his life or personal liberty except according to procedure established by law. It embodies three pivotal components and these three are: life, personal liberty, and procedure established by law. A bar, resembling the great wall of China is erected there under in the form of procedure established by law and if article 21 is the heart of the Constitution, this phrase is the heart of Article 21. It is an aphorism that exhibits the great wisdom and forethought which the founding-fathers had in their minds when they framed the constitution. They took the precaution taken against the arbitrary and whimsical action of the powerful against the powerless and the meek. Chief Justice Ray in *Additional District Magistrate Vs. S.S. Shukla*\(^9\) case, has therefore observed that Article 21 is our rule of law regarding life and liberty. He said that no other rule of law can have separate existence as a distinct right. The negative language of fundamental rights incorporated in part III puts a limitation on the power of the State and declares the corresponding guarantee of the individual to that fundamental right. The limitation and

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\(^7\) 2006 AIR SCW 5712  
\(^8\) AIR 2007 SC 861 : JT 2007 (2) SC 292  
\(^9\) AIR 1976 SC 1207
guarantee are complementary to each other. The limitation of State action embodied in a fundamental right, couched in the negative form, is the measure of the protection of the individual.

Justice Krishna Iyer in *Maneka Gandhi vs. Union of India*\(^{10}\) case, has put it more briefly thus: “The centre of the state in a legal debate on life and liberty must ordinarily be occupied by article 21 of our paramount parchment with emphatic brevity and accent on legality.”

6. **Right to life of the accused:** The Apex court and the High Court in India have considerably enlarged the meaning of the word life and have further unfolded and added newer facets. In *Sheela Barse Vs. State of Maharashtra*\(^{11}\) case, the Apex Court has observed that the citizens who are detained in prisons either as under trials or as convicts are entitled to the benefit of the guarantees under the extended meaning of the word life as embodied in article 21 however, subject to reasonable restrictions.

7. **Right to personal liberty of the accused:** For the first time in *Kharak Singh Vs. State of Uttar Pradesh*\(^{12}\) case, the question regarding the proper meaning of article 21 and thereby the scope of the expression personal liberty came up pointedly before the Apex Court. Not agreeing with the narrow interpretation taken by the court in *A.K. Gopalan Vs. State of Madras*\(^{13}\) case, the court took the view that personal liberty is used in article 21, as a concise term. It includes within itself all the varieties of rights which constitute the personal liberties of man, more than what is described in the

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\(^{10}\) AIR 1978 SC 597  
\(^{11}\) (1987) 4 SCC 373 : 1987 (3) Crimes 433  
\(^{12}\) AIR 1963 SC 1295  
\(^{13}\) AIR 1950 SC 27
several clauses of article 19 (1). In Shambhu Nath Sarkar vs. State of West Bengal\(^{14}\), Shelat, J. explained the ratio in R.C. Cooper Vs. Union of India.\(^{15}\)

8. **Right to fair trial**: Every accused person whatever be the nature of charge against him, has an inherent right to a fair trial. It is his fundamental right, an attribute of article 21 of the Constitution. Natural justice is most important facet of a fair trial. The Apex Court in T. Nagappa Vs. Y.R. Muralidhar\(^{16}\) case, has declared that the accused has a right to fair trial. He has a right to defend himself as per fundamental right as mentioned in article 21 and also the right to fair trial which includes fair and proper opportunities allowed by law to prove innocence.

9. **Right of the accused for speedy trial**: The right of the accused for a speedy trial is also read into article 21 of the Constitution A.R. Antuley Vs. R.S. Nayak\(^{17}\)\(^{17}\). Thus speedy trial is a fundamental right S. Rama Krishna Vs. S. Rami reddy\(^{18}\)\(^{18}\). The Apex Court has repeatedly has observed that a time frame cannot be fixed as a general rule, for the completion of a criminal trial. But the same court has also said that the court has to bear in mind that promptness in the trial and its early conclusion is necessary for the ends of justice and credibility of the judicial process. Unless prevented by any dilatory tactics of the accused, all trials should be promptly concluded.

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\(^{14}\) AIR 1973 SC 1325 : (1973) 1 SCC 856  
\(^{15}\) (1970) 1 SCC 248 : AIR 1970 SC 564  
\(^{16}\) (2008) 5 SCC 633 : 2008 AIR SCW 3349  
\(^{17}\) AIR 1988 SC 1531 : 1988 Cri. LJ 1661  
\(^{18}\) 2008 AIR SCW 2824
9.1 Direction of Supreme Court: The Apex court in Raj Deo Sharma Vs. State of Bihar case, issued the following guidelines with regard to this:
“(1) in cases where the trial is for an offence punishable with imprisonment for a period not exceeding seven years, whether the accused is in jail or not, the court shall close the prosecution evidence on completion of a period of two years from the date of recording the plea of the accused on the charges framed whether the prosecution has examined all the witness or not within the said period and the court can proceed to the next step provided by law for the trial of the case. (2) In all such cases mentioned above, if the accused has been in jail for a period of less than one half of the maximum period of punishment prescribed for the offence, the trial court shall release the accused on bail without any delay on such conditions as it thinks fit (3) If the offence under trial is punishable for the period with imprisonment for a period exceeding seven years, whether the accused is in jail or not the court shall close the prosecution evidence on completion of three years form the date of recording the plea of the accused on the charge framed, whether the prosecution has examined all the witnesses or not within the said period and the court can proceed to the next step provided by law for the trial of the case. It is for very exceptional reasons to and in the interest of justice the court may grant further time of the prosecution to adduce evidence beyond the foresaid time limit. (4) But, if the inability for completing the prosecution within the aforesaid period is caused by the conduct of the accused In prolonging the trial, no court is obliged to close the prosecution evidence within the aforesaid period in any of the cases covered by (1) to (3) above. (5) Where the trial has been stayed by orders of the court or by

19 AIR 1998 SC 3281 : 1998 Cri. LJ 4596
operation of law, that time during which the stay was in force shall be excluded from the aforesaid period for closing the prosecution evidence.”

10. **Right against handcuffing**: It cannot, as a general rule, be laid down that handcuffing infringes the fundamental rights of the accused in all cases. For example, taking an under trial for producing him before court by handcuffing him may not be against any fundamental right if the conduct of the accused gives birth to the fear of his escape or commit violence. This also is permissible only if the state shows that there is no other practical means.

10.1 **Directions of the Supreme Court**: In Kuleshwar’s case the directions issued with regard to handcuffing may be summoned up thus: (1) handcuffing without reasonable ground is not in tune with Article 21. It is inhuman and arbitrary. (2) The law if any, providing for handcuffing must satisfy the demands of Article 14, 19 and 21. (3) No undertrial shall be handcuffed unless the state shows that there is no other practical way of avoiding escape. Truth that can be seen is necessary. (4) Distinction between classes of prisoners is constitutionally old-fashioned. (5) Even the orders of superiors are not valid justification for handcuffing unless it is shown that the prisoner is dangerous and desperate. (6) Handcuffing a person on the ground that he is charged with a grave offence, is not sufficient. Nature of the accusation is not the criterion. (7) Even in extreme cases, the escorting authority must record the existing reasons for handcuffing. (8) The escorting authority must show the reasons so recorded to the presiding officer and obtain his approval. (9) If the presiding officer directs to take off the handcuffs, the escorting authority cannot overrule such direction. (10) It is
mandatory for the judicial officer before whom the prisoner is produced to interrogate to explain the action.

11. **Protection against arrest**: Protection against arrest means taking or keeping of a person in custody by legal authority in response to a criminal charge (Black’s Law Dictionary, 8th Edn.). The word arrest is derived from the French word arrêter meaning thereby to stop or stay Stround’s judicial dictionary (4th Edn. Vol 1, P 184), defines the word arrest as one which means to restrain a person from his liberty.

11.1 **Procedure to be followed for effecting arrest**: The Supreme Court in D.K. Basu Vs. State of West Bengal20 case, has set a detailed procedure for effecting the arrest of a person and has also issued necessary directions to be followed cautiously. The failure of all this would lead to contempt of court.

1. Police cannot arrest any person just because they can do so.
2. The police should be justified in arresting a person.
3. A person cannot be arrested merely on the suspicion of involvement in an offence.
4. Except in extremely wicked crimes, arrest should be avoided.
5. A person arrested has a right to have someone informed.
6. A person arrested, on the first point of time has a right to know the reason of his arrest.
7. He has a right to consult his counsel.
8. He cannot be detained beyond twenty four hours without the authority of a Magistrate. It amounts to saying that, an arrested person has a right to be produced before a Magistrate within Twenty Four hours of his arrest.
9. The arresting authority should follow the procedure set for arrest and directions issued therefore by the Apex Court in D.K. Basu ‘s Case.

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20 AIR 1997 SC 610 : 1997 Cri. LJ 743
12. **Protection against arbitrary detention**: It may be noted in the very beginning that preventive detention contemplated under Article 22 of the Constitution and arrest and detention for any offence by police stand on different footing. There is no authoritative definition of preventive detention either in the Constitution or in any other statute. However the expression is not punitive but is in the nature of preventive action or precautionary measure. The primary object of preventive detention is not to punish a person for having done something but to intercept him before he does it. In other worlds, it is not a penalty for past activities of an individual but is intended to prevent the person form indulging in unlawful activities and with a view to preventing him from doing harm in future (State of Maharashtra VS. Bhaurao Punjabrao Gawande)\(^{21}\).

12.1 **Preventive detention: necessary evil**: Liberty of an individual has to be subordinated, within reasonable bounds, and that too for the good of the people. The framers of the Constitution were well aware of the practical need of preventive detention with a view to striking a just and delicate balance between need and necessity to preserve individual liberty and personal freedom on one hand and security and safety of the country and interest of the society on the other. Security of state, maintenance of public order and services essential to the community, prevention of smuggling and black marketing activities, etc. demand effective safeguards in the larger interests of maintaining of a peaceful democratic way of life (Baburao Punjabrao Gawande’s Case).

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\(^{21}\) (2008) 3 SCC 613
12.2 **Interpretation of preventive detention laws:** While considering and interpreting detention laws, courts ought to show greatest concern in upholding and safeguarding the fundamental rights of liberty of the citizen.

12.3 **Principles of preventive detention:** Whether detention is illegal or valid, is the only question which ultimately remains to be decided by court. So, some of the principles propounded by Apex Court in a course of its judgments help us in knowing as to whether there is a valid detention order, whether the requirements of Article 22 are met with, whether the detention is arbitrary and so on and so forth. These principles which have been made clear in some of the judgments may be given below:

(1) **Act of the detenu:** Facts of the given case determine whether the act relates to a larger circle or a smaller one. An order made in such a case has to take note of the potentiality of the act objected (*State of Uttar Pradesh Vs. Hari Shankar Tewari*)²².

(2) **Safeguards under Article 22:** Article 22 of the Constitution provides various safeguards meant to protect personal liberty against arbitrary restraint without trial. These safeguards are: (1) The detaining authority must, an soon as possible and practicable after the detention, communicate to the detenu the grounds on which the order of detention has been made, and (2) The detaining authority must give the detenu the earliest opportunity of making a representation against the order or detention. The communication of the grounds of detention is, therefore, also intended to

²² AIR 1987 SC 998 : 1987 Cri.LJ 840
promote the purpose of enabling the detenu to make an effective representation (Khudiram Das Vs. State of West Bengal)\(^2\).

(3) **Grounds of detention** : The expression *grounds* means all the basic facts and material which have been taken into account by the detaining authority in framing the order of detention and on which, therefore, the order of detention is based (Khudiram Das Vs. State of West Bengal case).

(4) **Procedure established by law** : Article 22 guarantees that no person shall be deprived of his liberty except in accordance with procedure established by law. The minutest deviation from or displacement or infraction or violation of legal procedure symbolized in that fulcrum not only upsets the balance but also introduces error and aberration and vitiates its working. It is obligatory for the State to show that the liberty of a person is taken away strictly in accordance with the procedure established by law and the safeguards provided under article 22 and the law providing for detention have not been transgressed or violated (Mohd. Alam Vs. State of West Bengal, AIR 1974 SC 917 : 1974 Cri. LJ 770).

(5) **Right to consult** : Since the accused person has an absolute right to consult his counsel of his choice, this right does not depend on any other law (R.D. Saxena Vs. Balram Prasad Sharma, AIR 2000 SC 2912).

(6) **Failure to inform grounds** : Failure to inform grounds of detention violates article 22 (In the matter of Madhu Limaye, AIR 1969 SC 1014 : 1969 Cri LJ 1440).

\(^2\) AIR 1975 SC 550 : 1975 Cri. LJ 446
(7) **Failure to confirm detention**: Effect: Detention should be confirmed by the appropriate Government within three months. If that Government fails to exercise its power and confirm the detention within the said period, the detention thereafter ceases to be lawful (*Nirmal Kumar Khandelwal Vs. Union of India*).  

(8) **Consideration of representation**: The detaining authority must consider the representation of the detenu before it is forwarded to the Advisory Board and before the Board makes its report. Expedition or say haste is essential at every stage, for no allowance can be made for lethargic indifference or needless procrastination. The burden to explain the necessity for the slightest departure from the time imperative, lies on the detaining authority (*Rances Coralio Mullin Vs. W.C. Khambre*).  

(9) **Language of communication**: The ground of detention must be communicated to the detenu in a language which can be easily understood by him (*Prakash Chandra Mehta Vs. Commissioner and Secretary, Govt of Kerala*). If the grounds are conveyed in a language unknown to the detenu, the detaining authority must make sure that the grounds are explained to the detenu, in a language which he understands and a translated script is given to him.  

(10) **Right to essential particulars**: The detenu should be furnished with all essential particulars forming the basis of grounds of detention in order to facilitate him to make a representation. If the particulars are found to be  

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24 AIR 1978 SC 1155 : 1978 Cri. LJ 1094  
26 AIR 1986 SC 687 : 1986 Cri. LJ 786
insufficient, the detenu is entitled to seek better particulars (Bhanwarlal Ganeshmal Ji Vs. State of Tamil Nadu)\textsuperscript{27}.

\textbf{(11) Right to be released}: Where the facts put together lead to the unopposable conclusion that the detaining authority waited for the opinion of the Advisory Board, the detention becomes illegal. The detenu is thus entitled to be released (Mrs. Nafisa Khalifa Ghaem Vs. Union of India)\textsuperscript{28}.

\textbf{(12) Right to clear grounds}: Vague grounds of detention are bad in law and make detention order illegal (Jahangirkhan Fazalkhan Pathan vs. Police Commissioner)\textsuperscript{29}.

\textbf{(13) Right to know period of detention}: The period of detention has to be mentioned in the detention order. Failure to do so vitiates the order (Commissioner of police Vs. Gurbux Anandram Bhiryani)\textsuperscript{30}.

\textbf{(14) Right to communication of subjective satisfaction}: Since subjective satisfaction is a condition precedent for the exercise of the power of preventive detention conferred on the executive, the court can always examine whether the requisite satisfaction is arrived at by the authority, and if not the condition precedent to the exercise of the power would be bad. The court cannot go into correctness or otherwise of the facts stated or allegations leveled in the grounds in support of detention.

\textsuperscript{27} AIR 1979 SC 541 L 1979 Cri.LJ 462
\textsuperscript{28} (1982)1 SCC 422
\textsuperscript{29} AIR 1989 SC 1812 : 1989 Cri.LJ 2097
\textsuperscript{30} JT 1988 (1) SC 8
(15) **Safeguard against subsequent order of detention:** A fresh order of detention can only be made if fresh grounds come into existence only after the previous detention order is revoked or expires. Release of the detenu on bail would not be counted as fresh ground for making a fresh detention order (**Har Jas Dev Singh Vs. State of Punjab**)\(^{31}\).

(16) **Right to make representation:** A detenu has a constitutional right to make a representation against the order of detention. The law insists upon the literal performance of procedural requirements. Hence, it is imperative that the detaining authority must see that the detenu is made well aware of his constitutional right to make a representation against the order of detention.

(17) **Right of hearing before advisory board:** A detenu has a constitutional right to be informed by the detaining authority regarding his right to be heard before the Advisory Board (**Wasiuddin Ahmed case**).

(18) **Right to be assisted by a friend:** A timely request, if made by the detenu, seeking assistance of a friend, cannot be refused (**Anil vats Vs. Union of India**)\(^{32}\).

(19) **Right to legible copies of document:** Where the detenu has sought for certain documents which are in possession of Government, the same should be supplied, and should be legible. If illegible copies are supplied, it

\(^{31}\) AIR 1973 SC 2469 : 1973 Cri.LJ 1602

\(^{32}\) AIR 1919 SC 979
vitiates the safeguards provided to the detenu and hence, detention is liable to be quashed (Manjit Singh Grewal W Gogi Vs. Union of India)\textsuperscript{33}.

(20) **Nature of rights under article 22 (5):** The obligation to make a fair communication of the grounds and the particulars sufficient to enable the detenu to make his representation is not a fallacious right and hence, the executive agencies may be held to the standards implied by the court in article 22 (5) of the constitution (Bhut Nath Mete Vs. State of West Bengal)\textsuperscript{34}.

(21) **Right to basic facts:** Article 22 (5) provides for procedural safeguards which can be termed as the constitutional limitations on deprivation of a person’s freedom. Therefore, the basic facts operating in formation of subjective satisfaction, have to be provided to the detenu, and if not done, the safeguard becomes meaningless (Anil Dey Vs. State of West Bengal)\textsuperscript{35}.

(22) **Right to procedural safeguards:** The procedural requirements are the only safeguards available to a detenu, and so the procedural requirements are to be strictly complied with, if any value is to be attached to the liberty of the subject and the constitutional rights guaranteed to him in that regard (Iranna Vs. Govt. Karnataka)\textsuperscript{36}.

(23) **Grounds of Challenge:** An order of detention can be challenged on certain grounds, for example if the order is not passed by the competent

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\textsuperscript{33} (1990) Supp. SCC 59  
\textsuperscript{34} AIR 1974 SC 806 : 1974 Cri.LJ, 690  
\textsuperscript{35} AIR 1974 SC 832 : 1974 Cri. LJ 702  
\textsuperscript{36} 2006 (4) Cri.LJ (NOC) 447 : 2006 (4) Kar. LJ 200
authority; if the condition precedent for the exercise of power does not exist; if subjective satisfaction arrived at by the detaining authority is irrational; if the order is malafide; if the detaining authority has passed the order absent-mindedly; if the gourds are vague, indefinite, irrelevant, extraneous, non-existent or stale; if the order is belated; if the person against whom an order is passed is already in jail; if the order is punitive in nature; and If the order is not approved by the State or Central Government as required by law.

(24) **Challenge to detention order prior to execution:** A writ of habeas corpus may be prayed for in case actual detention or imprisonment of a person is illegal or unconstitutional. But, if a person is not actually detained, obviously a writ of habeas corpus would not lie. A question, however, may arise that under such circumstance no remedy at all is available to an aggrieved person against whom an order of detention has been made and such an order is still to be executed.

13. **Right to silence:** The constitutional maxim is “**No man is a witness against himself**” It is paradoxical to say that the nobility and generosity of an idea is admitted by the fact that it is never carried into practice. The right of the accused regarding silence is therefore a great intellectual triumph. Indeed, the divorce noticed everywhere between theory and practice here takes on dramatic colouring. If on one hand the daily papers report the demands of certain justice all over the world, on the other fortnightly, monthly, quarterly reviews devoted to the evolution of ideas, bear witness to the recognition of the rights of the accused, as a principle of elementary morality. However of all these rights, the right to silence takes the foremost place.
14. **Right against leading questions:** This is another facet of the right of the accused to fair trial. Framing of questions by the prosecutor, in such a manner that the witness by answering merely yes or no will give the evidence is illegal and violative of article 21.

15. **Right of the Accused to counsel:** Every accused person is entitled to have assistance of a counsel of his choice. When a person is arrested, he is entitled to talk to his counsel. When a person is detained under any preventive detention law, he has a right to have a friend informed of the detention. As these rights are the attributes of article 21 and 22. They cannot be denied to the person arrested, or charged or detained, as the case may be. Any violation thereof would vitiate the action taken against him.

16. **Right to legal aid:** Legal aid in criminal cases is a fundamental right implicit in Article 21 ([Kadra Pehadiya Vs. State of Maharashtra](#))

17. **Right against custodial torture:** Fear, helplessness and ignorance are the chief causes of custodial atrocities. A person who is arrested and taken into custody is helpless at least until someone reaches him. The impression which the association of police causes is that of fear. Though constitution has accorded so many protections yet a very few people who enter the police station as arrested, have a vague glimpse of those Constitutional protections. The police takes undue advantage of such people’s ignorance.

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37 AIR 1981 SC 939 : 1981 Cri. LJ. 481
17.1 Right of arrestee or detenu and procedure to be followed: The Apex court in D.K. Basu’s case therefore issued the following requirements to be followed in all cases of arrest or detention. (1) The police personnel should carry out the arrest and handle the interrogation of the arrestee in an accurate, visible and clear manner and their identification and designation should be clearly displayed. The particulars of all such police personnel who handle interrogation of the arrestee, must be recorded in a register. (2) The police officer carrying out the arrest of the arrestee shall prepare a memo of arrest at the time of arrest and such memo shall be attested by at least one witness, who may be either a member of the family of the arrestee or a respectable person of the locality form where the arrest is made. It shall also be counter signed by the arrestee and shall contain the time and date of arrest. (3) A person who has been arrested or detained and is being held in custody in a police station or interrogation center or other lock-up, shall be entitled to have one friend or relative or other person known to him so that he may inform that he has been arrested and is being detained at the particular place, (4) The time, place of arrest and venue of custody of an arrestee must be notified by the police to a friend or relative of the arrestee who lives outside the district or town through the Legal Aid Organization in the district and the police station of the area concerned telegraphically within a period of 8 to 12 hours after the arrest. (5) The person arrested must be made aware of his right to have someone informed of his arrest or detention as soon as he is put under arrest or is detained.

18. Right of female accused etc.: Accused women, women under trials, women convicts are more vulnerable and pose all sorts of difficulties in criminal justice system, for in India law has extended extra protection to
these highly esteemed creatures. A few of the legal protections accorded to a woman criminal are given here:

18.1 **Search** : A woman must not be searched except by a female with strict regard to decency in a manner provided under section 51 (2) of the Criminal procedure Code. The document prepared by the I.O. should indicate this along with the name of the female officer who conducted the search and the personal search memo should also indicate all the details. Failure to do so amounts to violation of the basic rights of the female. *(State of Punjab Vs. Baldev Singh)*\(^{38}\).

18.2 **Interrogation** : Females must be interrogated only in the presence of female police *(Sheela Barse Vs. State of Maharastra, AIR 1983 SC 378 : 1983 Cri. LJ. 642).*

18.3 **Detention** : Female suspects should not be detained in the same lock up where male suspects are detained *(Sheela Barse’s Case)*.

18.4 **Right to decency and dignity** : Female suspect, under trial or convict must be treated very decently by everyone concerned. Dignity is their fundamental right and it should not be violated. Rape is a frequent phenomenon. It amounts to violation of fundamental rights guaranteed under Article 21 *(Chairman, Railway Board Vs. Chandrima Das)*\(^{39}\).

\(^{38}\) AIR 1999 SC 2378 : 1999 Cri. LJ 3672

\(^{39}\) AIR 2000 SC 988 : 2000 Cri. LJ 1473
19. Rights of persons of unsound mind and children. : Persons of unsound mind or lunatics require special care and protection. Some of those rights are given below:

19.1 Right in prison : Persons of unsound mind or lunatics cannot be kept in jail along with other under trials (Hussainara Khatoon Vs. Home secretary, State of Bihar)\(^{40}\).

19.2 Right against admission to prison : Admission of mentally ill persons to jail is unconstitutional (Sheela barse ‘s case).

19.3 Right to safe custody : The judicial Magistrate should get mentally ill persons examined and should have sent them to safe custody. This function should not be performed by Executive Magistrate.

19.4 Right against chaining : Such persons should not be chained inhumanly in asylums. (Rakesh Chandra Narayan Vs. State of Bihar)\(^{41}\).

20. Right of under trials : No under trial can be detained in prison for a period longer than the maximum term for which they would have been sentenced. Its violation amounts to violation of their fundamental rights under article 21.

20.1 Right to speedy trial : where investigation has been delayed by over two years, the final report or charge sheet must be submitted by the police within a further period of three months. If that is not done, the state may well withdraw such cases. After a period of two years and three months, If police

\(^{40}\) AIR 1979 SC 1377 : 1979 Cri. LJ 1052  
\(^{41}\) AIR 1989 SC 348
is not able to file a charge-sheet, one can reasonably assume that there is no case against the arrested person. *(Hussainara Khatoon (III) Vs. Home Secretary, State of Bihar)*\(^{42}\).

**20.2 Sexual exploitation of juvenile under trials.** The Supreme Court was shocked to find allegation of sexual exploitation of juvenile under trials by adult prisoners in jail. It held that if the allegations are true, it cannot abdicate its constitutional obligations in ensuring human dignity of the unfortunate juvenile under trials *(Munna Vs. State of U.P.)*\(^{43}\).

**21. Rights of convicts and condemned:** Even if an accused person is convicted by a court of law, the law does not disentitle that person of civilized standard of human decency. A prisoner is a human being by his very existence and he will not become anything else after entering the prison. He is still entitled to all constitutional rights unless his liberty has been constitutionally curtailed by procedures that satisfy all the requirements of due process. In simple words lawful imprisonment necessarily makes unavailable many rights and privileges that are available to an ordinary citizen, which is a retraction justified by our penal system. Nevertheless, though his rights may be diminished by environment, a prisoner is not wholly stripped of his constitutional protections. Indeed, there is no iron curtain drawn between the Constitution and a prisoner.

**21.1 Right of access to law:** In Sunil Batra’s Case the Apex Court deprecated the failure to provide jail Manual to prisoners, which is very very

\(^{42}\) *(1980)1 SCC 93 : 1979 Cri. LJ 1036

\(^{43}\) AIR 1982 SC 806 : 1982 Criil. LJ 620
costly and is not bought even by outsiders who are interested in knowing as to what it contains.

21.2 **Direction of the Supreme Court**: The Supreme Court in Sunil Batra’s case pleading against the inhuman conditions prevailing in the jails and considering the constitutional rights available to convicts and other inmates, issued the following directions. (1) Punishments, in civilized societies, must not degrade human dignity and wound flesh and spirit. An attempt should be made to change the consciousness of the criminal to ensure social defence. Where prison treatment stops aiming at the reformatory purpose and practices dehumanizing techniques, it becomes wasteful, counter productive, irrational, and highly unreasonable (Article 19). Torture tactics and inhumanity in no case should be allowed (2) Section 30 for prisoners under sentence of death, does not permit solitary confinement though it is legal under that section to separate such prisoners form the rest of the prison community during hours when prisoners are generally locked in. The court also upheld the special watch, day and night, of such sentences by guards though guards must concede minimum human privacy in practice. (3) By necessary implication, prisoners under sentence of death shall not be denied any of the community amenities, including games, news papers, books, moving around and meeting prisoners and visitors, but all within rules and regulations of prison management. It must also be noted that section 30 of the Prisoners Act is no substitute for sentence of imprisonment. It merely prescribes the manner of organizing safe jail custody authorized by section 366 of the Cr.PC.
21.3 **Rights of female inmates:** Further, the Apex Court deprecated the conditions prevailing in jails while noticing the pathetic conditions to which female inmates were subjected, in *R.D. Upadhyay Vs. State of A.P.*\(^44\).

(1) **Pregnant women:** A child shall be treated as an under trial/ convict while in jail with his/her mother. Such a child in entitled to food, shelter, medical care, clothing, education and recreational facilities as a matter of right. (a) Before sending a pregnant woman to jail, the concerned authorities must ensure that jail in question has the basic minimum facilities for child delivery as well as for providing pre-natal and post natal care for both, the mother and the child.

(2) **Child birth in prison:** (a) So far as possible and provided she has a suitable option, arrangements for temporary release/ parole (or suspended sentence in case of minor and casual offender) should be made to enable an expectant prisoner to have her delivery outside the prison. This facility can be denied only in exceptional cases constituting high security risk or cases of equivalent grave descriptions. (b) Birth in prison, when it occurs, shall be registered in the local birth registration office. However the fact that the child was born in the prison shall not be recorded in the certificate of birth. Only the address of the locality shall be mentioned. (c) As far as circumstances permit, all facilities for the naming rites of children born in prison shall be extended.

(3) **Female prisoners and their children:** (a) Female prisoners shall be allowed to keep their children with them in jail till they attain the age of six

\(^{44}\) AIR 2006 SC 1946 : 2006 (2) Crimes 138
years. (b) No female prisoner shall be allowed to keep a child who has completed the age of six years. When the child attains the age of six years he/she shall be handed over to a suitable surrogate in accordance with the consent of the female prisoner or shall be sent to a suitable institution run by the social welfare department. As far as possible, the child shall not be transferred to an institution outside the town or city where the prison is located in order to avoid undue hardships on both mother and child due to physical separation.

(4) **Food, clothing, medical care and shelter** : (a) The state/U.T government shall lay down the scales for providing proper and necessary clothing, suitting the local climatic to children in jail. (b) State/U.T government shall also lay down dietary scales for children keeping in view the calorific requirements of growing children as per medical norms (c) All jails need to evolve a permanent arrangement in order to provide proper food to children in jail. The food supplied should meet all the nutritional needs of the children.

(5) **Education and recreation for children of female prisoners** : (a) All children of female prisoners living in the jails shall be given proper education and recreational opportunities. While their mothers are at work in jail, all the children shall be kept in crèches under the charge of a matron/female warden or other female prisoners. (b) There shall be a crèche and a nursery attached to the prison for women. It is here that the children of women prisoners will be looked after. Children below three years of age shall be allowed to live in the crèche and those between three and six years shall be looked after in the nursery.
22. **Right of the accused to legal remedies:** For a litigant who has been wronged or is about to be wronged, the court has made a large number of provisions. The apex court in *D.K. Basu Vs. State of West Bengal* case, has held that the law wills that in every case where a man is wronged, he must have a remedy. Hence the constitution of India, code of criminal procedure and other penal statutes have provided remedies to the accused persons at various levels. Under article 32, the Supreme Court and under Article 226 and 227, the High court are vested with extra ordinary powers and they can issue prerogative writs like mandamus, habeas corpus, etc.

22.1 **Writ of habeas corpus:** The celebrated writ of habeas corpus (a great constitutional privilege or the first security of civil liberty) provides a prompt and effective remedy against illegal detention. By virtue of this writ, the court can direct the detaining authority to bring the body of the prisoner before the court so as to enable the court to decide the validity, jurisdiction for such detention. The principal aim of the writ is to ensure swift judicial review of alleged unlawful detention on liberty of freedom of the prisoner or detenu.

(1) **Object and scope of the writ:** The writ of habeas corpus is a prerogative writ by which the causes and validity of detention of a person are investigated by summary procedure. The detaining authority must satisfy the court that the deprivation of his personal liberty is according to the procedure established by law. The order of release in the case of a person suspected of or charged with the commission of an offence does not amount to his acquittal or discharge. The authorities simply on the basis of habeas
corpus are not deprived of the power to arrest and keep him in custody in accordance with law. In simple worlds this writ is not designed to interrupt the ordinary administration.

22.2 **Right to appeal**: Right to appeal is a constitutional and statutory right of an accused. An appeal is a proceeding undertaken to have a decision reconsidered by a higher authority (Black’s law Dictionary 8th Edn.)

(1) **Delay in disposal of appeal**: So far delay in disposal of appeals is concerned the court in State of Punjab Vs. Ajaib Singh\(^{46}\) case, has deprecated the same. It is observed therein that although crime never dies nor there should be any sympathy for the criminal, yet human factors play an important role and reflect advertently or inadvertently in the decision making process.

(2) **Scope of appeal against acquittal**: The court’s jurisdiction and power in an appeal against acquittal is very limited. Because, though there is no embargo on the appellate court to review, re appreciate evidence upon which an order of acquittal is based, generally, as held in State of Haryana vs. Surender\(^{47}\).

(3) **Appeal against conviction**: Right to appeal against conviction is constitutional and statutory, and so the appellate court has the duty of itself, to appreciate the evidence on record (The Supreme Court in Lal Mandi Vs. State of West Bengal.)\(^{48}\)

\(^{47}\) AIR 2007 SC 2312 : JT 2007 (8) SC 490
\(^{48}\) AIR 1995 SC 2265 : 1995 Cri. LJ 2659
23. **Right to compensation**: Though the accused person has no right to claim damages or compensation for his prosecution, the State should stand firmly in protecting an individual. But when the state fails to do so the courts would not shut their eyes, nor they are helpless in this behalf. Award of compensation, by Supreme Court in *Smt. Nilabati behara Vs. State of Orissa case*.\(^{49}\)

24. **Right to premature or amnesty release**: Though no convict can claim premature or amnesty release as a matter of right. Yet he is entitled to be released as per the rules framed by the government (*The State of Haryana VS. Balwan*)\(^{50}\)

25. **Right to seek clemency etc.** Like wise clemency cannot be sought as a matter of right, convict’s right to file a clemency petition is a constitutional right. President of India under article 72 and governor under Article 161 are vested with power to pardon, reprieve, respite, remit sentence, suspend, or commute it.

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\(^{49}\) AIR 1993 SC 1960 : 1993 Cri. LJ 2899

\(^{50}\) AIR 1999 SC 3333 : 1999 (4) Crime 133