CHAPTER – II
CONSTITUTIONAL AND LEGISLATIVE PROVISIONS FOR THE PROTECTION OF CUSTODIAL TORTURE IN INDIA

Indian law provides certain rights to the prisoners / suspects / accused persons while in the custody. These rights are so fundamental that no one can lawfully violate them. Unlike the International Covenant on Civil and Political Rights, the Indian Constitution does not specifically provide any right against custodial torture. However, certain fundamental rights enumerated in Part III of the Constitution are also available to them. These rights are mainly contained in articles 19, 20, 21, 22, 32 and 226 of the Constitution. Besides these constitutional rights, they enjoy certain other legal right under Indian Penal Code, 1860. Criminal Procedure Code, 1975 and the Indian Evidence Act, 1861. Various Police and Prison Acts and manuals also carry certain rules and regulations against custodial torture. The human rights conscious Indian Supreme Court on a number of cases has not only acknowledged these rights but expanded their scope through the process of judicial activism giving new and liberal interpretation.¹

2.1 Protection under Indian Constitution

The main rights of an accused which have been recognized and guaranteed by the Constitution may be stated as under:

2.1.1 Right to life
2.1.2 Right against self-incrimination

2.1.3 Right against Ex-Post-Facto Operation of Law
2.1.4 Right of Equality and Equal Protection of Laws
2.1.5 Right against double jeopardy
2.1.6 Right to speedy trial
2.1.7 Right against arbitrary arrest
2.1.8 Right to Legal Aid
2.1.9 Right against handcuffing
2.1.10 Right to Appeal

2.1.1 Right to Life

One of the most basic and fundamental right of the prisoners/ suspects / accused persons is the right to life. In fact, it is the basis of all human rights and the sanctorum of the constitutional temple. If there were no right to life, there would be no point in having the other rights.\(^2\) Article 6 of the International Covenant on Civil and Political Rights characterises the right to life as 'inherent', to emphasize its primacy. The covenant further makes right to life non-derogatory under article 4(2). Right to life is conferred by the Constitution under Article 21. Before the enactment of the 44th Amendment Act of 1978, the right to life along with other fundamental rights was a derogable right. In ADM Jabalpur case,\(^3\) the Supreme Court took the view that if the President had declared a state of emergency in the country and has also suspended the right to move the court for the enforcement of any right, the right to life under Article 21 could also be suspended. The 44th Amendment Act engrafted an exception viz., that such

\(^3\) *ADM Jabalpur v. S. Shukla*, AIR 1976 SC 1207.
declaration suspending the right to move any court for the enforcement of fundamental rights shall not cover Article 20 or 21 of the Constitution. The result is that the right to life has been made a non-derogable right like under article 4(2) of the covenant. Under Article 21 no person shall be deprived of his life or personal liberty except according to procedure established by law.

This Article lays down that a person can be deprived of his life or personal liberty under a law enacted by the competent authority laying down a specific procedure for such deprivation. The Supreme Court got the opportunity to examine the "procedure established by law" of the article during the early years of independence. In Gopalan case, the court had to decide whether the phrase "procedure established by law" meant a "fair and reasonable procedure" or a mere semblance of procedure prescribed by the state for the deprivation of life and personal liberty of the individual. It held that the "law meant a law made by the State and the courts were not competent to enquire into the reasonableness or otherwise of that law. The court refused to uphold the plea of the defence that the procedure established by law should meet the standard of reasonableness under Article 19. This judgment was a setback to the right to life and personal liberty.

The issue was again raised in Maneka Gandhi case. The petitioner raised the same contention as was raised in Gopalan. Reversing its

4. Article 35-A as amended "when the proclamation is in operation, the President may by order declare that the right to move any court for enforcement such the right conferred by Part-III of Constitution (except Article 20 & 21) shall remain suspended for the period during which proclamation is in force."
narrow view, the Supreme Court interpreted Article 21 to mean that the procedure for deprivation of life and personal liberty could no longer be any procedure. It held that the procedure contemplated in Article 21 must be “right, just and fair” and “not arbitrary, fanciful or oppressive”, otherwise it would be no procedure at all and the requirement of Article 21 would not be satisfied.” In other words the procedure must be a reasonable law and not just any enacted piece of legislation.

The term life in Article 21 also received wider interpretation. In Kharak Singh case, the Supreme Court held that the term “life” in Article 21 meant not merely be continuance of one’s animal existence but a right to the profession of each organ of the body. Thus it includes be inhibition against the deprivation of any of the limbs and faculties of life. The provision further prohibits the mutilation of the body by the amputation of an arm or leg or the pulling out of an eye or destruction of any other organ of the body. Thus every limb or faculty through which life is enjoyed is protected under Article 21. It includes the faculties of thinking and feeling also.

The Supreme Court in Francis Corellie case, went further to say that “life” under article 21 cannot be restricted to mere animal existence. It means something much more than just physical survival. The right to life in the opinion of the court means the right to live with human dignity and all that goes with it, viz., the basic necessities of the life such as adequate nutrition, clothing, shelter and facilities for reading, writing and expressing oneself. etc. This interpretation of the term

8. Francis Corellie v. Union Territory of Delhi, 1980 Cr.LJ 306 SC.
“life” was reiterated by the Supreme Court in other cases as well. The apex court thus elevated immunity from torture to the status of a fundamental right under Article 21 though it is not specifically enumerated as a fundamental right under the Constitution.

2.1.2 Right against Self-Incrimination

From the verdict of the Supreme Court in Nandni Sathpathy’s case,9 the following aspects of the right can be stated as under:-

i) Suspects, not yet formally charged were entitled to right to silence during custodial interrogation.

ii) “To be a witness against himself” in Article 2(3) extended beyond the court process to convey any giving of incriminating evidence of information even during police investigation.

It points out that if Article 20(3) were to be construed as to permit police interrogation then the protection granted under the Article would be nullified. This is so as it would enable the police to prove such facts so forcible elicited from the accused by other evidence. Police are expected to secure evidence without the accused being forced to become a party to such effort. It covers not only such evidence, which actually incriminates a person as well as the evidence which may tend to incriminate him. The protection not only is applicable to an instant case but also to other cases which the accused has reasonable apprehension of implication. The compulsion included both the physical as well as psychological facets.10

One of the motives of torture is to extract confession from the suspect for crime he is alleged to have committed. He is subjected to various kinds of constant torture until he breaks down and finally makes confessional statement. However, he has right to refuse to answer all self-incriminatory questions. The presumption of innocence until proved guilty according to law, is the right of the suspect accused person guaranteed under International Covenant of Civil and Political Rights under Article 14(2). The doctrine of presumption of innocence is also the basis of Indian jurisprudence. This is a very important right provided to the accused/suspect person under the Indian Evidence Act 1872.¹¹

Clause (3) of Article 20 provides that “no person accused of any offence shall compelled to be witness against himself.” In other words, this clause prohibits all kinds of compulsions to make a person accused of an offence a witness against himself. In this context, the Supreme Court in the case of M.P. Sharma v. Satish Chandra¹² had observed that this right embodies three essentials, viz. (a) It is a right pertaining to a person who is accused of an offence; (b) It is a protection against compulsion to be witness and (c) It is a protection against such compulsion relating to his giving evidence against himself. This right can also be said to be the ‘Right to Silence’. It may be mentioned that while the Criminal Procedure Code enjoins an accused person to answer truthfully the questions put to him by an investigating officer, Article 20(2) gives him protection against self-incrimination. This principle is also contained in Article 14(g) of the International Covenant on Civil and Political Rights, 1966.¹³

¹¹. Ibid.
Sections 24, 26 and 27 of the Indian Evidence Act and sections 162, 163(1), 315 and 342(a) of Criminal Procedure Code also prohibit forced confession or testimony as inadmissible in the court of law and protect the suspect/accused person against such confession.  

The Supreme Court widely elaborated this right in its various judgments. The compulsion is held by the apex court to have taken place if the accused "is beaten, or starved or tortured in any way" during the course of investigation by the police. But this right of the accused was fully dealt with by the Supreme Court in Nandini Sathapathy. The court speaking through Krishna Iyer J. laid down a few propositions intended to act as concrete guidelines to provide protection to an accused person in police custody. It upheld the right against self-incrimination and right to silence of the accused. It held that if there is any mode of pressure, subtle or crude, mental or physical, direct or indirect, but sufficiently substantial, applied by the police in obtaining Information from the accused, it becomes compelled testimony violative of the right against self-incrimination.

The court also held that compulsion may be presumed in the case of custodial interrogation by the police “unless certain safeguards erasing duress are adhered to. It further observed that the police ought to permit a lawyer to assist the accused if he can afford one. However, it did not opine that the state is under an obligation to provide a lawyer to the accused if he is poor. It also acknowledged the right to silence against self-incrimination. The accused is not bound to answer self-incriminatory questions. But he does not have

14. Supra note 1 at 176.
right to complete silence. In other words non-incriminatory questions can be asked and the accused is “bound to answer where there is no clear tendency to criminate.”\(^{16}\)

Thus the right against self-incrimination is guaranteed under the international law as well as municipal law. But this right is widely violated by the police in most of the third world countries including India. Once captured, the police considers even an innocent person a criminal and every technique of torture is used to extract confession for the alleged crime, though the involuntary confession made before the police is inadmissible in the court of law.

2.1.3 Right against Ex-Post Facto Operation of Criminal Laws

An elemental feature of the concept of “Rule of Law” hinges on the basic understanding that a person should not be punished for any act, which was not prohibited by law at the time when the alleged acts was committed. The salient features of the right against ex-post facto operation of law are:

i) It prohibits retrospective imposition of criminality;

ii) It prohibits the extension by analogy of a criminal rules to cover a case not obviously falling within it; and

iii) It prohibits formulation of the penal laws is excessively vague and wide terms.

An ex-post facto law is a law which imposes penalties retrospectively, i.e., on acts already done, and increases the penalty for such acts. Clause (1) of Article 20 imposes a limitation in the law making power

of the legislature and prohibits the legislature to make retrospective
criminal laws. However, it does not prohibit imposition of civil liability
retrospectively, i.e., with effect from a past date. Article 20(1) runs
as under:

No person shall be convicted of any offence except for violation
of a law in force at the time of the commission of the act
charged as an offence, nor be subjected to a penalty greater
than that which might have been inflicted under the law in force
at the time of the commission of the offence.

2.1.4 Right of Equality and Equal Protection of Laws

The Article 14 of the Constitution of India prohibits the State from
denyng equality before the law or the equal protection of the law to
any person on the ground of caste, creed, faith, race, religion, birth
and place. The effective derivative source of the doctrine in the
criminal justice is Article 21 of the Constitution of India, which
provides that: No person shall be deprived of his life or personal
liberty except according to procedure established by law. In a criminal
trial, there are two parties: the state and the individual. However, both
the parties are unmatching in their strength and resourcefulness, in
which the individual, i.e. accused, is placed in a disadvantageous
position, The role of the doctrine of equality becomes more significant
in the context of the rights of a person who happens to be an
accused of having committed a crime. This doctrine aims to achieve
equality amongst unequal in prohibiting every kind of unjust,

undeserved and unjustified in equalities in the administration of justice. As the right of equality and equal protection of the laws are to be secured through instrumentalities of the state, the possible state action do not conflict with the fundamental right of equality guarantors against the state.\textsuperscript{20}

\subsection*{2.1.5 Right against Double Jeopardy}

In order to seek the protection of the right an accused has to establish the following facts:

i) A previous prosecution has taken place;

ii) Punishment has ensued or acquittal as well;

iii) The punishment or acquittal is for the same offence.

Clause (2) of Article 20 of the Constitution recognizes another important Human Right as a fundamental right of every citizen when it provides that: "No person shall be prosecuted and punished for the same offence more than once". This clause embodies the common law maxim rule of 'nemo debet lis vexaria' which means that 'no man should be put twice in peril for the same offence'. If he is prosecuted again for the same offence for which he has already been prosecuted he can take complete defence of his former conviction.\textsuperscript{21}

\subsection*{2.1.6 Right to Speedy Trial}

The right to have speedy trial is enshrined in Articles 14, 19(1)(a) and 21 of the Constitution and in the Criminal Procedure Code. It is rightly said that 'Justice delayed is justice denied'. Though there are no specific provisions either in the Constitution or in the Code of Criminal

\textsuperscript{20.} \textit{Ibid.} \\
\textsuperscript{21.} \textit{Supra} note 12 at 174.
Procedure for ensuring a speedy trial, the Supreme Court of India has held that this right is implicit under Article 21 of the Constitution. Firstly, in the famous case concerning the trial of juvenile delinquents, namely, *Sheela Barse v. Union of India*, the Supreme Court announced the time-schedule for the conclusion of a criminal trial of a juvenile accused. At that time, the Supreme Court showed his unwillingness to fix any time schedule for the conclusion of the trial of an adult accused. Later on, in a significant judgement delivered in *Abdul Rehman Antuley v. R.S. Nayak*, the detailed guidelines for speedy trial of an accused in a criminal case were laid down by the Supreme Court but the Supreme Court declined to fix any time limit for conclusion of a trial of offences. However, later on, the Supreme Court after four years, deviating from its old stand that ‘it was not practical to fix any time limit’, had laid down in the case of *Common Cause v. Union of India*.  

2.1.7 Right against arbitrary arrest

The Constitutional protection conferred by Article 22 is in fact a reiteration of the provision of Sections 56, 57 and 76 of the Code of Criminal Procedure. The intention of law is that such an arrested person must be produced before a Magistrate, competent to try or to commit the case without any delay. Protection of personal liberty of an individual is his basic Human Right and, thus, in order to protect this human right relating to dignity of a person while arrest, the Supreme Court has interpreted Article 21 of the Constitution in favour of the accused. In India, arrest can be made with a warrant or without

one. In the former case, there is already application of mind by a judicial authority, while in the latter case, such arrested person is required to be brought within 24 hours of arrest before the judicial authority.\(^\text{24}\) Clauses (1) and (2) of Article 22 guarantee the following rights to the persons who are arrested under an ordinary law:

(a) the right to be produced before a Magistrate;
(b) the right to be informed, as soon as may be, of ground of arrest;
(c) No detention beyond 24 hours except by order of the Magistrate.

**(a) Right to be produced before a Magistrate**

Salient feature of the right:

i) it prevents the illegal deprivation of the arrested person for the purpose of extracting confession or for compelling giving of information.

ii) Prohibits Police Stations from being used as prison.

iii) Affords an early recourse to a judicial officer on question of bail or discharge, as is practicable.

Clause (1) of Article 22 of the Constitution also provides that the arrested person must be produced before the Magistrate within 24 hours of his arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate. The time can be extended beyond 24 hours only under the judicial custody. It affords a possibility, if not an

opportunity, for immediate release in case the arrest is not justified.25

(b) The right to be informed of grounds of arrest

Salient feature of the right:

i) After every arrest (both under warrant and without warrant) the person arrested has right to be informed of the ground of arrest.

ii) In all cases of arrest in bailable offence, the accused has right to be informed of such a right to enable him to avail the same.

iii) Any arrest made without compliance of the provision of the Code as above will be illegal and the officer or the person making such an illegal arrest shall be liable for such actions as are likely in the case of an illegal arrest, including the right to appropriate remedies under the law for such transgression.

This right guarantee by the Constitution to an accused to know the grounds of his arrest enables him to prepare for his defence. The delay in informing the grounds of arrest must be justified by reasonable circumstances.26 The Supreme Court in the case of State of M.P. v. Shobharam27 has held that this 'right cannot be dispensed with by offering to make bail to the

arrested person'. Further, the Supreme Court by its two leading judgments given in the cases of Joginder Kumar v. State of U.P.\(^{28}\) and D.K. Basu v. State of West Bengal.\(^{29}\) have laid down certain guidelines which should be invariably followed by the police and other officers arresting a person during investigation.

(c) **No Detention beyond 24 hours except by order of the Magistrate**

It is also provided that if there is a necessity of detention beyond 24 hours, it is only possible under judicial custody.\(^{30}\) The expressions 'arrest' and 'detention' in Articles 22(1) and (2) were held not to apply to a person arrested under a warrant issued by the court on a criminal or quasi-criminal complaint or under security proceedings. Article 22 is not designed to give protection against the act of the executive or order of non-judicial authorities but applies to a person who has been accused of a crime or of offence of criminal or quasi-criminal nature or of some act prejudicial to the state or public interest. Exception to clause (3) of Article 22 provides two exceptions to the rule contained in clauses (1) and (2) and the rights mentioned above are not available to an enemy, alien and a person arrested and detained under a Preventive Detention Law.\(^{31}\)

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28. 1994(3) SC 423.
2.1.8 Right to Legal Aid

Two fundamental rights are conferred by the provisions contained in Article 22(1) of the Constitution of India they are:

i) Right to be informed of the ground of arrest.
ii) Right to consult and be defended by lawyer of his choice.

The former right precedes the right of a counsel and logically the sequence is appropriate. The contents of the right of an accused person is directly relevant to pre-trial penal process they can be seen as under:

i) Right to consult a lawyer
ii) Right of choice of the counsel
iii) Right to be defended
iv) Police interrogation and right to counsel

Article 22(1) of the Constitution of India states that “No person who is arrested shall be denied the right to consult and to be defended by a legal practitioner of his choice.” The international Covenant on Civil and Political Rights also provides the same right to the accused person under article 14(3)(b). This right begins as soon as he is taken into police custody in relation to criminal or quasi-criminal proceedings. Later the Supreme Court in one of its rulings extended the operation of this right, “to any accused person under circumstances of near custodial interrogation.” The court held that while undergoing interrogation in the police custody he has right to have his lawyer by his side. But in the Indian Constitution, there is no

specific provision which provides the right to free legal aid to the accused person. In Hussainara case, the Supreme Court specifically held that article 22(1) of the Constitution does provide the accused person the right to the services of a legal practitioner at the state cost. There is of course a directive principle of state policy contained in article 39-A which requires the state to provide free legal aid by suitable legislation or schemes so that opportunities for securing justice were not denied to a citizen on account of his economic or other disabilities. However, a directive principle of State policy is not enforceable in a court of law and therefore it does not confer a constitutional right to the accused person to secure free legal assistance at the cost of the state. The Supreme Court later filled up this constitutional gap through the creative judicial interpretation of Article 21 in number of cases, In its rulings in Hoskot, and Hussainara Khatoon case, the Apex Court held that a procedure which does not make legal services available to an accused person who is too poor to afford a lawyer and who would, therefore, have to go through the trial without legal assistance, cannot possibly be regarded as reasonable, fair and just procedure guaranteed under Article 21. The court thus spelt out the right to legal aid of the poor accused person from the language of Article 21. However, inspite of these constitutional provisions and the rulings of the Apex Court, the police usually refuses to allow a lawyer to meet and interview the accused person in custody unless the court intervenes on his behalf. The Supreme court in the case of Hussainara Khatoon v. Home Secretary, Bihar, AIR 1979 SC 1377. Hoskot v. State of Maharashtra, AIR 1978 SC 544. Hussainara Khatoon v. State of Bihar, 1981 SCC 91; 93; 98; 108; 115.

33. Hussainara Khatoon v. Home Secretary, Bihar, AIR 1979 SC 1377.
Secretary, Bihar\textsuperscript{36} has held that it is the Constitutional right of every accused person who is unable to engage a lawyer and secure legal services on account of reasons such as poverty, indigence or incommunicado situation, to have free legal services provided to him by the State; and the State is under a constitutional duty to provide a lawyer to such person in the case of a criminal trial. If an accused is not represented by any lawyer and he has not refused to avail the facility of free legal services provided by the State, the trial itself may be vitiated as contravening Article 21 – “Protection of life and personality liberty.”

2.1.9 Rights against handcuffing

Salient features of the right:

i) Handcuffing of prisoners (accused or under trial) is to be the exception and not the rule. Further, it cannot be mechanical routine for the escorting or prison authority. Any restriction imposed has to be based on reasonable and reliable material evidence and which on balance or consideration renders it as an unavoidable necessity.

ii) Further, the reasoning or logic so advanced has to be recorded in writing to enable scrutiny.

iii) Even inside the prisons chains, manacles and hoops etc. cannot be resorted mechanically.

\textsuperscript{36} 1980(1) SCC 98.
iv) Each and every case of handcuffing especially in relation to escorting to and from the judicial portals must be judicially approved or ratified.

v) For the purpose of escorting prisoners to and from the prison to the court, there can be no class differentiation made amongst the prisoners.

vi) Failure to comply with the prescription made by the Apex Court, which results in violation of human dignity, would expose the concerned police escorts to the legal consequence of compensation and punishment.

Accused persons in handcuffs are paraded on the road by the police while taking them to the court of jail. They are made to stand handcuffed in the court for hours waiting for their turn. This makes them feel humiliated and puts them in a lot of inconvenience. A person is to be considered innocent unless proved guilty beyond doubt by the court is an axiom of our legal system. But a person stands punished by this humiliation though he may be subsequently acquitted by the court.37

Many rights of an accused during custody police or judicial during trial have been recognized by the Supreme Court as implicit in Article 21 of the Constitution. An accused person is also a human being and, therefore, when he is in custody, during trial or awaiting for trial for any reason, his human dignity should be protected.38 In the case of

Sunil Batra v. Delhi Administration, 39 the learned Justice Krishna Iyer, delivering the majority judgement, has held that the integrity of physical person and his mental personality is an important right of a prisoner and must be protected from all kinds of atrocities. It was opined that under trials were presumably innocent until convicted and the practice of keeping under trials with convicts in jails offended the test of reasonableness in Article 19 and fairness in Article 21 of the Constitution. It was also held that the accused persons, in pre-trial or during trial detention, are entitled to fair and decent treatment by way of comforts, medical attention, etc., so that their humanity is not degraded and dignity is not offended. The Supreme Court had also granted to an accused an important right against handcuffing; the learned Justice Krishna Iyer opined in the case of Prem Shanker v. Delhi Administration, 40 that Handcuffing is prima facie inhuman and, therefore, unreasonable, is over harsh and at the first flush, arbitrary. Absent fair procedure and objective monitoring, to inflict 'irons' is to resort to zoological strategies repugnant to Article 21. Further, in the case of Kishore Singh v. State of Rajasthan, 41 the Supreme Court has held that the use of third degree method by police is violative of Article 21 and directed the Government to take necessary steps to educate the police so as to inculcate a respect for the human person. Similarly, torture and ill treatment of women suspects in police lock up have also been held to be violative of Article 21. The monetary compensation has also been awarded by the Supreme Court in appropriate cases where there have been violations of the

40. AIR 1980 SC 1535.
41. AIR 1981 SC 625.
constitutional rights of accused or convicts. By the landmark judgement delivered in Nilebati Behera v. State of Orissa, compensation of Rs. 1,50,000/- was awarded by the Supreme Court to the mother of the accused who died in the police custody due to beating. In D.K. Basu v. State of West Bengal, the Supreme Court while pronouncing a landmark judgement on 'rights of an arrestee', 'duties of police at the time of arrest', 'custodial deaths' and 'powers of Courts in the matter of torture to arrestee' had declared that the Court is empowered to award monetary compensation to an arrestee for the torture during the period of detention.

2.1.10 Right to Appeal

Articles 132 and 134 of the Constitution provide for an appeal to the Supreme Court on the certificate of fitness' granted by the High Courts and also for an appeal to the Supreme Court by special leave granted by it under Article 136 of the Constitution; but the appeal by special leave may be filed only when the certificate applied for filing an appeal has been refused by the High Court.

2.2 Protection under Code of Criminal Procedure, 1973

There are various human rights of an accused which are available to and can be availed of by them immediately from the time he become an accused i.e. the date when the former allegations is levied against him, and continue to be available to him throughout the period herein an accused i.e. the date on which the final acquittal or conviction of the accused is made. Out of these various rights some of the rights

42. (1993)2 SCC 746.
are granted by the Constitution and some are available under the Code of Criminal Procedure and some are available under both the Constitution and the Code of Criminal Procedure. Further out of these various rights, some rights are available to an accused which are later to his arrest and detention whereas some right available to him at every stage till his final acquittal or conviction.44

The main rights of an accused related to his arrest and detention during police custody are:

2.2.1 Right to know the ground of arrest
2.2.2 Right to be produced before the Magistrate within 24 hours
2.2.3 Right to consult a counsel of his own choice
2.2.4 Right of an accused to speedy trial
2.2.5 Right to know the power of arresting authority
2.2.6 Right against self-incrimination
2.2.7 Right to bail
2.2.8 Right of an accused against double jeopardy

2.2.1 Right to know the ground of arrest

The Criminal Procedure Code 1973, contains several provisions with regard to the arrest of persons in Chapter V of the Code. Out of these rights, the most important right which has been guaranteed as a 'fundamental right' of an accused by the Constitution of India as well as by Article 9(4) of the International Covenant on Civil and Political Rights, 1966, is the Right to Know the Grounds of Arrest.45 The criminal jurisprudence requires that in order to afford a person

44. Supra note 37 at 856.
45. Ajit Kumar v. State, 1976, Cr.L.J. 1303 (Gua)
accused of a crime an opportunity to advance his defence at the earliest opportunity, he should be informed of the grounds of his alleged implication in the crime. This concept is enshrined in Article 22(1) of the Constitution of India and now, this right has become a constitutionally guaranteed right and is inviolable by ordinary law of the land. 46 This right has always been regarded as vital and fundamental for safeguarding personal liberty in all legal systems where the Rule of Law prevail. Under the ancient Criminal Procedure which differed from modern Criminal Procedure, persons after their arrest were kept in confinement more or less secret till their trials and they could not prepare for their defence as they had no information of the grounds of arrest and moreover of evidence against them. During the confinement, they were subjected to cruel treatments and tortures in order to extort admissions and confessions of guilt justifying for their arrest. From time to time men have fought against arbitrary arrest and detention, i.e., measures of despotism. It was one of the grievances of the English Barons against King John in 1215 that prompted the inclusion of the following public opinion in the Magna Carta 47 that "no free man shall be taken or imprisoned, except by the legal judgement of his peers or by the law of the land". The bitter reaction against this arbitrary arrest and detention led to the French Revolution which resulted in the Declaration of the Rights of Men and Citizens of 1789 which incorporated that: No man should be accused, arrested or held in confinement, except in cases determined by the law, and according to the forms which it has prescribed. It is pertinent to note that this right could not be claimed by an accused

immediately after his arrest in the pre-constitution period. This right was protected and claimable by an accused under Section 173 of the Criminal Procedure Code, 1898, only when the police report was filed after the completion of investigation into the commission of an offence; of course, trial of the accused could not be held in the absence of the copy of the charge sheet before starting his trial in the court. However, after the incorporation of this right under clause (1) of Article 22 of the Constitution, a new section was included in the new Cr.P.C, 1973, which added a new vista in the promotion of human rights and personal liberty of an accused. As per Section 50(1) of the Cr.P.C, 1973: Every Police Officer or other person arresting any person without warrant (other than in preventive detention measures) shall forthwith communicate to him full particulars of the offence for which he is arrested or other grounds for such arrest.48 Section 50 (2) of the Cr.P.C., 1973, provides that 'if the arrest is made without a warrant in a bailable case, the accused should be informed of his right to be released on bail after furnishing sureties.' With the recognition of this new right in the Cr.P.C., 1973, the protection and preservation of civil liberty of the Indian citizens has been well recognized by the law relating to Criminal Procedure. However, this new provision of the Cr.P.C., 1973, only covers the cases of arrest of an accused without warrant. This does not confer a right to be informed of the grounds of arrest to an accused arrested with warrant. No such distinction, i.e., arrest with warrant and arrest without warrant, has been made in the Constitutional provision contained in Article 22(1) of the Constitution. While the arrested

person is entitled to be furnished with the grounds of his arrest as per Article 22(1), he cannot expect a minimum time limit guaranteed to him. The expression, "as soon as may be" used in Article 22(1) means "as nearby as is reasonable in the circumstances of a particular case."49

As per section 50-A every police officer or other person making an arrest shall give the information regarding such arrest and place where the arrested person is being held to any of his friends, relatives or such other persons as may be disclosed or nominated by the arrested person for the purpose of giving such informations. An entry of the fact as to who has been informed of the arrest of such person shall be made in a book to be kept in the police station. It shall be the duty of the Magistrate before whom such arrested person is produced to satisfy himself about the requirement of sub section (2) and sub section (3) of section 50-A.50

Guidelines issued by the Supreme Court to be followed in all cases of arrest or detention.

For the effective enforcement of various fundamental rights granted to an accused, the following requirements were prescribed by the Supreme Court in Joginder Kumar v. State of U.P.51 and D.K. Basu v. State of West Bengal:52

(i) An arrested person being held in custody is entitled, if he so requests to have one friend, relative or other person who is

49. In re Govinda Pd 79 CWN 474.
50. Inserted by Act 25 of 2005, clause 7 w.e.f. 23.6.2006
51. AIR 1994 SC 1172.
known to him or likely to take an interest in his welfare told as far as practicable that he has been arrested and where is being detained;

(ii) The police officer shall inform the arrested person when he is brought to the police station of this right; and

(iii) An entry shall be required to be made in the diary as to who was informed of the arrest. These protections must be held to flow from Articles 21 and 22(1) and be enforced strictly.

The Court further observed that it shall be the duty of the Magistrate before whom the arrested person is produced, to satisfy himself that these requirements have been complied with. Further, the above requirements were in addition the rights of the arrested persons found in the various Police Manuals. Departmental instructions should be issued that the attesting police officers record the reasons for making the arrest in the case diary.53 In The case of D.K. Basu v. State of West Bengal,54 the learned justice Dr. Anand, while deliberating the various rights of as person who is arrested called such person as "arrestee" instead of "accused" and laid down various requirements stated as under to be followed in all cases of arrest or detention as preventive measures till legal provisions are made which are stated as under:

(a) The police personnel carrying out the arrest and handling the interrogation of the arrestee should bear accurate, visible and dear identification and name tags with their designations. The

54. AIR 1997 SC 646.
particulars of all such police personnel who handle interrogation of the arrested must be recorded in a register.

(b) 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 family of the arrestee or a respectable person of the locality from where the arrest is made. It shall also be countersigned by the arrestee and shall contain the time and date of arrest.

(c) A person who has been arrested or detained and is being held in custody in a police station or interrogation centre or other lock up shall be entitled to have one friend or relative or other person known to him or having interest in his welfare being informed, as soon as practicable, that he has been arrested and is being detained at the particular place, unless the arresting witness of the memo of arrest is himself such a friend or a relative of the arrestee.

(d) The time, place of arrest and venue of custody of an arrestee must be notified by the police where the next friend or relative of the arrestee 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.

(e) The person arrested must be made aware of this right to have someone informed of his arrest or detention as soon as he is put under arrest or is detained.
(f) An entry must be made in the diary at the place of detention regarding arrest of the person who has been informed of the arrest and the names and particulars of the police officials in whose custody the arrestee is.

(g) The arrestee should, where he so requests, be also examined at the time of his arrest and major and minor injuries, if any, present on his / her body, must be recorded at that time. The "inspection memo" must be signed both by the arrestee and the police officer effecting the arrest and its copy provided to the arrestee.

(h) The arrestee should be subjected to medical examination by a trained doctor every 48 hours during his detention in custody by a doctor on the panel of approved doctors appointed by Director, Health Services of the concerned State or Union Territory. Director, Health Services should prepare such a panel for all Tehsils and Districts as well.

(i) Copies of all the documents including the memo of arrest, referred to above, should be sent to the Ilaqa Magistrate for his record.

(j) The arrestee may be permitted to meet his lawyer during interrogation, though not throughout the interrogation.

(k) A police control room should be provided at all district and state headquarters, where information regarding the arrest, and the place of custody of the arrestee shall be communicated by the officer causing the arrest within 12 hours of effecting the arrest.
The power of arrest is one of the most potent and misused sections of Section 41 of the Criminal Procedure Code. It provides police with wide-ranging powers of arrest without order from the magistrates or without any warrant of arrest. The Union Cabinet has now approved the amendment of the Cr.P.C. to make it mandatory for the police to record reasons of arrest of suspects involved in crimes punishable with seven years of or less imprisonment.

Lawyers had earlier protested to the amendment of Section 41 on the ground that this would remove fear from the minds of the criminals who will misuse the amended provisions. Of every four persons arrested, three were let off as not guilty. Thus, many poor people are needlessly arrested and our system has no way of compensating them for the damages they suffer.

The new amendment now specifies that police officers may instead of arresting the person issue a notice of appearance asking him to cooperate with the police officers in the probe. Further, every police officer while making an arrest shall bear "accurate, visible and clear identification mark". At the time of arrest, a memorandum will be drawn up attested by at least one witness who is a member of the family of the person arrested or respectable member of the locality where the arrest is being made.55

Three major amendments are proposed as enumerated in The Code of Criminal Procedure Amendment Bill, 2010. Briefly, the amendments are:

i) To make the police officer duty bound to not only record his reasons for making an arrest, but also for not making an arrest under Section 41.

ii) To substitute the word “may” in Section 41A by the word “shall”;

iii) To add a proviso in Section 41A, whereby Police could arrest a person if he fails to comply with the terms of notice or is unwilling to identify himself during issuance of a notice of appearance by the Police.

**Impact of Amendments, if enacted**

(i) This amendment sounds a death knell on the arbitrariness of police to make arrests. The very fact that reasons shall have to be recorded in writing fixes responsibility and makes the Police Officer accountable for justifying the arrest. Recording an arbitrary reason would be difficult, since it would need to be substantiated and will also be open to judicial scrutiny. As a matter of fact, to have power to make an arrest is one thing, but to justify that arrest is something completely different. And it is precisely this gap which the amendment seeks to bridge.

(ii) The amendment lays considerable stress on the importance of investigation before an arrest is made or not made. Which further means that the officer must be convinced about the bonafides of the case. A mere complaint would not be enough to exercise the power of arrest.

(iii) Insertion of Section 41A, pertaining to issue of Notice of Appearance, is in line with the Right to Life and Liberty of Indian citizens. It would also help bring down the number of arrests, which in turn would decongest the crowded Indian jails. Simultaneously, the innocents too can feel secure in case they stand a chance of exposure to implication in false cases.

(iv) System of administration of law and justice would become more transparent. The amended Cr.P.C. Act together with the Right to Information Act (RTI) would be able to inject necessary checks and balances in the Process of Administration of Law in India. But then, a lot depends on how awakened the citizens are to their Right to Information.57

2.2.2 Right to be produced before the Magistrate within 24 hours

Section 56 of the Code of Criminal Procedure, 1973, requires that "a police officer making an arrest without warrant shall, without unnecessary delay and subject to the provisions herein contained as to bail, take or send the person arrested before a Magistrate having jurisdiction in the case or before the officer-in-charge of a police

Further, Section 57 of the Cr.P.C., 1973, prohibits a police officer from detaining the arrested person for more than 24 hours, exclusive of the time necessary for the journey from the place of arrest to the magistrate's court. Sections 56 and 57 of the Cr.P.C., 1973, come into play only when a person is arrested without a warrant.\textsuperscript{58} In case a person is arrested under a warrant of arrest, the provisions of Section 76 of the Cr.P.C., 1973, are applicable which require the police officer or other person executing warrant of arrest 'to bring the person arrested, without unnecessary delay, before the court before which he is required by law to produce such person.' It is to be noted that although no time is given in these sections, only the expression 'without unnecessary delay' has been used but it has been provided that such delay shall not, in any case, exceed twenty-four hours from the time of arrest exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court. As had been earlier stated, the right of an accused granted under Sections 56 or 57 or 76 regarding the production before a Magistrate within a stipulated time has also been constitutionally recognized and guaranteed by Article 22(2) which are inviolable by ordinary legislative enactments.\textsuperscript{59}

There are some special circumstances in existing statutory law where there is a statutory duty of the police officer to notify the arrest. Section 58 of the Cr.P.C., 1973, provides thus Officers in charge of police station shall report to the District Magistrate or, if he so directs, to the Sub-Divisional Magistrate, the cases of all persons arrested

\begin{footnotes}
\item[59] Nagendra, 51 C. 402 Engadu, 11 M. 98, 102.
\end{footnotes}
without warrant, within the limit of their respective stations whether such persons have been admitted to bail or otherwise.\textsuperscript{60} Section 13 of the Juvenile Justice (Care and Protection of Children) Act, 2000, provided that 'the parent or guardian of the child, if he can be found, shall be informed of the arrest and be directed to be present at the children's court before which the child will appear'.\textsuperscript{61}

2.2.3 Right to consult a counsel of his own choice

This right is protected under Section 303 of the Cr.P.C., 1973 and extends and attaches to the accused not only since his arrest and detention under any punitive law but also extends to attach to any accused person under circumstances of near custodial interrogation if desired for one to be presented by his side at the time of his examination. This right must not be abused and should be granted subject to reasonable restrictions as to time and convenience of the police authorities no less than that of the party seeking interview.\textsuperscript{62} In this connection, Bombay High court has observed thus:\textsuperscript{63}

\begin{quote}
If the ends of justice is justice and the spirit of justice is fairness, then each side should have equal opportunity to prepare its own case, and to lay its evidence fully, freely and fairly before the Court. This necessarily involves preparation. Such preparation is far more effective from the point of view of justice, if it is made with the aid of skilled legal advice so valuable that in the gravest of Criminal trials when life
\end{quote}

\begin{flushright}
\textsuperscript{60} Sharifbai v. Abdul Razak, AIR 1961, BOM. 42.
\textsuperscript{62} Nandni Sathapathy v. P.L. Dani, 1978 Cr.LJ 968 SC.
\textsuperscript{63} Motibai v. State, 1954 Cr.LJ (Raj) 1951, 241.
\end{flushright}
undertakes the prosecution of the prisoner also provides him, if poor, with such legal assistance.

Section 126 of the Indian Evidence Act, 1872, also provides for all communications to be privileged made between client and his counsel and therefore, all communications between an accused and his legal advisors will be privileged and confidential. Section 304 of Criminal Procedure Code, 1973, provides that in a trial if the accused is not represented by a pleader due to insufficient means the Court shall assign a pleader for his defence at the State expenses'. The combined and effective forces of Section 304 Cr.P.C., Article 21 and that of Article 39-A are quite consistent with that of Article 22(1). The 'Court shall assign a pleader for his defence at the expenses of State' and 'an arrestee has a right to consult and be defended by a legal practitioner of his choice' have different meaning. While both the provisions of Cr.P.C. and the Constitution are for ensuring and securing justice to an accused, it was held earlier by the Supreme Court that 'the right to be defended by a legal practitioner of his choice' could only mean right of the accused to have the opportunity to engage a lawyer and does not guarantee an absolute right to be supplied with lawyer by the State. Access of justice is an integral part of social justice enshrined in the Preamble of the Constitution. On this basis the Supreme Court, later on, held in the case of Hussainara Khatoon v. Home Secretary, State of Bihar, that 'in view of our Indian society of which poor and weaker section constitute larger part

66. 1980(1) SCC 98.
of it, free legal service is inalienably element of reasonable, fair and just procedure for without it person suffering from economic or other disabilities would be denied of justice.' Legal Aid is 'really nothing else but equal justice in action and in fact is delivery system of social justice intended to reach justice to common man. This is a Constitutional right of every accused person who is unable to engage a lawyer, "The state is under a mandate to provide a 'lawyer to an accused person if the circumstances of the case and the needs of justice so required, provided of course the accused person does not object to the provision of such a lawyer. The State's obligation starts when the accused was produced first time before the Court of Magistrate. That is the stage at which an accused needs competent legal services. The Magistrate or Session Judge, before whom the accused appears, is under an obligation to inform the accused that 'if he is unable to engage the services of a lawyer on account of poverty or indigency, he is entitled to obtain free legal aid at the cost of State. Legal assistance to a poor or indigent accused who is arrested and put in jeopardy of his life or personal liberty is a Constitutional imperative / mandate not only by Article 39-A but also by Articles 14 and 21 of the Constitution.67 In Sheela Barse v. State of Maharashtra,68 the apex court held that 'it is a sine qua non of justice and where it is not provided, injustice is likely to result.' In this case the Supreme Court directed the State Government regarding protection of women prisoner and the legal assistance. In M.M. Hoskot v. State of Maharashtra,69 the Supreme Court held that

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67. Hussainara Khatoon (V) v. Home Secretary, 1990(1) SCC 108.
68. AIR 1983 SC 378.
69. AIR 1978 SC 544.
'persons who are in prison shall be given legal aid at the expense of the State by the Court assigning counsel.' An accused who is lodged in a jail does not know to whom he can turn for a help in order to indicate his innocence or defend his Constitutional or legal right or to protect himself against torture and ill-treatment or oppression and harassment at the hand of his custodians. It is, therefore, absolutely essential that legal assistance must be made available to prisoners in jail whether they may be under trial or convicted prisoner. Hence, in the case of Hussainara Khatoon (II) v. Home Secretary, State of Bihar, the Supreme Court held that the 'right to free legal services is an essential ingredient of reasonable, fair and just procedure for a person accused of an offence and it must be held implicit in the guarantee of Article 21. Thus the choice of consultation and representation by a pleader is a personal lookout of the accused; neither the State can deny it to him nor the State can offer it to him by assigning a lawyer generally in all cases. Of course, the assignment of a pleader to an indigent accused has now been a statutorily recognized right. Section 304 of the Criminal Procedure Code, 1973 fortified by compulsive directive of Article 39-A of the Constitution is a good vista regarding indigent accused and it should be given full effect.

2.2.4 Right of an Accused to Speedy Trial

Inordinate delay in the investigation effects the rights of accused as he is kept in tenterhooks and suspense about the outcome of case. If the investigating authority pursue the investigation as per the

70. SCC (1980) 99.
provision of the code, there can be no cause of action. But, if the case is kept alive without any progress in the investigation, when the prevision of Article 21 are attracted and the right is not only against actual proceedings in court but also against police investigation.\textsuperscript{71}

The main statutory provision which exemplifies the rule of speedy trial is Section 309 of the Code of Criminal Procedure, 1973 which provides that in every inquiry or trial, the proceedings shall be held as expeditiously as possible and, in particular, when the examination of witness has once begun, the same shall be continued from day to day until all the witnesses in attendance have been examined, unless the Court finds the adjournment of the same beyond the following day to be necessary for reasons to be recorded.' Clause (2) of Section 309 of the Cr.P.C., 1973, provides that 'if the court after taking cognizance of an offence, or commencement of trial, finds it necessary or advisable to postpone the commencements of, or adjourn, any 'Inquiry' or 'Trial', it may, from time to time, for reasons to be recorded: postpone or adjourn the same to such terms as it thinks fit, for such time as it considers reasonable, and may by a warrant remand the accused if in custody. Magistrate has been empowered to grant remand to an accused, the following restrictions are imposed upon this power of Magistrate:\textsuperscript{72}

(i) No Magistrate shall remand an accused person to custody under Section 309 (1) for a term exceeding fifteen days at a time;

(ii) When witnesses are in attendance, no adjournment or postponement shall be granted without examining them, except for special reasons to be recorded in writing; and

(iii) No adjournment shall be granted for the purpose only of enabling the accused person to show cause against the sentence proposed to be imposed on him.

An individual’s personal liberty is affected by an arrest. For this reason, Sections 56 and 57 of the Cr.P.C. 1973, analogous to Article 22(1) and (2) of the Constitution provide for the production of such person before a Magistrate as soon as possible to determine whether the arrest depriving the personal liberty to the arrested persons is justified or not whereas reference of Section 167 under Section 57, emphasizes the importance of expeditious disposal of case during investigation and trails. The entire objects of Section 56, 57 and 167 of the Cr.P.C. 1973, which are mandatory, and of Article 22(1) and (2) of the Constitution are fully supported by Article 21 because quick justice is sine qua non of Article 21 of the Constitution.73

In order to prevent trials in rape cases including child rape case, from being unduly delayed clause 21 amends Section 309 providing that the inquiry of trial in such cases shall, as far as possible, be completed within a period of two months from the date of commencement of examination of witnesses. This clause inserts in another provisions of sub Section clause 274 specifying the

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74. Inserted by the Code of Criminal Procedure (Amendment) Act, 2008 (5 of 2009), S. 21(a) (w.e.f. 31.12.2009).
circumstances where the adjournment shall not be granted by the court.

2.2.5 Right to know the power of arresting authority

The Criminal Procedure Code, 1973, gives an right to an accused to know the power of the arresting person to arrest the accused.\textsuperscript{75} This provisions is applicable when arrest is made by an officer-in-charge of a police station making an investigation or any officer subordinate to him, a duty is imposed upon the superior officer to deliver an order in writing to the officer required to make the arrest specifying: (a) the person to be arrested, and (b) the offence or other cause for which the arrest is to be made. Further, the officer so directed to make the arrest is also under a statutory duty: (a) to notify to the person to be so arrested the substance of the order, and (b) if so required by such person, to show him the order. This section is, however, related to the arrest made without warrant.

In case an arrest is to be made under a warrant of arrest, the provision contained in Cr.P.C., 1973,\textsuperscript{76} imposes a duty upon the police officer or other person executing a warrant of arrest to notify the substance thereof to the person to be arrested and also to show such person the warrant so that he may read it and know the grounds of

\textsuperscript{75} S. 55 of Code of Criminal Procedure, 1973, when any officer in charge of a police station or any police officer making an investigation under Chapter XII requires any officer subordinate to him to arrest without a warrant (otherwise than in his presence) any person who may lawfully be arrested without a warrant, he shall deliver to the officer required to make the arrest an order in writing, specifying the person to be arrested and the offence or other cause for which the arrest is to be made and the officer so required shall, before making the arrest, notify to the person to be arrested the substance of the order and, if so required by such persons, shall show him the order.

\textsuperscript{76} S. 75 of Cr.P.C., 1973 provides the police officer or other person executing a warrant of arrest shall notify the substance thereof to the person to be arrested, and, if so required shall show him the warrant.
arrest and power of the police officer or other person arresting him. It is to be noted that the provisions of Section 55 of Cr.P.C., 1973, empowering a person to be arrested to know the power of the arrester is not applicable in the case in which arrest can be made by any police officer without an order from a Magistrate and without a warrant as has been specified in Section 41 of the Cr.P.C., 1973. An additional right to an accused has been provided with regard to arrest by this section.77 The requirement of production of an accused within 24 hours is an healthy provision which enables the Magistrate to keep check over the police investigation and its scrupulous observance by the police is vital for the protection of human dignity and human rights of the pre-trial detainees. For this obvious reason, the Supreme Court has also strongly urged upon the States and its police authorities to ensure the enforcement of this requirement. The Bombay High Court has held that if a police officer fails to observe the requirement of producing the accused within 24 hours before the Magistrate, would be guilty of ‘wrongful detention’.78

2.2.6 Right against self incrimination
Salient features of the right:

i) The right pertains to a person “accused of an offence”.

ii) Though formal accusation may not have been made, the immunity would become effective from the time a person is named in the first information report or a complaint which in the normal course would result in a prosecution.

77. In re Appaswami Mudaly, AIR 1924 Madras 555.
iii) It is confined to criminal proceedings or proceedings of that nature before a court of law.

iv) The protection is patently against "compulsion to be a witness" and such protection is against such compulsion resulting in the accused being made a "witness against himself".

v) The protection is available to a person accused of an offence not merely with respect to the evidence to be given in the courtroom in the course of the trial but at the previous stages is an accusation has been made against him which might in the normal course result in his prosecution.

Section 313 of the Cr.P.C., 1973 which provides thus:

1. In every enquiry or trial, for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him the court:

   (a) may at any stage, without any previously warning to the accused put such questions to him as the court considers necessary;

   (b) shall after the witness for the prosecution have been examined and before he is called on for his defence, question him generally on the case; provided that in any summons case, where the court has dispensed with the personal attendance of the accused it may also dispense with his examination under clause.
2. No oath shall be administered to the accused when he is examined under sub-section.

3. The accused shall not render himself liable to punishment by refusing to answer such question, or by giving false answer to them.\footnote{79}{Kathi Kalu Oghad v. State of Bombay, AIR 1961 SCR 1808.}

Further, Section 315(1) of the Cr.P.C, 1973 reproducing the provisions of Section 342-A of Cr.P.C, 1898, provides that any person accused of an offence before a criminal court shall be a witness for the defence and may give evidence on oath in disproof of the charges made against him or any person charged together with him at the same trial provided that he shall not be called as a witness except on his own request in witness.\footnote{80}{Maqbool v. State of Bombay, (1953) SCR 1077.}

Similarly, an accused person cannot be convicted on the basis of a coerced confession of an accused. Section 164(2) of the Cr.P.C, 1973, narrates this right of the accused in the following words "The Magistrate shall before recording any such confession, explain to the person making it that he is not bound to make a confession and that if he does so, it may be used as evidence against him; and the Magistrate shall not record any such confession unless, upon questioning the person making it he has reason to believe that it is being made voluntarily.

Additional protection have been provided by the Indian Evidence Act, 1972 according to this, any confession made by accused is relevant if
it has been caused by inducement threat or promise. Further the act provides that confession made by an accused person to the police officer cannot be proved. \[81\] Similarly confession by accused while in custody cannot be proved. \[82\] The principle upon which the reflection of confession made by an accused to police officer or while in custody of such officer is foundered that a confession thus made or obtain is untrustworthy. The broad ground for not admitting confession made to police officer is to avoid he danger of admitting false confession.

2.2.7 Right to bail

Salient features of the right:

i) Bail is a matter of right, if the offence is bailable, whereas in non-bailable offences it is a matter discretion.

ii) A Magistrate will not grant bail if the offence is punishable with death or life imprisonment. But, if the accused happens to be woman, minor below the age of 16 years or a sick or infirm person, the court has discretion to grant bail.

iii) The court of Sessions and High courts have a wider discretion in granting bail even in respect of offences punishable with death or imprisonment for life.

In case an accused is arrested by a police officer without warrant, it is his right that he should be informed that he is entitled to be released

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on bail and that he may arrange for sureties on his behalf. Section 436 of the Cr.P.C. 1973, enacts that a person arrested without a warrant on the allegation of having committed a bailable offence, as a matter of right, shall be released on a bail bond with or without surety either while in the custody of the officer immediately after his arrest or when such person appears or is brought before the Court at any stage of the Criminal proceedings. There had been instances, where undertrial prisoners were detained in jail for periods beyond the maximum period of imprisonment provided for the alleged offences. A new section 436-A is being inserted in the code to provide that where an undertrial prisoner other than the one accused of an offence for which death has been prescribed as one of the punishments, has been under detention for a period extending to one half of the maximum period of imprisonment provided for the alleged offence, he should be released on his personal bond, with or without sureties.

Section 437 of the Cr.P.C. 1973, provides that to enlarge an arrestee who committed a non-bailable offence is a matter of judicial discretion; such person may or may not be released on bail. But if there are reasonable grounds to believe what such arrestee is guilty of an offence punishable with death or imprisonment for life, the arrestee shall not be released on bail unless the arrestee is below 16 years of age, or is a women or is sick or infirm. The Supreme Court in the case of Chandra Swami v. Central Bureau of Investigation,\(^83\) has held that when a case does not cover the clause (i) or (ii) of Section 437, ordinarily a person who is suspected to having committed offence would be entitled to bail under Section 437(1).

\(^{83}\) AIR 1997 SC 2575.
provision of the Section 437(1) speaks of release on bail of person below 16 years of age (Juvenile) and women, it cannot be said that a small boy or a pardanashin women should be refused to be released on bail and be allowed to languish "stress and distress" of jail for want of sureties. Clause 31 of Cr.P.C. Amendment Act, 2008 inserts a new section 437-A to provide for the court of require accused to execute bail bonds with sureties to appear before the higher court as and when such court issues notice of an appeal against the judgement of the respective court.84 Section 438 of the Cr.P.C., 1973, empowers a High Court or a Court of Sessions to grant a bail to a person apprehending arrest on an alleged accusation of non-bailable offence. These Courts, on the application of a person, may direct that in the event of such arrest, the applicant shall be released on bail subject to the conditions amongst others in the light of the facts of a particular case that:

(i) the person shall make himself available for interrogation by police officer as and when required;

(ii) The person shall not directly or indirectly on inducement, threat, or promise to any person acquainted with the facts of the case to dissuade him from disclosing such facts to the Court or to any police officer;

(iii) shall not leave India without the previous permission of the Court; and

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such other conditions as may be imposed under sub-section (3) of Section 437 of the Code as if the bail is granted under that section.

Supreme Court in *Bimal Krishna Kundu v. State of Andhra Pradesh*,\(^8\) has laid down the following guidelines with regard to the powers of Court to grant anticipatory bail:

(i) Section 438 applies to all non-bailable offences and not merely to offences punishable with death or imprisonment for life;

(ii) The applicability of the section is not confined to offences triable exclusively by the Court of Sessions;

(iii) There is no indication in section 438 for justifying a hiatus to be made among non-bailable offences vivisecting those punishable with death or imprisonment for life and those others punishable with less than life imprisonment. No doubt such a classification is indicated in Section 437 (1), but that section is concerned only with pre-arrest bail.

The following principles of law as laid down in Cr.P.C. 1973, with regard to provision of bail can be stated:

(i) Section 436(1) of the Cr.P.C., 1973, speaks of bail but the provision thereof makes contradiction between 'bail' and 'personal bond' without sureties in bailable offence. Here bail is suggestive of 'with or without sureties'; but bail bond under Section 436(2) of the Code covers own bond;

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85. AIR 1997 SC 3589.
(ii) Section 444(1) of Cr.P.C., 1973, provides for both the bond of the accused and the undertaking of the surety. Thus, to read bail as including only cases of release with sureties will stultify the importance of this sub-section;

(iii) Sub-section (2) or (3) of Section 441 of the Code dispel the doubts reflected in sub-section (1) and the word 'bail' has been used in a generic sense intending to cover bond "with or without sureties".

(iv) Section 389 of the Cr.P.C., 1973, provides for release of a convicted person by the appellate court on bail or on his own bond. Thus, an undertrial cannot be worse off than a convict.

(v) The Supreme Court's power to enlarge a prisoner is very wide and contains no limitations. Law which is meant for the service of life must interpretatively rise to the occasion for liberties.

According to Proviso (a) to Section 167 (2) of the Cr.P.C., 1973, an accused can claim release by furnishing bail before the completion of investigation and the filing of charge sheet. After the filing of the charge sheet the power of granting bail is, however, only under Section 437. An accused under the proviso to section 167(2) acquires statutory right to be released on bail on default of prosecution in not filing charge-sheet within the prescribed period of 90 days and this right is absolute, as it is a "legislative command" and not Courts' discretion.86

86. Davinder Kumar v. MP, Cr.LJ, 1992, 1730.
2.2.8 Right of an accused against double jeopardy

Section 300(1) of the Criminal Procedure Code, 1973, provides that a person who has been tried by a court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence nor on the same facts for any other offence of which a different charge from the one made against him might have been made under sub-section (1) of Section 221, or for which he might have been convicted under sub section (2) thereof.87

In sub-sections (2) to (6) of Section 300, certain exceptions to the rule contained in sub-section (1) of Section 300 have been provided. The whole basis of the application of Section 300(1) is that the first trial should have been before a court competent to hear and determine the case and to record a verdict of conviction or acquittal. Under this Section, second trial is barred when the accused is convicted or acquitted, that is, the cause must have been heard and determined. It is also to be remembered that where there are two alternative charges in the same trial, the fact the accused is acquitted of one of them will not prevent the conviction on the other.88

2.3 Protection of an accused under Indian Penal Code, 1860

Monitoring of torture and deaths in police custody is very essential. The government officials are not conscious of the fact that it is a grave crime and need attention. There are no datas, records, or statistics available on torture and death in police custody. If there is

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torture, it is crime under hurt and grievous strange that all cases of
torture and deaths in custody are a crime under Indian Penal Code
yet it is not mentioned anywhere in any of the national institute
dealing with crimes e.g. National Bureau of Crimes and Records.89

Section 330 and Section 331 of this code deals with causing hurt and
grievous hurt respectively for of extorting confession or to compel
restoration of property, principle object of these sections is to prevent
torture by police. A police officer is under a legal duty to prevent
implication of torture on those who are in his custody and his failure
to discharge that duty make him a party to the crime. The offence is
complete as soon as the hurt or confession or any other information
the punishment under Section 330 is with imprisonment of either
description for a term which may extend to seven years and shall be
liable for fine. The offence under Section 331 is punishable with
imprisonment of ten years and fine. Section 330 specifically states in
its illustration (a) and (b) that if a police officer torture anybody in
order to induce him to confess that he has committed an offence or to
induce him to point out where certain stolen property deposited, the
police officer is guilty of an offence under this section. The police
officer by inflicting torture on persons in their custody also commit
offences of voluntarily causing hurt by dangerous weapon i.e. means
under section 32; murder under section 302; force under Section 349;
criminal force under section 350; assault under Section 351; rape
under section 375. The police officers are liable under law for any act
or omission and commission. Apart from the provisions which

89. Balwinder Kumar, Torture and Death in Police Custody a Violation of Right to Life,
specially deal with torture, other provisions relating to murders, Homicides, hurt, rape etc. are equally applicable to policemen whose unlawful recourse to violence against a person in custody may result in any such contingency.90

The Supreme Court in Bhagwan Singh and another v. State of Punjab,91 pointed out that it may be legitimate of any police officer to interrogate or arrest any suspect on some credible material, but it is needless that such an arrest must be in accordance with law and the interrogation does not mean inflicting injuries. The police would be accomplishing behind their closed doors precisely what the demands of our legal order forbids.92

In Dagdu and others v. State of Maharashtra,93 the court pointed out that the police, with their wide powers are apt to overstep their zeal to detect crimes and are tempted to use the strong arm against those who happen to fall under their secluded jurisdiction. That tendency must in the larger interest of justice be nipped in the end.

In Bhagwan Singh case,94 the observation of the court are indeed poignant when it noted that the police who are the creature of the law cannot be allowed to violate the very law they are expected to uphold. The act of police officers in giving third degree treatment to an accused person while in their custody and thus killing him are not referable to and based on the delegation of the sovereign powers of the state to such police officers to enable them to claim any

92. Ibid.
93. 1977(SCC) 68.
sovereign immunity. In the Bombay High Court in the case of Mrs. Jeverina Reveno Carshino v. Union of India, very correctly refused to countenance the plea of sovereign function by the every police officers who caused a custodial homicide. In Emperor v. Miran Baksh, the police officer was held guilty of an offence under section 331 Indian Penal Code and sentenced to 10 years rigorous imprisonment including three months solitary confinement for torture in police custody leading to death of an accused. The Supreme Court of India in State of U.P. v. Rafuddin Khan, observed that death in police custody must be curbed with a heavy hand. Punishment in such cases should be such as would deter others from indulging in such behaviour.

Despite all these provisions, torture in police custody could not be mitigated. Therefore, Indian Penal Code has been amended in respect of custodial rape, a new provision was added in section 376 of Indian Penal Code to deal with case of rape committed by police officer, public servant, and member of jail or hospital staff on woman in custody. The police manuals and jail manuals of different States/UT also contain detailed instructions prohibiting the use of excessive force or abuse of power by custodial officers. The manuals also contain specific provision regarding the safety of personnel in custody. The code of conduct laid down for the police in this country also contain several relevant provisions in this regard.

95. 1990 Crimes.II (19).
96. (18) 1917 Cr.LJ 710.
97. AIR 1990 SC 709.
2.4 Protection under Indian Evidence Act, 1872

On the arrest of person by a police officer in connection with the commission of the offence, the accused is required to be produced before the Magistrate without delay, preferably within 24 hours, but experience has shown that the police seek the remand for retaining the custody of the accused for purpose of interrogation and investigation. The court readily grant the police remand in view of the provision of Section 27 of the Act. The police obtain custody of a longer period in police custody (pursuant to the remand granted by the Magistrate). The accused is severely interrogated to get some information leading to discovery of facts as contemplated by Section 27 and in that process police is tempted to resort to third degree methods and torture the accused. In Aghnoo Nagasia v. State of Bihar. The Supreme Court observed the law relating to confessional statement given by the accused during custody. Section 24 to 30 of the Indian Evidence Act and Section 162 and 164 of the Code of Criminal Procedure generally deals with this. Section 17 to 31 of Indian Evidence Act are to be found under the heading 'admissions' confession is a species of against the maker of it unless it's admissibility is excluded by some provision of law. Section 24 excludes no confession made to police officer shall be proved as against a person accused of an offence. The expression 'accused of an offence' covers a person accused of the offence at the trial, whether or not he was accused of an offence when he made the

confession. Section 26 prohibit the proof a confession made by him in the custody of a police officer, unless it is made in the immediate presence of the Magistrate. The partial ban imposed by Section 25 on a confession made to police officer. Section 27 is in the form of proviso, and partially lifts the ban imposed by sections 24, 25 and 26. It provides that when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of police a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved. Section 162, Code of Criminal procedure forbids the use of any statement made by any person to a police officer in the course of an investigation for any purpose at any inquiry or trial in respect the offence under investigation. Save as mentioned in the proviso and in case falling under Section (2), and it specially provides that nothing in it shall be deemed to affect the provision of Section 27 of the Evidence Act. The words of Sections 162 are wide enough to include confession made to police officer in the course of an investigation may be recorded by Magistrate under Section 164 of the Code of Criminal Procedure subject to safeguards imposed by the Section. This except as provided by Section 27 of Evidence Act, a confession made by an accused to police officer is absolutely protected under Section 25 of the Evidence Act, and if it is made in the course of and confession to any other person made by him while in the custody of police officer is protected by Section 26, unless it is made in the immediate presence of the Magistrate. These provisions Section to proceed upon the view that confession made by an accused to a police officer or made by him while he is in custody a police officer are not to be hurted and
should not be used in evidence against him. They based upon grounds of public policy and the fullest effect should be given to them.

2.4.1 Confession caused by any inducement, threat or promise:

A confessional statement by an accused during custody does not become inadmissible because it was made before 'a person in authority'. It is inadmissible only when it is brought about under any 'inducement, threat or promise' and the court is of the opinion that accused had reason to believe that he will get some advantage or avoid some evil by making such confession.101 The accused while retreating the confession and during his examination under Section 313 Cr.P.C., 1973, alleged threat he made the confession under pressure and from the police, it cannot be concluded that confession was not voluntarily made.102

The confession does not become vitiated, merely because the same was extracted by inducement, threat or promise. If a person is induced to speak the truth, that may persuade him to make a true confession. Similarly, if a person exert threats that if the statement turns out to be untrue, the maker thereof would be made liable for perjury. Such a threat is insufficient to exclude the statement from the range of admissibility, because there is nothing wrong in informing or reminding a person of his statutory obligation to speak the truth, and also of consequences of his not doing so. A promise that no

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prosecution would be launched against the maker of the confession for perjury is also insufficient to sideline the confession.\textsuperscript{103}

The question of voluntariness lies upon the prosecution to establish and upon the accused to negative, it being the duty of the prosecution to satisfy thereon before putting the statement in.\textsuperscript{104}

The burden of proving the voluntariness of the confession on the prosecution can only be discharged, if the court is satisfied beyond reasonable doubt that the confession was voluntary.\textsuperscript{105}

\textbf{2.4.2 Confession to police officer not to be proved}

The powers of the police are often abused for purposes of extortion and oppression,\textsuperscript{106} confession obtained by the police through undue influence have been subject of frequent judicial comment. The object of this provision is to prevent confession obtained from accused persons through any undue influence, being received as evidence against them.\textsuperscript{107} If a confession is made by the police officer, the law says that such confession shall be absolutely excluded from evidence, because the person to whom it was made is not to be relied or for proving such a confession, and he is moreover suspected of employing coercion to obtain the confession.\textsuperscript{108}

The reasons for the rule is stated in \textit{R. v. Babu Lal},\textsuperscript{109} where these legislative provision leaves no doubt in that the legislature had in view

\begin{footnotesize}
105. \textit{Ibid}.
107. \textit{State v. Rajan Raja}, 1991 SCC 139 (no confession to a police officer shall be proved as against the person accused of an offence).
109. (1884)6 All 509.
\end{footnotesize}
the malpractice of police officer in extorting confession from accused person in order to get credit by securing convictions, and threat those malpractices went to the length of positive torture. The legislature in laying down such stringent rules, regarded the evidence of police officer as untrustworthy, and the object of the rules was to put a stop to the extortion of confession by taking away from police officer the advantage of proving such extorted confession during the trial of accused person.

The rule enacted by this Section is without limitation or qualification and a confession made to a police officer is inadmissible in evidence, except so far as provided in Section 27. It is better in continuity a section, such as this, which was intended as a wholesome protection to the accused, to construe in its widest and mot popular signification. The enactment in this section is one to which the court should give the fullest effect.\(^{110}\) The prohibition contained in Section 25 is of female nature. It forbids the proof, at a trial of a criminal offence, of any admission of an offence made by the accused to police officer, and it makes no difference, whether the offence is one of which the accused could have been convicted at the trial, in which it was sought to prove the confession made to police officer. In other words, the term of this section do not limit its applicability to confession offence with which the accused was changed. Where an accused is charged with murder, a confession to the police officer of a lesser offence is also inadmissible. This section applies equally to confession with regard to offences not under investigation as with regard to offences not under investigation as with regard to offences under investigation.

\(^{110}\) R. v. Pancham, (1882)4 All 198.
Any incriminating statement of an accused, which may show the presence or complicity of the accused at the time of occurrence, will amount to confession and cannot be used the accused in view of provision of Section 25. A statement of the accused person recorded in a video cassette can't be accused as section 25 of the act.\textsuperscript{111}

A confession recorded under the Section 32 of POTA like a TADA Act when made before a police officer not below the rank of Superintendent of Police, even under police custody, is admissible, but not under other criminal trials. Keeping an accused under police.\textsuperscript{112} Custody in what manner with what precautions, is a matter for the police administration to decide.\textsuperscript{113}

\textbf{2.4.3 Inadmissibility of Custodial Confession}

According to Section 26 of Indian Evidence Act, “No confession made by any person while he is in the custody of police officer, unless it is made in the immediate presence of a Magistrate shall be proved against such person.

The objection of section 26 is to prevent the use of their power by police.\textsuperscript{114} The Section 25 excludes confession to a police officer under any circumstance. The present section excludes confession to anyone else, while the person making it is in a position to be influenced by police officer, i.e. when he is in the custody of a police officer, unless the free and voluntary nature of the confession is seemed by its being in the immediate presence of the Magistrate, in

\begin{itemize}
\item \textsuperscript{111} \textit{Sri Jaya Ram Singh v. Taka}, (1993) Crimes 622.
\item \textsuperscript{113} \textit{Gurdeep Singh alias Deep v. The State of Kerala (Delhi Administration)}, AIR 1999 SC 3646.
\item \textsuperscript{114} \textit{R. v. Manmohan}, (1875) 24 WR Cr. 33, 36.
\end{itemize}
which case, the confessing person has an opportunity of making a statement uncontrolled by any fear of police.\textsuperscript{115} A confessional statement must be proved to be voluntary by the evidence of the Magistrate, who recorded it, and the intrinsic evidence condiment in the document itself.\textsuperscript{116}

It is true that any confession made to a police officer is inadmissible under a section 25 of the act and that it is further restricted through section 26, to the confession made to any other person also, if the confessor was then in police custody. The word 'custody' used in section 26 is to be understood in a pragmatic sense. If any accused is within the Ken of Surveillance of the police, during which his movements are restricted, then it can be regarded as custodial surveillance for the purpose of the section. If he makes any confession during that period to any person be he not a police officer. Such confession would also be hedged within the branch counter outlined in section 26 of Indian Evidence Act, 1872.\textsuperscript{117}

If the confession be made to a third person, the presence of a Magistrate is necessary in order to render the confession admissible under this confession. But a confession made to Magistrate himself conforms to the requirement of the section and is admissible, even though the confessing party be at the time in the custody of the police.\textsuperscript{118}

\begin{flushright}
\textsuperscript{115} Ammini and other v. State of Kerala, 1998 SCC (Cri) 618. G.T. Nanawati and Jagandha Rao JJ.
\textsuperscript{116} Ibid.
\textsuperscript{118} R. v. Manmohan, (1875) 24 WR (Cri) 33.
\end{flushright}
The arrest by the police officer need not be legal, whether the arrest is legal or illegal, the mischief, which this section is intended to avert, remains all the same.\textsuperscript{119} The term of section do not limit its applicability only to confessions made by a person while in the actual custody of police.\textsuperscript{120}

The immediate presence of the custodian is not necessary that if the person in the Magistrate with the police custody to see that he does not escape, is not in the custody of the police, simply because they cannot be seen by the prisoner.\textsuperscript{121} When once an accused is arrested by a police officer and is to his custody, the mere fact that for some purpose or other, he happens to be temporarily absent and during his temporary absence, leaves the accused in the charge of a private individual, does not terminate his custody. The accused is deemed to be brought before Magistrate for the purpose of recording his confession and that a confession recorded by a Magistrate holding an highest under Section 176 Cr.P.C., 1973, and not empowered under Section 164 to record confessions, is admissible to evidence and can be used against the accused even though the provision of Section 164 Cr.P.C., 1973, have not complied with.\textsuperscript{122}

### 2.5 Burden of Proof

As the law stands today, if a complaint is made against torture, death or injury, in police custody, no evidence is available to substantiate the charge in court of law. The prosecution is unable to produce

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\textsuperscript{119}. Emperor v. Mst. Jagaya, AIR 1938 Pat 338.
\textsuperscript{120}. Ali Gobar v. Emperor, AIR 1938 Pat 308.
\textsuperscript{121}. Ram Bharose v. Emperor, AIR 1994 Nag 105.
\textsuperscript{122}. Re Ramaswamy Reddiar, AIR 1953 Mad 138.
evidence to prove the charge. It is difficult to secure the evidence against policemen responsible for resorting to third degree methods, since they are in charge of the police station, which they do not find difficult to manipulate consequently, prosecution against the delinquent officer generally result in acquittal.\(^\text{123}\) In this context, one has to examine the law relating to burden of proof, contained in Sections 101 to 104 of Evidence Act. The general principle deducible from these sections is that it is for the prosecution to prove the essential elements are proved, it is for the accused to prove that the case falls within the general or special exceptions to criminal liability recognized by criminal law. In certain special situations, this position does undergo a change. As the law stands at present, there is no special provision as to the burden of proof where the injuries were received by a person in police custody.\(^\text{124}\)

In Ramsagar Yadav case,\(^\text{125}\) Supreme Court suggested the amendment of the law relating to the burden of proof in the law of evidence. The court in this case had to deal with highly shocking incident of torture of a suspect in police custody, who died within 6 months of his arrest. The court laid stress on the extremely peculiar character of the situation, where the police officer alone can give evidence regarding the circumstances in which a person in police custody comes to receive injuries. The result is that a person on whom atrocities are perpetrated by the police in the sanctum sanctorum of police station in left without any evidence to prove who

\(^\text{123}\) Supra note 97 at 13.
\(^\text{124}\) Ibid.
the offenders are? This situation naturally results in paucity of evidence and probable escape of the guilty person.

The Supreme Court in Bhagwan Singh v. State of Punjab,126 pointed out that if a person is in police custody, then what has happened to him in peculiarly within the knowledge of the police official who have taken him into custody. When the other evidence is convicting enough to establish that the deceased died because of the injuries inflicted by the accused, the circumstances would only lead to an irresistible reference that the police personal who caused his death must also consul the disappearance of the body.

In Nilabati Behra v. State of Orissa,127 the Supreme Court observed where the admitted fact of the case indicate that the victim was taken into custody and latter on the next day he was found dead near the police post. Then burden was clearly on the state to explain how the victim sustained those injuries which causes his death. The court added that unless a plausible explanation is given by the respondent which is considered with their innocence, the obvious inference is that the total injuries were implicated on Suman Behra in police custody resulting in his death for which respondents are responsible and liable.

On the suggestion of the Supreme Court in Ramsagar Yadav's case,128 the law commission in its 113th report, recommended the

insertion of a new section as Section 114(B) in the Indian Evidence Act,¹²⁹ as under:

(i) 114(B)(1) in a prosecution of a police officer for an offence constituted, by an act alleged to have been caused bodily injury to a person, if there is evidence that the injury was caused during a period when that person was in the custody of the police, the court may presume that the injury was caused by the police officer having custody of that person during that period.

(ii) The court in deciding whether or not it should show a presumption under sub-section (1) shall have record to all the reliant circumstances including in particular (a) the period of custody (b) any statement made by the victim as to how the injuries were received, being a statement admissible in evidence.

(iii) The evidence of any medical practitioner who might have examined the victim, and (d) evidence of any Magistrate who might have recorded the victim's statement or attempted to record it.

The commission further recommended the court, while considering the question of presumption, should have regard to all reliant circumstances including the period of custody, statement made by the victim, medical evidence and the evidence which the Magistrate may have recorded.

¹²⁹. Supra note 99 at 14.
2.6 Protection under Police Act, 1861

The police Act, 1861 (Act 5 of 1861) is described an Act for the regulation of police, and is thus an act for the regulation of that group of officers who come within the word ‘police’ whatever meaning be given to that word. The preamble of the Act further says: “whereas it is expedient to reorganize police and to make it a more efficient instrument for the prevention and detention of crime, it is enacted as follows. This indicates that the police is the prevention and detection of crime, which can be said to be the main object and purpose of having police. Section 23 and 25 lays down the duties of the police officers and section 30 deals with the authority they can exercise. They can exercise such authority as is proved for a police officer under the Police Act and any act for regulating criminal procedure. The authority given to police officers must naturally be to enable them to discharge their duties efficiently. Of the various duties mentioned in section 23, the more important duties are to collect and communicate intelligence affecting the public peace, to prevent the commission of offences and public nuisance and to detail and being offenders to justice and to apprehend all persons, whom the police officer is legally authorized to apprehend. It is clear, therefore in view of the nature of the duties imposed on the police officers, the nature of the authority conferred and the purpose of the Police Act, that the powers which the police officers enjoy are power for the effective prevention and detention of crime, in order to maintain law and order.\textsuperscript{130}

\textsuperscript{130} Supra note 108 at 24-25.
Section 29 of the Police Act, 1861 stipulates that every police officer who inflict personal violence to any person in his custody shall be liable to punishment of fine in the form of salary of three months and imprisonment of three months or both. These statutory provisions in their entirety insulate the accused person against torture.131

The code of conduct for police in India, adopted at the conference of Inspector General of Police in 1960 also deals with this issue. Clause 1 states that police must bear faithful allegiance to the Constitution of India and respect and uphold the right of the citizens as guaranteed by it. Clause 2 states that the police is essentially a law enforcement agency and it should not usurp the function of judiciary and sit in judgement on cases. Clause 3 states that under no circumstances should it punish the guilty which is the function of judiciary.132

But in India, the police lacks the sense of accountability. There is growing tendency on the part of police to act unlawfully. The result is horrifying cases of brutal custodial torture.

2.7 Protection of Women Accused of Offence

The founding father of our Constitution have designedly couched article 14, 15 and 16 in comprehensive phraseology to that the trail and emaciated Section of people living in poverty, rearing in obscurity, possessing no wealth or influence, having no education, much less higher education and suffering from social repression and oppression should not be denied of equality before the law and equal

protection of the laws and equal opportunity in the matter of public employment or subjected to any prohibition of discrimination or ground of religion, race, caste, sex or place of birth.  

Article 14 of the Constitution of India proclaims equality of all persons and further by virtue of article 15, there can be no discrimination between persons on ground of sex. However, Article 15(3) provides the competence for the state he makes special provision in relation to women and children. Based on that well accepted logic, special provisions are made to guard the interest of women and children laws, both civil and criminal.  

Under Code of Criminal Procedure, 1973, there are specific sections for the protection of rights of female accused person. Section 51 of the Code of Criminal Procedure provides that whenever it is necessary to cause a female to be searched, the search shall be made by another with strict regard to decency.  

Section 100(3) of the Code of Criminal Procedure, 1973 in relation to searches under warrant, provides that:  

Where person in or about such place is reasonably suspected of concealing about his person any article for which search should be made, such person may be searched and if such person is woman, the search shall be made by another female with strict regard to decency.  

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134. Supra note 13 at 200.
136. Id at 71.
Under Section 160(1) it is provided that no male person under the age of 15 years or woman shall be required to attend at any place other than place in which such male person or woman resides. The express prohibition on seeking the woman to give information by coming to the police station or before the investigating officer is illegal and the Supreme Court has clearly deprecated such unjustified and illegal practices.\textsuperscript{137}

The Magistrate cannot also issue a process compelling anyone (i.e. such person i.e. a female) to give evidence in police investigation. In relation to the refusal of the accused to report before the investigating officer, the Supreme Court has this say:

\begin{quote}
To serve the end of justice, when woman is commanded into a police station, violating the commandment of section 160 of the code, this right thing is to quash the prosecution as it stands at present.\textsuperscript{138}
\end{quote}

In every exceptional circumstances police should ask for the custody of an arrested woman on remand. Before any such request is made a gazetted police officer must satisfy himself about the grounds and the arrangements made for the safety of the arrested woman.\textsuperscript{139} In Sheela Barse case,\textsuperscript{140} the Supreme Court issued certain directions against custodial offence. The directions are as follows:

(i) To keep police lock up in good locality where only female suspects should be kept and they should be guarded by female constables.

\textsuperscript{138} Supra note 13 at 201.  
\textsuperscript{139} Davinder Singh, Human Rights Woman and Law, 1st Ed. 174(2005).  
(ii) The female suspects should not be kept in a lock up in which male suspects were detained.

(iii) The interrogation of female suspect should be carried out only in the presence of female police officer and female constables.

(iv) The Magistrate before whom the arrested person was produced should enquire from that person whether he or she was tortured or maltreated in the police lock up. He should also inform the right to be medically examined.

Section 437(1),\textsuperscript{141} provides that when any person accused of or suspected the commission of any non-bailable offences is arrested or detained without warrant by an officer in charge of police station, appears or is brought before a court other than high court or court of session, he may be released on bail if such person is under the age of 16 years or is woman or is sick or infirm.

2.8 Protection of Juvenile Accused of Offence

Children below 18 years of age are dealt with the Juvenile Justice Act, 2000. Besides it, there is another act called Probation of Offenders Act, 1956 which impose restrictions on imprisonment of offenders under 21 years of age. The main aim of Juvenile Justice Act, 2000 is to prevent incarceration of the juveniles and young offenders.

The legislation deals with two types of Juveniles: Neglected Juvenile and Delinquent Juvenile. A Juvenile as defined under section 2 is a

person who has not attained the age of 16 years in the case of boy who has not attained the age of 18 in the case of girl. A delinquent juvenile is one who commits any offence under any criminal law of this country.\textsuperscript{142}

Preamble to the Act of 2000 states that the Constitution of India has in several provisions including clause (3) of Article 15, article 39(e) and (f), article 15 and 47, imposed on state a primary responsibility for ensuring that all needs of human. Children are next and that their basic human rights are fully protected. The U.N. has adopted the convention on the rights of the child which prescribes as set of standards to be adhered to by all states in securing the best interest of the child.\textsuperscript{143}

In Sheela Barse v. Union of India,\textsuperscript{144} Supreme Court observed that if a child is national asset, it is the duty of the state to look after the child with a view to ensuring full development of its personality. That is why all the statute dealing with children provide that a child shall not be kept in jail. There can be no doubt that incarceration in jail would have the effect of dwarfing the development of the child, exposing him to baneful influences, coarsening his conscience and alienating him from the society.

Article 39(e) and (f) of the Constitution also provide provision for children. Article 39(e) provides that the tender age of children is not abused due to economic necessity and they should not be forced to enter avocations unsuited to their age and strength. Article 39(f) of

\textsuperscript{142} Supra note 133 at 261.
\textsuperscript{143} Mamta Rao, Law relating to woman and children, 1\textsuperscript{st} Ed., 445(2005).
\textsuperscript{144} AIR 1986 SC 1773.
the Constitution obligates the state to give children the situations that facilitates development in a healthy manner and in conditions of freedom and dignity, protecting childhood against exploitation and against moral and material abandonment.\textsuperscript{145}

Where a complaint is filed or first information report is lodged against a child below the age of 16 years for an offence punishable with imprisonment of not more than seven years, the investigation shall be completed within a period of three months from the date of filing of the complaint or lodging of the FIR and if the investigation is not completed within this time, the case against the child must be treated as closed.\textsuperscript{146}

There are also specific provisions relating to children accused under Indian Penal Code. According to Section 82 nothing is an offence which is done by a child under seven years of age. Section 83 of that code provides that nothing is an offence which is done by a child above 7 years of age and under 12, who has not attained sufficient maturity of understanding to judge the nature and consequence of his conduct on that occasion.\textsuperscript{147}

The Probation of Offenders Act, 1956 is a social legislation which imposes restriction on imprisonment of offenders under 21 years of age and section 6 of that enactment provides that as a normal practice young person below that age are not consigned to prisons after due process of ascertaining the guilt; and unless it is satisfied that having regard to the nature of the offence and the character of

\textsuperscript{145} V.N. Shukla, \textit{Constitution of India}, 10\textsuperscript{th} Ed. 302(2001).
\textsuperscript{146} Sheela Barse v. Union of India, \textit{AIR} 1986 SC 173.
\textsuperscript{147} K.D. Gaur, \textit{The Indian Penal Code}, 3\textsuperscript{rd} Ed. 110-11(2004).
the offender, it would not be desirable to deal with the person under the beneficial provision of that law and record reasons therefore.148

Conclusion

Each one of the police action like arrest, search, interrogation and so on, have various procedural guidelines mandatory by law. This has to be inferred or appreciated from a perusal of the Constitution of India, Code of Criminal Procedure, 1973, and also other laws like Police Act or the Police Manual etc. It needs no special argument to assert that the significance of each of such standard is of fundamental import. Amongst the total range of rights of accused relatable to the police processes commonly referred to as pre-trial processes as well as those that come as part of the trial or post-trial processes, it is essential to understand, the total picture of criminal justice administration. For a procedure to valid and permissible, it has to be “fair, reasonable and just”. Naturally these yardsticks have been steadily intensifying the horizon of the obligations thrust on the state viz-a-viz the people in general. Such dynamic vibration provide the needed protection to those who come in adverse contact with the penal processes in particular. Several other rights, as can be are now being considered as inclusive under the umbrella of Article 21. It is of immense significance to the very concept of ‘rule of law’ that everything is done to ensure that the penal processes are reflective of the constitutional values an procedural mandates envisaged under the law of land.

148. Supra note 12 at 201.