CHAPTER - 3
CONSTITUTIONAL AND LEGISLATIVE PROVISIONS FOR
THE ACCUSED IN INDIA

3 INTRODUCTION

The three segments of Criminal Justice System viz., the police, the judiciary and the correctional institutions ought to function in harmonious and cohesive manner. But in practice, one often finds that it is not the case. The police, instead of protecting and promoting human rights, are often found to violate them. The National Human Rights Commission has been receiving reports of custodial deaths, non-registration of cases, arbitrary arrests, custodial violence etc. A person in custody of the police, an under-trial or a convicted individual does not lose his human and fundamental rights by virtue of incarceration. The two cardinal principles of criminal jurisprudence are that the prosecution must prove its charge against the accused beyond shadow of reasonable doubt and the onus to prove the guilt of the accused to the hilt is stationary on the prosecution and it never shifts.

The prosecution has to stand on its own legs so as to bring home the guilt of the accused conclusively and affirmatively and it cannot take advantage of any weakness in the defence version. The intention of the legislature in laying down these principles has been that hundreds of guilty persons may get scot free but even one innocent should not be punished. Indian Constitution itself provides some basic rights/safeguards to the accused persons which are to followed by the authorities during the process of criminal administration of justice. The Criminal Procedure Code deals with the procedural aspects of arrest of an accused person and provides various rights to accused/arrested
persons. There are some provisions which expressly and directly create important rights in favour of the accused/arrested person.

3.1 PROVISIONS OF INDIAN CONSTITUTION AND CRIMINAL PROCEDURE CODE

The Constitution of India itself provides some basic rights/safeguards to the accused persons which are too followed by the authorities during the process of criminal administration of justice. There are some provisions which expressly and directly create important rights in favour of the accused/arrested person:

1) Regarding protection in respect of conviction for offence, Article 20 of the Constitution, following are some important provisions creating right in favour of the accused/arrested person:

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

   b) *No person shall be prosecuted and punished for the same offence more than once.*

   c) *No person accused of any offence shall be compelled to be a witness against himself*.  

Thus, Article 20 of the Constitution of India provides three types of safeguards to the person accused of crimes namely:

   (i) *Protection against ex-post facto laws [Article 20(1)]*

   (ii) *Doctrine of guarantee against Double Jeopardy, [Article 20(2)] and*

   (iii) *Privilege against self-incrimination [Article 20(3)]*

   (iv) *Protection against arrest and detention in certain cases under Article 22.*

   (v) *Protection on Appeals to Supreme Court under Articles 134,136.*
(vi) *Protection available under some other Articles*

### 3.1.1 Protection Against Ex-Post Facto Laws: Article 20[1]:

Article 20 provides safeguards to persons accused of a crime. Article 20 is basically a facet of Article 21. Article 20[1] of the Constitution contains two parts: one, no person shall be convicted of any offence except for violation of the law in force at the time of the commission of the act charged as an offence; and two, no person shall be subject to penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.

It is a phrase taken from Latin words which means "from after the action" or "after the facts", is a law that retroactively changes the legal consequences or status of actions that were committed, or relationships that existed, before the enactment of the law. In criminal law, it may criminalize actions that were legal when committed; it may aggravate a crime by bringing it into a more severe category than it was in when it was committed; it may change the punishment prescribed for a crime, as by adding new penalties or extending sentences; or it may alter the rules of evidence in order to make conviction for a crime likelier than it would have been when the deed was committed.

Clause (1) of Article 20 of the Indian Constitution says that 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. Thus, if the act was not an offence, at the date it was committed, no future law can make the accused liable for that act.  

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Article 11, para 2 of the Universal Declaration of Human Rights, 1948 also provides freedom from ex-post facto laws.

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. The American Constitution also contains a similar provision prohibiting ex post facto laws both by the Central and the State Legislatures. If an act is not an offence at the date of its commission it cannot be an offence at the date subsequent to its commission. The protection afforded by clause (1) of Article 20 of the Indian Constitution is available only against conviction or sentence for a criminal offence under ex post facto law and not against the trial. The protection of clause (1) of Article 20 cannot be claimed in case of preventive detention, or demanding security from a person. The prohibition is just for conviction and sentence only and not for prosecution and trial under a retrospective law. So, a trial under a procedure different from what it was at the time of the commission of the offence or by a special court constituted after the commission of the offence cannot ipso facto be held unconstitutional. The second part of clause (1) protects a person from a penalty greater than that which he might have been subjected to at the time of the commission of the offence.

In *Kedar Nath v. State of West Bengal*, the accused committed an offence in 1947, which under the Act then in force was punishable by imprisonment or fine or both. The Act was amended in 1949 which enhanced the punishment for the same offence by an additional fine equivalent to the amount of money procured by the accused through the offence. The Supreme Court held that the enhanced punishment could not be applicable to the act committed by the accused in 1947 and hence, set aside the additional fine imposed by the amended Act.

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144 AIR 1954 SC 660.
In the criminal trial, the accused can take advantage of the beneficial provisions of the ex-post facto law. The rule of beneficial construction requires that ex post facto law should be applied to mitigate the rigorous (reducing the sentence) of the previous law on the same subject. Such a law is not affected by Article 20(1) of the Constitution. “Law in Force” must be understood in its natural sense. The law factually in force and not a law “deemed to be in force”.

In Budh Singh v. State of Haryana,\textsuperscript{145} the petitioner was convicted under section 15 of the NDPS Act, 1985 and the sentence to undergo imprisonment for a period of 10 years and also a fine of Rs. 1,00,000/- and in default to suffer further RI for a period of three years. After undergoing custody for a period of more than seven years, the petitioner contended taking into account the remission which had been due to him under different Government notification/orders issued from time to time, he would have entitled to be released from prison by virtue of section 32-A of NDPS Act for the violation of Fundamental Rights under Articles 14, 20(1) and 21 of the Constitution.

Article 20 (1) prohibits conviction and sentence for a criminal offence under an ex post facto law but the Constitution does not provide that such ex post facto law shall be void ab initio. But under the American Constitution, the ex post facto law shall be invalid. Thus, the scope of application is broader under the American Constitution. It is only the conviction and sentenced under the ex post facto law which is prohibited under Article 20 (1) and not the trial. Thus, when an ex post facto law prescribes the change in procedure, it will not be hit by Article 20 (1).

The Universal Declaration of Human Rights under Article 11, paragraph 2 provides that no person be held guilty of any criminal law that exists at the time of an offence or suffer any penalty heavier than

\textsuperscript{145} AIR 2013 SC 2386
what existed at the time of offence. It does however permit application of either domestic or international law.

This can further be explained with the help of an example. Suppose a person does an act in 2015 which is not unlawful at that point of time. But thereafter a law was passed in 2017 making that act a criminal offence and seeking to punish that person for what he did in 2015. Again suppose punishment prescribed for an offence in 1860 is six months of imprisonment, but the punishment of the same offence is increased in 2013 to imprisonment for one year, and is made applicable to the offences committed before 1860. These examples are both of ex post facto laws. Such laws are regarded as inequitable and abhorrent to the notions of justice and therefore, there are constitutional safeguards against them.

For better understanding of Article 20 (1), the researcher has divided it into two parts, viz., under the first part, no person is to be convicted of an offence except for violating a ‘law in force’ at the time of commission of the act charged as an offence. A person is to be convicted for violating a law in force when the act charged is committed. A law enacted later, making an act done earlier (not an offence when done) as an offence, will not make the person liable for being convicted under it. Immunity is thus provided to a person from being tried for an act, under a law enacted subsequently, which makes the act unlawful. This means that if an act is not an offence on the date of its commission, a law enacted in future cannot make it so. This can be explained by the following illustrated example:

Section 304B, IPC, was enacted on 19-11-1986 making a dowry death punishable as an offence under the penal code. A new offence has been thus inserted in the IPC with effect from 19-11-1986. Because of Art 20(1), S.304 B cannot be applied to dowry death which took place in 1984, i.e. prior to its enactment. S.304 B is a substantive provision creating a new offence subsequent to the commission of the
offence attributed to the respondent in the instant case and so he could not be tried under section 304 B.

In *Sakshi v. Union of India* 146, the court refused to give an enlarged meaning to the word ‘rape’ in Section 375 IPC on the ground that such an interpretation may violate Article 20(1). The word ‘offence’ used in Art 20 is not defined in the constitution. S.3 (38) of the General Clauses Act defines the word ‘offence’ as an act or omission made punishable by any law for the time being in force. Article 20 relates to the constitutional protection given to persons who are charged with a crime before a criminal court. The word ‘penalty’ in Art 20(1) is used in a narrow sense as a meaning a payment “which has to be made or a deprivation of liberty which has to be suffered as a consequence of finding that the person accused of a crime is guilty of charge.”

The immunity extends only against punishment by courts for a criminal offence under an ex post facto law and cannot be claimed against preventive detention, or demanding a security from a press under a press law, for acts done before the relevant law is passed.

It is only retrospective criminal legislation that is prohibited and not the importance of civil liability, i.e. if the statute fixes criminal liability for contravention of a prohibition or command which is made applicable to transactions which took place before the date of its enactment, the provisions of Art 20(1) are attracted. If they are not attracted, the statute fixes only civil liability. Thus, for example, in *Hath Sing Mfg Co. v. Union of India*, 147 an act passed in June 1957, imposed on the employees, closing their undertakings, the liability to pay compensation to their employees since Nov 28, 1956. For failure to discharge the liability to pay compensation, a person could be imprisoned under the statute. The question was if the act violated Art

146 (2004) 5 SCC 518
147 AIR 1960 SC 923
20(1). The court held that the liability was a civil one and since the failure to discharge it is not an offence. Article 20(1) would not apply.

Likewise, a tax can be imposed retrospectively. Not only that, even a penalty is simply a civil liability to be enforced by the tax authorities. So also restrictions on dealing in securities under the Securities and Exchange Board of India Act, 1992 (SEBI Act) does not amount to creation of offence.\textsuperscript{148}

What is prohibited under Art 20(1) is only conviction or sentence, but not trial, under an ex post facto law. The objection does not apply to a change of procedure or of court. A trial under a procedure different from what obtained at the time cannot ipso facto be held unconstitutional. A person being accused of having committed an offence has no fundamental right of being tried by a particular court or procedure, except in so far as a constitutional objection by way of discrimination or violation of any fundamental right may be involved.

Article 20 (1) does not make a right to any course of procedure a vested right. Thus, a law which retrospectively changes the venue of trial from a criminal court to an administrative tribunal is not hit by Art 20 (1). Similarly, a rule of evidence can be made applicable to the trial of an offence committed earlier. Further, what Art 20 (1) prohibits is conviction and sentence under an ex post facto law for acts done prior thereto, but not the enactment or validity of such a law. There is, thus, a difference between the Indian and American positions on this point. In America, an ex post facto law is in itself invalid, but it is not so in India. The courts may also interpret a law in such a manner that any objection against it of retrospective operation may be removed.

\textit{(i) \textbf{Doctrine of “autrefois acquit” and “autrefois convict”}}

According to this doctrine, if a person is tried and acquitted or convicted of an offence, he cannot be tried again for the same

\textsuperscript{148} SEBI v. Ajay Agarwal, (2010) 3 SCC 765
offence or on the same facts for any other offence. This doctrine has been substantially incorporated in the Article 20(2) of the Constitution and is also embodied in Section 300 of the Criminal Procedure Code, 1973. When once a person has been convicted or acquitted of any offence by a competent court, any subsequent trial for the same offence would certainly put him in jeopardy and in any case would cause him unjust harassment. Such a trial can be considered anything but fair, and therefore has been prohibited by the Code of Criminal Procedural as well as by the Constitution. The doctrine of “autrefois acquit” and “autrefois convict” has been embodied in Section 300 of Criminal Procedure Code as follows:

**Person once convicted or acquitted not to be tried for same offence -**

(1) a person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted for 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 for 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 (1)

(2) thereof the dismissal of a complaint, or the discharge of the accused, is not an acquittal for the purposes of this section. Constitutional provision to the same effect is incorporated in Article 20 (2) which provides that no person shall be prosecuted and punished for the same offence more than once.

These pleas are taken as a bar to criminal trial on the ground that the accused person had been once already charged and tried for the same alleged offence and was either acquitted or
convicted. These rules or pleas are based on the principle that “a man may not be put twice in jeopardy for the same offence”.

Article 20(2) of the Constitution recognizes the principle as a fundamental right. It says,” no person shall be prosecuted and punished for the same offence more than once”. While, Article 20(2) does not in terms maintain a previous acquittal, Section 300 of the Code fully incorporates the principle and explains in detail the implications of the expression “same offence”.

In order to get benefit of the basic rule contained in Sec 300(1) of Criminal Procedure Code is necessary for an accused person to establish that he had been tried by a “court of competent jurisdiction” for an offence. An order of acquittal passed by a court which believes that it has no jurisdiction to take cognizance of the offence or to try the case, is a nullity and the subsequent trial for the same offence is not barred by the principle of autrefois acquit. To operate as a bar the second prosecution and consequential punishment there under, must be for the “same offence”. The crucial requirement for attracting the basic rule is that the offences are the same, i.e. they should be identical. It is therefore necessary to analyze and compare not the allegations in the two complaints but the ingredients of the two offences and see whether their identify is made out. Section 300 of Criminal Procedure Code bars the trial for the same offence and not for different offences which may result from the commission or omission of the same set of the act. Moreover, the principle of issue-estoppel, as enunciated and approved in several decisions of the Supreme Court, is simply is, that where an issue of fact has been tried by a competent court on a former occasion and a finding has been reached in favour of an accused, such a finding would constitute an estoppel or res judicata against the prosecution not as a bar to the trial and conviction of
the accused for a different or distinct offence but as precluding the reception of evidence to disturb that finding of fact when the accused is tried subsequently even for a different offence which might be permitted by law.  

3.1.2 Doctrine of Guarantee Against Double Jeopardy: (Article 20 (2))

According to this doctrine, if a person is tried and acquitted or convicted of an offence, he cannot be tried again for the same offence or on the same facts for any other offence. This doctrine has been substantially incorporated in the Article 20(2) of the Constitution and is also embodied in Section 300 of the Criminal Procedure Code, 1973. When once a person has been convicted or acquitted of any offence by a competent court, any subsequent trial for the same offence would certainly put him in jeopardy and in any case would cause him unjust harassment.

The English common law rule is that of “Nemo Debut Bi’s Punibi Prouno Delicto” which means that no one should be punished twice for same fault again. Such a trial can be considered anything but fair, and therefore has been prohibited by the Code of Criminal Procedural as well as by the Constitution. When once a person has been convicted or acquitted of any offence by a competent court, any subsequent trial for the same offence would certainly put him in jeopardy and in any case would cause him unjust harassment. Such a trial can be considered anything but fair, and therefore, has been prohibited by the Code of Criminal Procedural as well as by the Constitution.

The Doctrine of “Autrefois Acquit” and “Autrefois Convict” has been embodied in Section 300 of Criminal Procedure Code, 1973. This doctrine is in a way the rule against double jeopardy. ‘Autrefois Acquit and Autrefois Convict’ are the French terms literally meaning “previously acquitted” and “previously convicted” respectively. These
two terms have their origin in the common law where they are accepted as the pleas of autrefois acquit and autrefois convict and these pleas have the effect that the trial cannot go ahead due to the special circumstances that these two pleas depict. Actually a plea of autrefois acquit means that a person cannot be tried again for an offence for the reason that he has previously been acquitted in the same offence and such a plea can be taken or combined with plea of not guilty. Similarly a plea of autrefois convict means that a person cannot be tried for an offence for the reason that he has been previously been convicted in an offence and the same can be combined with the plea of not guilty. However these two terms are jointly known as *Doctrine of Autrefois Acquit and Autrefois Convict*. Actually this doctrine in a way is the rule against double jeopardy. Rule against double jeopardy means that a person cannot be tried for the same offence once again if he has been either convicted or acquitted in the trial relating to same offence.

Protection against double jeopardy has been provided by many countries as a constitutional right India being one of them. The other countries include Canada, Israel, Mexico and U.S. However in this project we will analyze this Doctrine of Autrefois Acquit and Autrefois Convict in special reference to Indian context in the light of the provisions of Code of Criminal Procedure, 1973, Constitution of India and Indian Evidence Act, 1872. The Constitution of India has provided this protection as a fundamental right under the Article 20(2) which provides “No person shall be prosecuted and punished for the same offence more than once”. The same principle has been enacted in the Section 26 of the General Clauses Act, 1897 and Section 300 of the Criminal Procedure Code, 1973. However, these two provisions mentioned later have formed the basis of the incorporation of the protection against double jeopardy as a fundamental right guaranteed by the Constitution of our country. However this is to be emphasized and the same will be analyzed in the later part of this project that this
doctrine has not been a replicate of the forms that exist in the Common Law and the US Constitution. In a nutshell at this point it can be just said that the ambit of this doctrine in Indian context quite narrower as compared to other global systems.

However, it follows two essentials to attract Article 20(2) are:

i) The accused must have been ‘prosecuted and punished’;

ii) The prosecution and punishment must have been for the ‘same offence’.

The expression to be underlined is “prosecuted”. This has to be read in conjunction with the word “punished”. The following essentials flow from the various observations made through judicial precedents.

a) The person must be accused of an “offence” as defined in the General Clauses Act as “any act or omission made punishable by the law for the time being in force.”

b) The proceeding or prosecution must have taken place before a “Court” or “Judicial Tribunal”, e.g., Revenue Authorities, Sea Customs Authorities, a tribunal for departmental or administrative enquiries are not judicial tribunals for the above purpose.

c) The proceedings should have taken before the judicial tribunal or court in reference to the law which creates offences, e.g., an enquiry held by a statutory authority against a government servant to suggest the government as to the disciplinary action to be taken and not for the purpose of punishing for the offence of cheating or corruption is not prosecution under Article 20(2).149

There is no punishment within the meaning of Article 20(2) unless it is preceded by a prosecution in the sense explained above is well illustrated in Maqbool Hussain v. State of Bombay150. In that case,
the appellant, a citizen of India, on arrival at the airport, did not declare that he had brought in gold with him. But on search it was found that he was carrying 107 tolas of gold in contravention of the government notification. The customs authorities thereupon took action against him under Section 167(8) of the Sea Customs Act, 1878, and confiscated the gold. Sometime afterwards a complaint was filed in the Court of the Chief Presidency Magistrate against the appellant charging him with the offence under Section 8 of the Foreign Exchange Regulation Act, 1947. The appellant pleaded that his prosecution before the Magistrate was in violation of the fundamental rights guaranteed under Article 20(2) because he had already been prosecuted and punished in as much as his gold had been confiscated by the custom authorities.

The Court held that the sea customs authorities is not a court or judicial tribunal and the adjudging of confiscation or the increased rate of duty or penalty under the provisions of the Sea Customs Act did not constitute a judgment or order of a court or judicial tribunal necessary for the purposes of supporting a plea of double jeopardy. The proceedings taken before the sea customs authorities were, therefore, not ‘prosecution’ of the appellant nor did the order of confiscation constitute a punishment inflicted by a court or judicial tribunal on the appellant. The appellant could not, therefore, be said to have been prosecuted and punished for the same offence with which he was charged before the Chief Presidency Magistrate.\footnote{Mahendra Pal Singh, V.N. Shukla’s Constitution of India, 13th edn., 2017, p. 157.}

As pointed out above, the second prosecution must be for the ‘same offence’. If the offences are distinct, there is no question of the rule as to double jeopardy being applicable. Thus, where the accused are sought to be punished for the offence under Section 105 of Insurance Act, 1938, after the trial and conviction for the offence under
Section 409\textsuperscript{152}, Penal Code, they are not being sought to be punished for ‘the same offence’. It is for two distinct offences constituted or made up of different ingredients and therefore, the bar of Article 20(2) is not applicable. The same offence would mean an offence whose ingredients are the same.

This provision was previously mentioned in the Section 403 of the old code. Section 300 lays down the principle that a person who has been previously acquitted or convicted in any offence cannot be tried for the same offence again, i.e., rule against double jeopardy. However, this protection is not absolute in nature and this thing becomes clear from the detailed analysis of the Section 300, CrPC.

This rule is actually based on common law maxim ‘\textit{nemo debet bis vexari}’ that means a person shall not be brought into danger for one and the same offence more than once. The application of this doctrine in Indian context is different from that in Common Law and U.S legal system. A detailed study of this section will bring out that the conditions necessary for the application of this provision.

Section 300(1) lays down the proposition mentioned hereunder:

1. The accused has been tried by a court of competent jurisdiction.
2. He should be acquitted of the offence alleged to have been committed by him or an offence which he might have been under Section 221(1) or for which he might have been convicted under Section 221(2).

At the same time a person cannot be tried for an offence for which he has been convicted previously. With regard to sub-section (1) of section 300 the second trial of a person is barred even if it is not for the same offence, but then if it is based on the same facts for any other offence for which a charge might have been against him under section 221(1) or for which he might have been convicted under section

\textsuperscript{152} It deals with offence of criminal breach of trust by public servant, or by banker, merchant, agent.
221(2). Section 221(1) provides that where it is doubtful on the basis of the facts of the case that what offence has been committed, the accused can be charged with all such offences or any of such offences; or he may be in alternative charged of having committed any one of the said offences. Section 221(2) provides that if the accused has been charged with one offence and it appears from the evidence that he committed a different offence for which he might have been charged under the provisions of sub section (1), he may be convicted with the offence which he is shown to have committed, although he was not charged with it.

An analysis of this section makes it clear that there must be the trial of the accused, that is, hearing and determination on the merits and for the purpose of the ban to subsequent trial as contemplated by Section 300(1) there should have been the trial of the accused and on previous occasion, he must have been convicted or acquitted. If there is no trial then the subsequent trial for the same offence is not barred.

However, the acquittal or the conviction, in order to be actual defence to the charge must be by a court of competent jurisdiction. If the court which held the first trial was not competent to try the charge put forward in the second trial, this section would have no application. A trial by a court having no jurisdiction in the case is void ab initio and the accused if acquitted is liable to be re-tried for the same offence.

The person must have been either acquitted or been convicted. It is only then that a person can take the plea of this section in order to bar the second trial for the same offence. Mere discharge of the accused does not amount to acquittal. A person is said to be discharged when he is relieved from the legal proceeding by an order which does not amount to judgement. Judgement is the final order in a trial terminating either in conviction or acquittal of the accused. A person who is in law only discharged may be charged again for the same offence if some other testimony is discovered against him; however a
person who is acquitted of a charge can never be put on the trial for the same offence. A discharge leaves the matter at large for all purposes of judicial inquiry and there is nothing to prevent a Magistrate discharging the accused from inquiring again into the case.

However, in case where a judgement has been passed by a competent court either acquitting or convicting the accused, there so long as the judgement remains in force the person so acquitted or convicted cannot be tried again for the same offence, but where such an order or judgement has been set aside by a Court either on appeal or revision then such person can again be tried for the same offence because the previous trial is annulled thereby.

The conviction or the acquittal in the previous case cannot be a bar in the trial of the same person for a different offence based on different facts but on the same evidence. In the case of *State of Tamil Nadu v. Nalini*\(^ {153} \), there was criminal trial for certain offences under TADA (now POTA), along with the other offences under IPC. The subsequent trial for the offences under TADA based on the same facts was held to be barred and the conviction of the accused in the subsequent trial was set aside.

On the other hand, Section 300(2) contemplates a situation where a person might have been charged with and tried in accordance with the Section 220(1) of Cr.PC, 1973. In this case the person who can be so charged, may be tried once again even after the order of the conviction or acquittal in the previous case, however with the prior consent of the state government. Section 220(1) provides that if, in one series of acts so connected together as to form the same transaction, more offences than one are committed by the same person, he may be charged with and tried at one trial for, every such offence. Where a person has been convicted of any offence and a separate charge for

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\(^{153}\) AIR 1999 SC 2640
another offence could have been made but was not made against him in
the formal trial, he should not be liable to be tried again for the other
offence as a matter of course because this might lend itself to abuse.\footnote{Joint Committee Report, p.xxii}
For this reason the later part of this section envisages the provision that
such kind of second trial can be made only with the prior consent of
the state Government. The State Government also is supposed to give
its consent after the due consideration of all the facts and
circumstances of the case and with the main intendment of the law viz.
promotion of justice.

Section 300(3) envisages a situation where a person is convicted
of any offence by an act causing such consequences, that the act
together with the consequences constituted a different offence from the
one for which he was convicted. In such a situation if the consequences
had not happened or were not known to the court at the time when such
person was convicted then he may be afterwards tried for such an
offence.

However, it must be noted in the Section 300(3) that the words
used are a person ‘convicted’ and does not include ‘acquitted’ as in the
former sub-sections. Therefore, this rule does not apply where he has
been acquitted. In order to have a better understanding on this point let
us take an example where ‘A’ is tried for causing grievous hurt to a
person and is convicted. Later it is found that the person to whom
grievous hurt was done he died. Here in this case ‘A’ may be tried once
again separately for the offence of culpable homicide. However, let us
presume in the same example that ‘A’ was acquitted of the charge of
grievous hurt, and then in this case he cannot be tried once again if the
person later dies, for the offence of culpable homicide under this
section. The reason for keeping the acquittal out of the purview of this
section can be logically ascertained in the sense that the section
provides that later offence for which the person may be tried, is an offence because of the consequences of the former act and the offence constituted by the former act, being taken together. However when a person is acquitted of the former charge then it is quite clear that he is exonerated from the liability of committing that offence, therefore how and why should a person be tried once again for the consequences that have ensued from the act from the liability of which he has been exonerated. This is the possible logical explanation behind the contemplation of this section by the legislature.

Section 300 (4) provides that where a person has been acquitted or convicted of any offence constituted by any acts, he may be charged with and tried again for any offence based on the same facts notwithstanding his acquittal or conviction, if the court by which he was previously tried was not competent to try the offence with which he is subsequently charged. To provide a better explanation to the section let us take an example where ‘A’ is tried for robbery by a Judicial Magistrate of first class. However, he is later charged for the offence of dacoity based on the same facts. In this case since the subsequent charge of the offence of dacoity is not triable by a Judicial Magistrate of first class and is triable only by the Court of Session, therefore the second trial of such a person irrespective of the fact that whether he has been acquitted or convicted, will not be barred.

Section 300(5) contemplates a situation where a person has been discharged under section 258 of the Cr.PC, 1973. Section 258 provides that “in any summons-case instituted otherwise than upon complaint, a Magistrate of the first class or, with the previous sanction of the Chief Judicial Magistrate, any other Judicial Magistrate, may, for the reason to be recorded by him, stop the proceedings at any stage without pronouncing any judgement and where such stoppage is made after the evidence of the principal witness has been recorded, pronounce a judgement of acquittal, and in any other case, release the accused, and
such release shall have the effect of discharge.” The Section 300(5) provides that where a person has been so discharged under the Section 258 he cannot be tried once again for the same offence without the previous consent of the Court which gave such order of discharge or of any other Court to which the former court is subordinate. This provision is in order to provide a check against abuse of power of fresh prosecution especially in respect of discharge under the said provisions thus treating it differently from discharges under other provisions of law. It should be noted that this Section does not apply in case of discharge made in the cases which have been instituted on a complaint. More so an order of discharge under Section 258 can never be regarded as an acquittal for the purpose of the section 300(5). It can be very well be visualized in the explanation appended to the Section 300 which specifically provides that dismissal of a complaint or discharge of the accused in not an acquittal for the purpose of this section.

Section 300(6) in clear terms provides that “nothing in the section 300 shall affect the provisions of the section 26 of the General Clauses Act, 1897 or of section 188 of this code.” Section 26 of the General Clauses Act, 1897 provides: “Where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence.” If the accused was acquitted during the first trial on a specific charge such acquittal will not prohibit a second trial on a separate charge for an offence constituted by the same facts under a different enactment.

3.1.3 Privilege against Self-Incrimination: Article 20 (3)

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155 Sarkar, Code of Criminal Procedure, 9th edn, p.1251
The Fundamental Right guaranteed under Article 20(3) is a protective umbrella against testimonial compulsion for people who are accused of an offence and are compelled to be a witness against themselves. The provision borrows from the Fifth Amendment of the American Constitution which lays down that, “No person shall be compelled in any criminal case to be a witness against himself”, same as mentioned in the Constitution of India embodying the principles of both English and American Jurisprudence. This libertarian provision can be connected to an essential feature of the Indian Penal Code based on the lines of Common Law that an accused is innocent until proven guilty and the burden is on the prosecution to establish the guilt of the accused; and that the accused has a right to remain silent which is subject to a much broader right, against self-incrimination.

Article 20 (3) declares that no person accused of an offence shall be compelled to be a witness against himself. This provision embodies the principle of protection against compulsion of self-incrimination which is one of the fundamental canons of the British system of criminal jurisprudence and which has also been adopted by the American system and incorporated in the Federal Constitution. The Fifth Amendment of the American Constitution provides that no person shall be compelled in any case to be a witness against himself. It has also, to a substantial extent, been recognized in the criminal administration of justice in this country by incorporation into various statutory provisions. The Constitution of India, on the other hand, raises the rule against self-incrimination to the status of a constitutional prohibition. Self-incrimination must mean conveying information based upon the personal knowledge of the person giving the information and cannot include merely the mechanical process of producing documents in the Court. It also has certain exceptions such as giving thumb impressions, or impression of foot or palm or fingers or specimens of writings or exposing body for the purpose of
identification are not covered by the expression ‘to be a witness’ under Article 20(3).

Thus, self-incrimination in context of Article 20(3) only means conveying information based upon personal knowledge of the person giving information. But where an accused is compelled to produce a document in his possession which is not based on the personal knowledge of the accused, in such a case there is no violation of Article 20(3).

The accused person is protected under this provision because of the fear of police continuing with third degree torture, violation of human rights etc. This is the reason confessions of an accused is only admissible if recorded by a Magistrate in accordance with an elaborate procedure to ensure that they are made voluntarily.157 Protection is also accorded by the provisions of the Indian Evidence Act, 1872.158 This protection is available to every person including not only individuals but also companies and incorporated bodies.

As analyzed by the researcher, the terms in which the guarantee is contained in our Constitution, may be stated to consist of the following three components:

1. *It is a right pertaining to a ‘person accused of an offence’;*
2. *It is a protection against ‘compulsion to be a witness against oneself’;* and
3. *It is a protection against such compulsion resulting in his ‘giving evidence against himself’.*

Here, a person accused of an offence implies a person against whom a formal accusation relating to the commission of an offence has been levelled, which may result in prosecution. Formal accusation in

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158 Section 24-26 of the Indian Evidence Act, 1872, exception being only provided in S.27 which states that, “Information to discovery on the basis of statement made by such an accused is admissible irrespective of whether it was or was not improperly or illegally obtained.”
India can be brought by lodging of an F.I.R or a formal complaint, to a competent authority against the particular individual accusing him for the commission of the crime.

It is only on making of such formal accusation that Article 20 (3) becomes operative covering that person with its protective umbrella against testimonial compulsion. It is imperative to note that a person cannot claim the protection if at the time he made the statement, he was not an accused but becomes an accused thereafter. Article 20 (3) does not apply to departmental inquiries into allegations against a government servant, since there is no accusation of any offence within the meaning of Article 20 (3).

Self-incrimination has been extensively discussed in the case of *Nandini Satpathy v. P.L Dani*,\(^{159}\) where the appellant, a former Chief Minister of Orissa was directed to appear at Vigilance Police Station, for being examined in connection to a case registered against her under the Prevention of Corruption Act, 1947 and under Sections 161/165 and 120-B and 109 of the Indian Penal Code, 1860. Based on this an investigation was started against her and she was interrogated with long list of questions given to her in writing. She denied to answer and claimed protection under Article 20(3). The Supreme Court ruled that the objective of Article 20(3) is to protect the accused from unnecessary police harassment and hence it extends to the stage of police investigation apart from the trial procedure.

Further, this right to silence is not limited to the case for which the person is being examined but also extends to other offences pending against him, which may have the potential of incriminating him in other matters. It was also held that the protection could be used by a suspect as well.

\(^{159}\) AIR 1978 SC 1025
On the other hand, the basic concept of criminal law is that no confession made to a police officer shall be proved as against a person accused of any offence whereas S.161 (2) of Criminal Procedure Code requires a person, including a accused person, to answer truly all questions put to him by the investigating police officer. S.161 as well as Article 20(3) of the Constitution gives protection to such person against questions and answers which would have a tendency to expose him to a criminal charge. The arrested person may remain silent or may refuse to answer when confronted with incriminating questions, Art.20 (3) clearly provides as a fundamental principle that no person accused of any offence shall be compelled to be a witness against himself.

In the above-mentioned case, the Supreme Court made a view that arrested person cannot be forced to answer questions merely because the answers thereto are not implicative when viewed in isolation and confined to that particular case. He is entitled to keep his mouth shut if the answer sought has a reasonable prospect of exposing him to guilt in some other accusation actual or imminent, even though the investigation under way is not with reference to that. Compelled testimony has been considered as evidence procured not merely by physical threats or violence but by psychic torture, atmospheric pressure, environmental coercion, tiring interrogative prolixity overbearing and intimidatory methods and the like. Frequent threats of prosecution if there is failure to answer may take on the complexion of undue pressure violating Art.20(3) legal penalty by itself not amount to duress buy, the manner of mentioning it to the victim of interrogation may introduce on element of tension and tone of command perilously hovering near compulsion.

Having discussed the main principles, the Supreme Courts addressed itself to the further task of concretizing guidelines with a view to give full social relevance to its judgment. If an arrested person expresses the wish to have his lawyer by his side when the police
interrogate him, this rights shall not be denied to him. The police must invariably warn and record the fact-about the right to silence against self-incrimination: and where the accused is literate take his written acknowledgement. After an examination of the accused where the lawyer of his choice is not available, the police official must take him to a magistrate, doctor or other willing and responsible and allow a scheduled audience where he may unburden himself beyond the view of the police and tell whether he has suffered duress, which should be followed by judicial or some other custody for him where the police cannot reach him. The main concern of the Supreme Court in this case is to sensitize the police to humanism and therefore, it made it prudent for the police to humanism. For the protection of accused from miscarriage of Justice, there are cardinal principles of law of evidence. Evidence must be confined to the matters in issue or subject in question; hearsay evidence is not to be admitted; in all cases the best evidence must be given.\(^{160}\)

In Criminal cases there are certain rules that the accused is always presumed to be innocent until the prosecution proves him to be guilty. The onus of proving everything essential to the establishment of the charge against the accused lies on the prosecutor. The evidence must be such as to exclude every reasonable doubt regarding the guilt of the accused. It means that the issues must be proved beyond any reasonable doubt. Thus, these principles are based on English Principle of Criminal Law that it is better that ten guilty men should escape rather than that one innocent person should not suffer. In case of doubt regarding the guilt of accused it is safer to acquit him by giving him the benefit of doubt. The benefit of doubt is never given to the prosecution. There must be clear and unequivocal proof of the facts of crimes. Thus, the admissibility of evidence in criminal justice

\(^{160}\) Ibid.
administration is governed by the above mentioned rules which prove to be a great protection to an accused in criminal laws.

3.1.3.1 Compulsion must be to give evidence “Against Himself”

The guarantee in Article 20(3) is against the compulsion to be a witness. ‘To be a witness’ means making of oral or written statements in or out of court by a person accused of an offence. In other words, it means imparting knowledge in respect of relevant facts by an oral statement of a statement in writing made or given in a court or otherwise. Such statements are not confined to confessions but also cover incriminatory statements, i.e., to the statements which have a reasonable tendency strongly to point out to the guilt of the accused. Thus, if the accused voluntarily makes an oral statement or voluntarily produces documentary evidence, incriminatory in nature, Article 20(3) would not be attracted.

“To be a witness” is not equivalent to ‘furnishing evidence’ in its widest significance, that is to say, as including not merely making of oral or written statement but also production of documents or giving materials which may be relevant at trial to determine the guilt or innocence of the accused. In the leading case of State of Bombay v. Kathi Kalu Oghad\(^\text{161}\), a Bench of the Supreme Court consisting of eleven Judges, disagreeing with the interpretation in its earlier case defined the scope of the protection thus:\(^\text{162}\)

“It is well established that clause (3) of Article 20 is directed against self-incrimination by the accused person. Self-incrimination must mean conveying information based upon the personal knowledge of the person giving the information and cannot include merely the mechanical process of producing documents in court which may throw a light on any of the points in the controversy, but which do not contain any statement of the accused based on his personal knowledge.

\(^{161}\) AIR 1961 SC 1808.

\(^{162}\) Ibid.
For example, the accused person may be in possession of a document which is in his writing or which contains his signature or his thumb-impression. The production of such a document, with a view to comparisons of the writing or the signature or the impression, is not the statement of an accused person which can be said to be of the nature of a personal testimony.\textsuperscript{163}

Hence, giving thumb-impression or impressions of foot or palm or fingers or specimen writing or showing parts of the body by way of identification are not included in the expression ‘to be a witness’. In \textit{Kalawati v. H.P. State}\textsuperscript{164}, the Supreme Court has held that Article 20(3) does not apply at all to a case where the confession is made by an accused without any inducement, threat or promise. Similarly, retracted confessions, although they have very little probative value, are not repugnant to this clause.\textsuperscript{165}

However, the term compulsion under Article 20(3) means ‘duress’. Thus, compulsion may take many forms. If an accused is beaten, starved, tortured, harassed etc. to extract a confession out of him/her then protection under Article 20(3) can be sought. A case of \textit{Mohd. Dastagir v. State of Madras}\textsuperscript{166} was discussed by the researcher, where the appellant went to the residence of the Deputy Superintendent of Police and handed him an envelope. On opening the envelope, the DSP found cash in it, which meant that the appellant had come to offer bribe to the officer. The DSP refused it and asked the appellant to place the envelope and the notes on the table, and he did as told, after which the cash was seized by the Police. In this case, the Supreme Court held that the accused wasn’t compelled to produce the currency notes as no duress was applied on him. Moreover, the appellant wasn’t even an

\begin{flushleft}
\textsuperscript{163} Ibid.
\textsuperscript{164} AIR 1953 SC 131.
\textsuperscript{165} Mahendra Pal Singh, V.N. Shukla’s Constitution of India, 13th edn., 2017, p.163.
\textsuperscript{166} AIR 1960 SC 756
\end{flushleft}
accused at the time the currency notes were seized from him. Hence, in this case the scope of Article 20(3) was not applicable.

3.1.3.2 Person Must Be ‘Accused of An Offence’

The privilege under clause (3) is confined only to an accused i.e., a person against whom a formal accusation relating to the commission of an offence has been leveled which in may result in the prosecution. It is, however, not necessary, to avail the privilege, that actual trial or enquiry should have commenced before the court or tribunal. Thus, a person against whom the first information report has been lodged by the police and investigation is ordered by the Magistrate, he can claim the benefit of this protection. Even if his name was not mentioned as an accused in the first information report, it will not take him out of that category of evidence, whether oral or circumstantial, and he is taken in custody and interrogated on that basis. He becomes a person accused of an offence.

Under the American criminal jurisprudence, the privilege against self-incrimination is not confined to the accused only. It is also available to ‘witnesses’. Under the English law, too, a witness is protected from answering questions which may lead to criminal prosecution or any other penalty or forfeiture. The protection under Article 20 (3), Constitution of India is confined to the accused only and is accord with the existing rule of the Indian Evidence Act, 1872. A person served with summons under the Foreign Exchange (Regulations) Act, 1947 against whom FIR has already been lodged, is an accused within the meaning of Article 20(3). A person called for questioning during investigation by authorities under the provisions of the Customs Act or the Foreign Exchange Regulation Act is not an accused.167

In *K. Joseph Augusthi v. M.V. Narayanan* the legality of Section 45-G of the Banking Companies Act, 1949 was involved. Under this Section, where an order has been made for the winding up of a company, the High Court may, on a report of the official liquidator, direct the holding of a public sitting of the court for the public examination of promoters, directors, auditors, etc. of the company, regarding their conduct and dealing in relation to the affairs of the bank. The appellant, who was ordered under Section 45-G, to appear for the examination, challenged the validity of the order on the ground that this Section was unconstitutional inasmuch as it contravened the fundamental right guaranteed to the citizen under Article 20(3).

Hon’ble Chief Justice Gajendragadhkar observed that Article 20(3) was inapplicable to the instant case, because the persons called for examination under Section 45-G was not accused of any offence. The fact that an accusation might follow the enquiry would not attract Article 20(3). A person charged of contempt of court is not an accused of any offence within the meaning of Article 20(3). 169

In *Nandini Sathpathy v. P.L. Dani* the Supreme Court had to consider the legal basis of the police practice of interrogating suspects in view of the constitutional and legal safeguards available to a person against oppressive and unjust police interrogations. In this case, Mrs Sathpathy, the accused, who was a suspect and yet not an accused, was examined at the police station in connection with investigation into the charges of corruption against her. On her refusal to answer the questions put to her, she was charged with an offence under Section 179 of IPC. It was argued that the refusal to answer interrogations was justified on grounds of Article 20(3) of the Constitution and

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168 AIR 1964 SC 1552.
170 AIR 1978 SC 1025
171 It explains the offence related to Refusing to answer public servant authority to question.
Section 161(2) of the CrPC, 1973. The Supreme Court, speaking through Krishna Iyer, J., took the view that the area covered by Article 20(3) and Section 161(2) is substantially the same, the expression ‘any person supposed to be acquainted with the facts and circumstances of the case’ included an ‘accused person’ who fulfills that role because the police supposes him to have committed the crime and must, therefore, be familiar with the facts.

The Supreme Court observed that the expression ‘accused of an offence’ no doubt includes a person formally brought into police diary as an accused person but it also includes a suspect. Adverting to several of its earlier decisions, the Court did not agree with the ‘restrictive view’ of the expression ‘accused of an offence’ taken therein and extended the application of Article 20(3) to police interrogations.173

3.2 PROTECTION AVAILABLE UNDER THE CONSTITUTION OF INDIA

3.2.1 Article 21: Protection of Life and Personal Liberty

Article 21 of the Constitution of India provides that no person shall be deprived of his life or personal liberty except according to procedure established by law. Here, ‘life and personal liberty’ though drafted in a negative language confers on every person the fundamental right to life and personal liberty. The foreigners are as much enticed to these rights as the citizens. The two rights have been given paramount position by our Courts. The right to life which is the most fundamental of all is also the most difficult to define.174

Although most of the cases concerning the expansion of Article 21 in different directions have been given by art, yet there are many more which have not received adequate attention under them. For the

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172 It deals with of Examination of witnesses by police.
sake of convenience they may be mentioned under the following different subheads:

3.2.2 Rights of Prisoners

The case of Prabhakar Pandurang\textsuperscript{175}, it has held that the right of a detenu to send his book, written during detention, for publication was recognised. A prisoner is entitled to all his fundamental rights unless his liberty has been constitutionally curtailed. Therefore, any imposition of a major punishment within the prison system is conditional upon the observance of the procedural safeguards of fundamental rights due to the very nature of the regime to which he is lawfully committed. In Sunil Batra \textit{v. Delhi Administration}\textsuperscript{176}, the solitary confinement of a prisoner, who was awarded the capital sentence for having committed the offence of murder under Section 30(2) of the Prisons Act, 1894, was held bad as it was imposed not as a consequence of the violation of the prison discipline but on the ground that the prisoner was one under sentence of death. Justice Desai pointed out that the conviction of a person for a crime did not reduce him to a non-person vulnerable to major punishment imposed by the jail authorities without observance of procedural safeguards. It was also held that bar-fetters, to a very considerable extent, imposed under Section 56 of the Prisons Act, 1984, curtail, if not wholly deprive, locomotion which is one of the facets of personal liberty and such action can only be justified in the circumstances relatable to the character of the prisoner and his safe custody. However, prisoners have no fundamental right to escape from lawful custody, and hence, the presence of armed police guards causes no interference with the right to personal liberty. So also, prisoners cannot complain of the installation of the live wire mechanism with which they are likely to come in contact only if they attempt to escape from the prison. Also, the denial of amenities or their poor maintenance do not necessarily constitute an encroachment on the right to personal liberty. If a prisoner

\textsuperscript{175} State of Maharashtra \textit{v. Prabhakar Pandurang Sanzgiri, AIR 1966 424.}
\textsuperscript{176} 1980 AIR 1579
demands that he should have better companions in jail or should be removed to a ward with more relaxation and resents keeping convict cooks or having wardens as jail mates in his cell, the Superintendent of Jail may justifiably turn down such requests in view of the prisoner’s record and potential. However a prisoner has the fundamental right to be protected from the co-prisoners. In case a prisoner is killed by his co-prisoner the State may be compelled to compensate the dependents of the deceased. Similar rights of the arrestees and persons in police custody have also been recognized.\textsuperscript{177}

Moreover, in several cases courts have issued appropriate directions to prison and police authorities for safeguarding the rights of the prisoners and persons in police lock-up, particularly of women and children against sexual abuse and for their early trials. Handcuffing of undertrials without adequate reasons in writing has also been found against Article 21 and the Court has directed the Union of India to issue appropriate guidelines in this regard. A right to be released on bail has not yet been recognized under Article 21 and it has been held that insofar as the Scheduled Caste (Prevention of Atrocities) Act, 1989 prohibits anticipatory bail for offences under that Act it is not violative of Article 21.\textsuperscript{178}

Provision in Section 32-A of Narcotic Drugs and Psychotropic Substances Act, 1985, taking away right of Court to suspend sentence awarded under the Act, pending an appeal, violates Article 21, particularly when no mechanism is provided for early disposal of the appeal.

\textbf{3.2.3 Rights of Inmates of Protective Homes}

Appropriate directions have been given by the courts to the inmates of protective and remand homes for women and children for

\textsuperscript{177} Mahendra Pal Singh, V.N. Shukla’s Constitution of India, 13th edn., 2017, p. 177.
providing suitable human conditions in the homes and for providing appropriate machinery for effective safeguard of their interests.

3.2.4 Right to Legal Aid\textsuperscript{179}

Right to free legal aid at the cost of the State to an accused who cannot afford legal services for reasons of poverty, indigence or incommunicado situation is part of fair, just and reasonable procedure under Article 21. Not only that, the trial court is under an obligation to tell an accused who fails to afford legal representation that he is entitled to be represented by a lawyer at the cost of the State. In case an accused is not told of this right and therefore he remains unrepresented by a lawyer, his trial is vitiated by constitutional infirmity and any conviction as a result of such trial is liable to be set aside.\textsuperscript{180}

3.2.5 Right to Speedy Trials

This right came up in a series of cases involving undertrials, who were in jail for a period longer than the maximum sentence that could be imposed on conviction. In \textit{Hussainara Khaton (I) v. Home Secretary, Bihar}\textsuperscript{181}, it was held that the procedure which keeps such large numbers of people behind bars without trial so long cannot possibly be regarded reasonable, just or fair so as to be in conformity with the requirement of Article 21. Bhagwati, J. observed that although the right to speedy trial is not specifically mentioned as a fundamental right, it is implicit in the broad sweep and content of Article 21. In \textit{Hussainara(II)}\textsuperscript{182}, the Court re-emphasized the expeditions review for withdrawal of cases against undertrials for more than two years. In \textit{Hussainara(III)}\textsuperscript{183}, the Court reiterated that the investigation must be completed within a time-bound programme in respect of undertrials.

\textsuperscript{179} This right is also ensured in Criminal Procedure Code, 1973.
\textsuperscript{181} Hussainara Khatoon (I) v. Home Secretary, Bihar, AIR 1979 SC 1360
\textsuperscript{182} (1980) 1SCC 91
\textsuperscript{183} AIR 1979 SC 1360
and gave specific orders to be followed for quick disposal of cases of undertrials. In *Hussainara(IV)*\(^{184}\), in continuation of *Hussainara(I)* and *Hussainara(III)*, the Court considered for affidavits filed in response to its earlier orders and passed further directions. Dissatisfied with the compliance of its earlier direction, the Court ordered release of undertrials held for periods more than the maximum term imposable on them on conviction. It was held that continuance of such detention is clearly illegal and in violation of that fundamental right under Article 21. The Court went one step further and after making a reference to the Hoskot case, recognised the right to free legal services to the poor and the needy as an essential ingredient of reasonable, fair and just procedure implicit in the guarantee of Article 21, and directed the State to provide a lawyer at its own cost for making a bail application to an undertrial: (i) charged with bailable offence on the next remand date, or (ii) held for non-bailable offence after having spent half the term of maximum sentence imposable on him where he convicted. In *Hussainara(V)*\(^{185}\), the Court considered the extent to which direction in *Hussainara (IV)* had been complied with, passed further directions and gave more time where necessary. In this case, the pending cases to ensure speedy trials, the Court requested further details from the High Court and directed the State Government to file affidavit in reply. The sum and substance of the decisions in the Hussainara cases is the recognition of the right to speedy trial, and the right to legal aid services under Article 21. It was pointed out that the present legal and judicial system denied justice to the poor and the needy because the system of bail with its misdirected emphasis in furnishing financial security operated adversely against the accused.

Since Hussainara in a large number of cases involving accused charged with serious and non-serious offences, mentally retarded

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\(^{184}\) (1980) 1 SCC 98

\(^{185}\) Hussainara Khatoon v. Home Secretary, Bihar, AIR 1978 SC 1377
persons and others have come up before the Court and it has held that all persons awaiting trial for long can approach the Supreme Court which will give necessary in the matter. In several cases the Court has given such directions. Specifically in the two Common Cause cases, the court has held that if the trial of case for an offence which is punishable with imprisonment upon 3 years has been pending for more than two years and the trial has not commenced, the court is required to discharge and acquit the accused. But whether a case deserves such directions will depend on a number of factors relevant for the determination of the fact if there has been any unfairness in the administration of criminal justice i.e. where in spite of most effective steps on the part of the State because of the complex nature of a case trial could not be held expeditiously the Court may not give any relief beyond asking the State that the trial should be started soon and proceeded from day to day. The right to speedy trial encompasses all the stages, namely the stage of investigation, inquiry, trial, appeal, revision and retrial. Prosecution pending for 14 years without even a single witness examined and without any fault of the accused was quashed.186

3.2.6 Right against Cruel and Unusual Punishment

In Jagmohan Singh v. State of U.P.187, the constitutionality of imposing death sentence was challenged. The Supreme Court held that if the entire procedure for criminal trial under the Criminal Procedure Code for arriving at a sentence of death is valid then the imposition of death sentence in accordance with the procedure establishment by law cannot be said to be unconstitutional. In Bachan Singh v. State of Punjab188, it was argued that the Supreme Court in the Maneka Gandhi case has given a new interpretative dimension to the provision of

188 AIR 1980 SC 898.
Articles 21, 19\textsuperscript{189} and 14\textsuperscript{190}, and their inter-relationship in every law of punitive detention both in its procedural and substantive aspects must pass the test of all the three Articles. This argument was not accepted by the Court (four to one). It was held that Article 19, unlike 21, does not deal with the right to life and personal liberty and is not applicable for judging the constitutionality of the provisions of Section 302\textsuperscript{191}, IPC. The condition precedent for the applicability of Article 19 is that the activity which the impugned law prohibits and penalises must be within the purview and protection of Article 19(1). To commit crime is not an activity guaranteed by Article 19(1). As regard Article 21, it was recognized that in Article 21 the founding fathers recognized the right of the State to deprive a person of his life or personal liberty in accordance with fair, just and reasonable procedure established by valid law, and there are several other indications in the Constitution which show that the Constitution makers were fully cognizant of the existence of death penalty, such as, Entries 1 and 2 in List II, Article 72(1)(c), Article 161 and Article 34. Thus, it was observed that death penalty either per se or because of its execution by hanging by rope does not constitute an unreasonable, cruel or unusual punishment. However, provision for keeping the dead body suspended for half an hour after the execution of death sentence is inhuman and violative of Article 21.

In \textit{T.V. Vatheeswaran v. State of T.N.}\textsuperscript{192}, it was held that delay exceeding two years in the execution of death sentence entitles a convict to get it commuted to life imprisonment. But it was overruled in \textit{Sher Singh v. State of Punjab}\textsuperscript{193}, that no such limit could be fixed for

\begin{itemize}
  \item \textsuperscript{189} It deals with Protection of certain Rights regarding freedom of speech etc.
  \item \textsuperscript{190} Already explain above in detail.
  \item \textsuperscript{191} It deals with Punishment for Murder.
  \item \textsuperscript{192} AIR 1983 SC 361.
  \item \textsuperscript{193} AIR 1983 SC 465
\end{itemize}
the execution of death sentence without regard to the facts of every case.\textsuperscript{194}

Finally, a constitutional bench of the Supreme Court in \textit{Triveniben v. State of Gujarat}\textsuperscript{195}, has expressly overruled Vatheesweran and held that it “may consider the question of inordinate delay in the light of all circumstances of the case to decide whether the execution of sentence should be carried out or should be altered into imprisonment for life. In calculating delay time taken in the disposal of mercy petition is also taken into account. Two years delay in such disposal has been found enough to convert death sentence into life imprisonment.\textsuperscript{196}

3.2.7 Right of Release and Rehabilitation of Bonded Labour

Article 21 read with the Directive Principles of State Policy enshrined in Articles 39\textsuperscript{197}, 41\textsuperscript{198}, and 42\textsuperscript{199} as well as the Bonded Labour System (Abolition) Act, 1976 obliges the State to identify, release and suitably rehabilitate the bonded labourers. The bonded labourers also have the right to live with human dignity enshrined in Article 21.\textsuperscript{200}

\textsuperscript{195} (1988) 4 SCC 574, 576.
\textsuperscript{197} Certain principles of policy to be followed by the states. The State shall, in particular, direct its policy towards securing- (a) that the citizens, men and women equally, have the right to an adequate means of livelihood; (b) that the ownership and control of the material resources of the community are so distributed as best to sub serve the common good, (c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common deterrent; (d) that there is equal pay for equal work for both men and women; (e) that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocation unsuited to their age or strength; (f) that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.
\textsuperscript{198} Right to work, to education and to public assistance in certain cases. The State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want.
\textsuperscript{199} Provisions for just and humane conditions of work and maternity relief.
3.3 PROTECTION AGAINST ARREST AND DETENTION IN CERTAIN CASES UNDER ARTICLE 22

Article 22 makes the minimum procedural requirements which must be included in any law enacted by legislature in accordance of which a person is deprived of his personal liberty. Article 22(1) and (2) are also called Rights of an arrested person.

3.3.1 Rights of an arrested person (Article 22(1) and 22 (2))

1) A person cannot be arrested and detained without being informed why he is being arrested.

2) A person who is arrested cannot be denied to be defended by a legal practitioner of his choice. This means that the arrested person has right to hire a legal practitioner to defend himself/herself.

3) Every person who has been arrested would be produced before the nearest magistrate within 24 hours.

4) The custody of the detained person cannot be beyond the said period by the authority of magistrate.

5) However, Article 22(3) says that the above safeguards are not available to the following:
   
   i) If the person is at the time being an enemy alien.
   
   ii) If the person is arrested under certain law made for the purpose of “Preventive Detention.”

The first condition is justified, because when India is in war, the citizen of the enemy country may be arrested. But the second clause was not easy to justify by the constituent assembly. This was one of the few provisions which resulted in stormy and acrimonious discussions.

Right to silence is also available to accused of a criminal offence. Right to silence is a principle of common law and it means that normally courts tribunal of fact should not be invited or encouraged to conclude, by parties or prosecutors, that a suspect or an accused is guilty merely because he has refused to
respond to question put to him by the police or by the Courts. The prohibition of medical or scientific experimentation without free consent is one of the human rights of the accused\textsuperscript{201}. In case of *Smt. Selvi & Ors. v. State of Karnataka & Ors.*\textsuperscript{202}, wherein the question was- Whether involuntary administration of scientific techniques namely Narcoanalysis, Polygraph (lie Detector) test and Brain Electrical Activation Profile (BEAP) test violates the ‘right against self- incrimination’ enumerated in Article 20(3) of the Constitution. In answer, it was held that it is also a reasonable restriction on ‘personal liberty’ as understood in the context of Article 21 of the Constitution. Following observations were made in this landmark case:

(i) *No individual should be forcibly subjected to any of the techniques in question, whether in the context of investigation in criminal cases or otherwise. Doing so would amount to an unwarranted intrusion into personal liberty.*

(ii) *Section 53, 53-A and 54 of Criminal Procedure Code permits the examination include examination of blood, blood-stains, semen swabs in case of sexual offences, sputum and sweat, hair samples and finger nail dipping by the use of modern and scientific techniques including DNA profiling. But the scientific tests such as Polygraph test, Narcoanalysis and BEAF do not come within the purview of said provisions.*

(iii) *It would be unjustified intrusion into mental privacy of individual and also amount to cruel, inhuman or degrading treatment.*

\textsuperscript{201} Article 7 of the International Covenant on Civil and Political Rights, 1966.

\textsuperscript{202} 2010 (2) R.C.R. (Criminal) 896.
(iv) Voluntary administration of impugned techniques are, however, permissible subject to safeguards, but test results by themselves cannot be admitted in evidence.

(v) No Lie Detector Tests should be administered except on the basis of consent of the accused. An option should be given to the accused whether he wishes to avail such test.

(vi) If the accused volunteers for a Lie Detector Test, he should be given access to a lawyer and the physical, emotional and legal implication of such a test should be explained to him by the police and his lawyer.

(vii) The consent should be recorded before a Judicial Magistrate.

(viii) During the hearing before the Magistrate, the person alleged to have agreed should be duly represented by a lawyer.

(ix) At the hearing, the person in question should also be told in clear terms that the statement that is made shall not be a ‘confessional’ statement to the Magistrate but will have the status of a statement made to the police.

(x) The Magistrate shall consider all factors relating to the detention including the length of detention and the nature of the interrogation.

(xi) The actual recording of the Lie Detector Test shall be done by an independent agency (such as a hospital) and conducted in the presence of a lawyer.

(xii) A full medical and factual narration of the manner of the information received must be taken on record.

The underlying rational of right against self incrimination is as under

(i) The purpose of the ‘rule against involuntary confessions’ is to ensure that the testimony considered during trial is
reliable. The premise is that involuntary statements are more likely to mislead the judge and the prosecutor, thereby resulting in a miscarriage of justice.

(ii) The right against self-incrimination’ is a vital safeguard against torture and other ‘third-degree methods’ that could be used to elicit information.

(iii) The exclusion of compelled testimony is important, otherwise the investigators will be more inclined to extract information through such compulsion as a matter of course. The frequent reliance on such ‘short-cuts’ will compromise the diligence required for conducting meaningful investigations.

(iv) During trial stage the onus is on the prosecution to prove the charges leveled against the defendant and the ‘right against self-incrimination’ is a vital protection to ensure that the prosecution discharges the said onus.203

3.3.2 Person arrested to be informed of grounds of Arrest

Article 22 (1) of the Constitution provides that a person arrested for an offence under ordinary law be informed as soon as may be the grounds of arrest. In addition to the constitutional provision, Section 50 of Criminal Procedure Code also provides for the same.

(i) According to Section 50(1) of Criminal Procedure Code, every police officer or other person arresting any person without warrant shall forthwith communicate to him full particulars of the offence for which he is arrested or other grounds for such arrest.

(ii) When a subordinate officer is deputed by a senior police officer to arrest a person under Section 55 of Criminal
Procedure Code, 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 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 person, shall show him the order. Non-compliance with this provision will render the arrest illegal.  

(iii) In case of arrest to be made under a warrant, Section 75 provides that 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. If the substance of the warrant is not notified, the arrest would be unlawful.

The right to be informed of the grounds of arrest is recognized by Sections 50, 55 and 75 in cases where the arrest is made in execution of a warrant of arrest or where the arrest is made by a police officer without warrant. If the arrest is made by a magistrate without a warrant under Section 44, the case is covered neither by any of the Sections 50, 55 and 75 nor by any other provision in the Code requiring the Magistrate to communicate the grounds of arrest to the arrested person. This lacuna in the Code, however, will not create any difficulty in practice as the Magistrate would still be bound to state the grounds under Article 22(1) of the constitution. The word “forthwith” in section 50 (1) of the Code of Criminal Procedure creates a stricter duty on the part of police officer making the arrest and would mean immediately. The right to be informed of

205 Satish Chandra Rai v. Jodu Nandan Singh, ILR 26 Cal 748; Abdul Gafur v. Queen-mpress, ILR 23 Cal 896.
the grounds of arrest is a precious right of the arrested person.\textsuperscript{206} The grounds of arrest should be communicated to the arrested person in the language understood by him; otherwise it would not amount to sufficient compliance with constitutional requirements.

3.3.3 Right to be defended by a Lawyer

It is one of the fundamental rights enshrined in our Constitution. Article 22 (1) of the Constitution provides, \textit{inter alia}, 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 right of the accused to have a counsel of his choice is fundamental and essential to fair trial. The right is recognized because of the obvious fact that ordinarily an accused person does not have the knowledge of law and the professional skill to defend himself before a court of law wherein the prosecution is conducted by a competent and experienced prosecutor. This has been eloquently expressed by the Supreme Court of America in \textit{Powell v. Alabama}.\textsuperscript{207} The Court observed that “The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and the knowledge adequately to prepare his defence, even though he

\textsuperscript{206} Udaybhan Shuki vs. State of U.P. 1999 CRI LJ 274 (All).
\textsuperscript{207} 287 US 45 (1932).
has a perfect one. He requires the guiding hand of counsel at every step of the proceeding against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.”

The Criminal Procedure Code has specifically recognized the right of a person against whom proceedings are instituted to be defended by a counsel. According to Section 303 of Criminal Procedure Code, any person accused of an offence before a criminal court, or against whom proceedings are instituted, may of right be defended by a pleader of his choice.

In Hussainara Khatoon (IV) v. Home Secretary, State of Bihar209, the Supreme Court after adverting to Article 39-A of the Constitution and after approvingly referring to the creative interpretation of Article 21 of the constitution as propounded in its earlier epoch-making decision in Maneka Gandhi v. Union of India210, has explicitly observed as follows:

The right to free legal services is, therefore, clearly 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. This is a 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 and the State is under a mandate to provide a lawyer to an accused person if the circumstances of the case and the

208 Ibid.
needs of justice so required, provided of course the accused person does not object to the provision of such lawyer.\textsuperscript{211}

It has been categorically laid down by the Supreme Court that the constitutional right of legal aid cannot be denied even if the accused failed to apply for it. It is now therefore clear that unless refused, failure to provide legal aid to an indigent accused would vitiate the trial, entailing setting aside of conviction and sentence.\textsuperscript{212}

These questions are now of academic importance only. Because the Supreme Court has now recognized that every indigent accused person has a fundamental constitutional right to get free legal services for his defence, and this recognition goes far beyond the length and breadth of Section 304 even if liberally interpreted. The provisions of Section 304 of the Code never comes in the way of right of accused to be defended by an advocate of this choice. The person who has been granted legal aid as per the provision of Section 304 of the Code can always on the later stage of the trial engage a counsel of his own choice. Thus, The Constitution as well as Section 303 of Code of Criminal Procedure recognized the right of every arrested person to consult a legal practitioner of his choice. Article 22 (1) provides, “ No person who is arrested shall be detained in custody without being inform, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice”.

3.4  **PREVENTIVE DETENTION OF THE ACCUSED PERSON**


\textsuperscript{212} Suk Das v. Union Territory of Arunachal Pradesh, (1986) 2 SCC 401.
A person can be put in jail / custody for two reasons. One is that he has committed a crime. Another is that he is potential to commit a crime in future. The custody arising out of the later is preventive detention and in this, a person is deemed likely to commit a crime. Thus, Preventive Detention is done before the crime has been committed. For example: How one can say that a person will do a crime in future? What are the implications of arresting a person without having committed a crime? Why Preventive Detention in peacetime? Isn’t it against the safeguards of our own citizens as provided by Article 22?

The preventive detention laws are repugnant to modern democratic constitutions. They are not found in any of the democratic countries. In England, the preventive detention law was resorted to only during the time of war. The provisions of the ‘Preventive Detention’ are unlawful in most countries like USA & UK, then why India has such a provision?

In the opinion of the researcher, India is a country having multi-ethnic, multi-religious and multilingual society. Caste and communal violence is very common in India. In the words of Dr. Bhimrao Ambedkar, in the present circumstances of the country, it may be necessary for the executive to detain a person who is tempering either with the public order or with the defense services of the country. In such case, we should not think that the exigency of the liberty of an individual should be above the interests of the state.

However, the provisions of the Constitution seem to be ambiguous and this ambiguity has been done away with some of the provisions mentioned in Article 22 (1), 22(5), 22 (6) of the Constitution of India.

However, in the case of preventive detention, it must be authorized by law and not at the will of the executive. It cannot extend beyond a period of 3 months. Every case of preventive detention must
be placed before an Advisory Board composed of Judges of the High Court or persons qualified to be Judges of the High Court. Thereafter, the case must be presented before the Advisory Board within 3 months. A continued detention after 3 months must be with the consent of the Advisory Board. The accused/detained person will be given opportunity to afford earliest opportunity to make a representation against his detention. Article 22 (7) provides exception to the above provisions. This Article mandates that:

When Parliament prescribes by law the circumstances under which a person may be kept in detention may be kept in detention beyond 3 months without the opinion of the advisory board. Parliament by law can also describe under the same law, the maximum period of detention. Preventive Detention means detention of a person without trial and conviction by a court, but merely on suspicion in the mind of an executive authority. The word “preventive” is used in Contradistinction to the word “Punitive”. Lord finally in Rex v. Halliday, said, “It is not punitive but precautionary measure”.

Preventive Detention differs from the ordinary or punitive detention both in respect of its purpose and its justification. The object of preventive detention is not to punish a man for having done something but to intercept him before he does it and to prevent him from doing it. No offence is proved nor any charge formulated. The justification of such detention is suspicion or reasonable probability of the impending commission of the prejudicial act and not criminal conviction which can only be warranted by legal evidence.

In A.K. Gopalan v. State of Madras, Patanjali Shastri, J. said: “This Sinister-looking law, so strangely out of place in a democratic constitution, which invests personal liberty with the sacrosanct of a FR,
and so incompatible with the promises of its preamble, is doubtless designed to prevent the abuse of freedom by anti-social and subversive elements which might imperil the national welfare of the infant republic”.  

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The provision for preventive detention is also found in other democratic countries like England and Canada, but only as a war-time, and not a peace-time measure, In India, the Constitution visualizes the possibility of a law of preventive detention. In spite of all the emphasis on individual liberty, it has been found necessary in India to resort to preventive detention during peace-time because of the unstable law and order situation in the country.  

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Clauses (4) to (7) of Article 22, relate to preventive detention. The subject of preventive detention is mentioned in the union list as well as in the concurrent list. Both the centers and the states can make their own laws, except that in the case of a conflict, it is the central law that will prevail. The center’s ambit is larger than that of the states, as the centre can have a preventive detention law for reasons connected with defenses, foreign affairs and security of India by virtue of entry 9 of List – I, in addition to security of a state, the maintenance of public order or of supplies and services essential to the community by virtue of Entry 3 of List – III.  

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The history of preventive detention can be traced back to the Bengal State Prisoners Regulation, 1818, but since 1950, the centre has been having preventive detention laws except for two brief gaps between January 1970 and May 1971 and then from March 1977 till September 1980. In September 1980, the president promulgated the National Security Ordinance, 1980, which ultimately became the National Security Act, 1980. In addition to that there are other central

and state laws which provide for preventive detention. At present, in addition to the NSA, 1980 the other central Legislation which provide for preventive detention are:


iii) Prevention of illicit traffic in Narcotic Drugs and Psychotropic Substances Act, 1988 and


v) POTA, 2002

3.4.1 Constitutional Safeguards Against Preventive Detention Laws

Though the Constitution has recognized the necessity of laws as to preventive detention, it has also provided safeguards to mitigate their harshness by placing fetters on legislative powers conferred on the legislature.219

1. Presumption of Innocence

Criminal proceedings which start from a presumption of guilt and put the onus to prove one’s innocence on the accused are inherently unfair. It is not by accident that virtually all enlightened judicial systems take the opposite approach, assuming that, in Blackstone’s famous words, “it is better that ten guilty persons escape than that one innocent suffer”. Today the presumption of innocence is explicitly recognized not only by the Article 11 (1) of the Universal Declaration of Human Rights but also by most constitutions and a plethora of international treaties. While its results may at times be hard for the public to stomach any encroachment upon this fundamental principle must be resisted.

2. Freedom from Self-Incrimination

In a fair judicial system no person must be forced to incriminate himself. This principle, which is enshrined in many constitutions and human rights treaties, must be understood broadly. Not only is it impermissible to torture the accused to obtain a confession. Every kind of undue pressure exercised to obtain a statement from an accused person who has expressed his will to remain silent must be deemed illegal. The same holds true of other unacceptable methods (e.g. administering of psychoactive substances) meant to induce the accused to testify against himself. Law enforcement authorities should be obliged to inform the accused of his right to remain silent upon first contact. It furthermore appears desirable that this right be extended to close family of the accused, who should not be forced to choose between their familial and their civic obligations.

3. **Right to a Hearing and Effective Remedy**

Whilst every accused person must enjoy a right to remain silent, some may want to speak out and tell their part of the story. No fair judicial system will ignore this wish to become an autonomous participant in the proceedings. In fact, a criminal case cannot be concluded before the accused has been granted a chance to make himself heard. This is why convictions in absentia are always problematic and, at least in cases where not even a lawyer was able to speak on the accused’s behalf, incompatible with the rule of law.

The accused should, furthermore, be allowed to ask for new and potentially exonerating evidence to be taken and considered by the authorities. At least during the trial-stage of a criminal proceeding this should correspond with the right to have this petition evaluated by a judge. A refusal to take the evidence must be justified in a reasoned manner.

The right to make oneself heard furthermore includes the right to raise objections to the behavior of courts and law enforcement authorities. If the accused is convinced that his rights have been violated, he must have
an effective opportunity to voice his complaint. If it is found valid the violation must be redressed in an appropriate manner.

4. **Swiftness of Justice**

Justice delayed is justice denied. While this statement holds true for most legal disputes it is of particular relevance to criminal proceedings. Living under the Damocles sword of a prison sentence takes a tremendous emotional toll of the accused. Every defense lawyer can attest to the harmful effects which months or years of existential uncertainty will have on clients. By the end of a lengthy trial the accused will often find herself out of a job, with a marriage in tatters or a once flourishing business ruined. Many suffer from depression or stress-related illnesses. Even an eventual acquittal can feel like a Pyrrhus victory under such circumstances.

What is worse sometimes prosecutors will actively exploit these effects to force a deal. They count on the fact that many individuals cannot withstand months of preliminary detention or that their businesses will not survive an extended trial with their assets “precautionally” frozen. If in this situation the accused is offered a speedy resolution in exchange for an admission of guilt it will feel like extortion rather than a choice. Practices of this kind can amount to duress and therefore need to be unequivocally condemned as prosecutorial misconduct.

The state has a responsibility to ensure a speedy process and avoid undue delays. As evidently swiftness of justice cannot come at the price of decreased thoroughness it requires that law enforcement authorities be appropriately funded and well staffed. Where delays are inevitable nonetheless appropriate mechanisms of compensation need to be found. Never should criminal proceedings amount to a punishment in themselves.

5. **Access to Counsel and Other Assistance**

Every defendant must be allowed access to a lawyer of his choosing at every stage of a criminal proceeding. Law enforcement failing to inform the accused of this right or deliberately obstructing its exercise must face consequences while statements obtained under such circumstances should
be deemed inadmissible. If the accused cannot afford to hire a lawyer legal aid must be granted to guarantee a fair representation of his interests. Furthermore, some accused persons are at a natural disadvantage when it comes to asserting their interests and adequately defending themselves. A blind person cannot read the charges against him, a foreigner may not be able to communicate with the authorities and a mentally disabled person will require extra help to understand what is happening during a criminal trial.

In these circumstances law enforcement authorities and courts have a duty to assist the accused person in any way possible to restore his autonomy regardless of financial means. Thus, a foreigner has a right to an interpreter and a hearing-impaired person must be equipped with a hearing aid or a sign language interpreter. This is a necessary precondition for a fair trial which does not condemn the accused to the role of a passive observer unable to defend for himself.

6. **Equal Fighting Chances**

   Even when the accused is assisted by counsel she will nearly always be in a weaker position than the public prosecutor, who not only has at his disposal an entire police force but is vested with far-reaching official powers. To mitigate this asymmetry between the state and the accused individual procedural rules must, at the very least, strive to level the playing field in some respects. Most importantly, the accused cannot be convicted on charges she was never informed of. Likewise she cannot be found guilty on the basis of evidence she does not know and did not have a chance to examine for herself.

   Closely connected to the aforementioned principle is the right to confront witnesses. The accused is entitled to know who is accusing her. She must also be given a chance to confront the accuser and challenge his
account. An accuser who remains in the shadows and can only be questioned by the prosecution is dubious and his statements can never be the basis for a criminal conviction. Moreover, law enforcement authorities need to document every investigative step they undertake. While hidden surveillance and other secretive measures may sometimes be deemed necessary, they too need to be recorded. Once the accused is indicted, she has a right to access this record and to learn what evidence the prosecution intends to rely on and how it was obtained. Even considerations of national security cannot justify a deviation from these principles. A criminal trial with unknown charges and secret evidence would constitute nothing sort of a nightmare.

7. Transparency

Criminals may hold their meetings behind closely guarded doors; a criminal court may not. In camera trials are incompatible with a liberal idea of justice. Some degree of transparency and public scrutiny is vital to insure that the rule of law is not perverted. The public and the media, while often driven by other motives, play an important role as watchdogs over the judicial system. They should be granted access to the courtroom and allowed to report freely and critically on the workings of the judicial machinery. Restrictions concerning media access and coverage will sometimes be necessary lest the trial become a spectacle. Their purpose, however, cannot be to shield the judiciary from the critical gaze of outsiders but only to allow the accused a modicum of privacy.

8. Proportionality of means

Not everything that can be done to convict a criminal must be done. 24/7 video surveillance of an individual’s living quarters only to catch a shoplifter is evidently excessive. So is pretrial detention without proper cause. Such disproportionate use of the state’s capabilities will inevitably prove corrosive to a free society. Liberals, in particular, should be wary of ever widening government surveillance and an increasingly reckless exploitation of the investigative toolkit in minor cases.
9. Impartiality and Non-Discrimination

Whether the accused is the Pope or a homeless person must not matter to the judicial system. Both should be prosecuted and tried according to the same rules and with the same degree of diligence. Whether a judge or police officer agrees with the lifestyle or political and religious convictions of an accused person likewise cannot influence their behavior. Any kind of discrimination on the basis of age, caste, ethnicity, gender, religion, nationality, employment or sexual orientation must be avoided. Least of all should personal connections influence the way an accused is treated. A judge or juror with a personal stake in the matter before her should have to recuse herself.

Furthermore, to ensure the impartiality of criminal proceedings all decision-makers involved should be shielded from undue outside influence. Judges in particular must enjoy a largely independent position and should not take order from politicians.

Economic factors too play an important role. If police or judges earn too little to support their family they will be very tempted to accept bribes and carry favors for the wealthy. Underpaid officials are the number one cause for widespread corruption. Finally, if the accused has reason to fear that inappropriate motives are influencing the course of the investigation he needs to be given a chance to voice his concerns and have an independent body make a determination as to their substance.

10. Dignity

All aforementioned principles serve to protect the dignity of the accused as a human being. He must never be reduced to a mere object whose fate is being negotiated but retain the chance to be an active participant in the proceedings. Regardless of the charges in question, the accused individual’s dignity places insurmountable restrictions on what law enforcement and the courts may do. Any form of torture, abuse and cruelty as a measure of interrogation is absolutely impermissible. The accused is to be treated with respect by all agents of the state and protected from unnecessary humiliation and degradation. Shaming, applied in some
states as a penalty, can never be justified as part of the investigative process. Humiliating public confessions, whether as a result of coercion or subtle pressure, have no place in a liberal judicial system. Using one accused person as a means to deter others or to “make a statement” is incompatible with all acceptable notions of dignity and equality.

The dignity of the individual is non-negotiable regardless of the circumstances. Failure to recognize it disqualifies a person from serving in law enforcement and should itself be deemed a criminal offence. There can be no impunity for those who violate essential human rights in the name of law enforcement or justice.

3.5 PROVISIONS UNDER CrPC

The framers of the Constitution of India had fresh memories of a govt. that accused people of crimes they did not commit and then convicted them in unfair trials. Consequently, they went to great lengths to assure that the new govt. in discussing the safeguards granted to an accused person. A written constitution embodies the important rules about the framework of govt. and pronouncement about the rights and duties of citizens and non-citizens of the country. The Constitution of India is not a mere collection of pious platitudes. It is the Supreme law of the land embodying three basic concepts, one of them being that the individual has certain fundamental rights upon which not even the power of the State may encroach. For the purposes of this research work, the emphasis would be only upon the basis concept of fundamental rights of the accused person. This is set out in Part III of the Constitution of India. These provisions contained in Part III are meant to protect individual rights by ensuring that the power of the State is not exercised erratically or arbitrarily.

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The accused has certain fundamental rights under the Constitution of India. They are provided under Article 22, which provides for protection against arrest and detention. (1) no person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by a legal practitioner of his choice. (2) every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of 24 hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate.
Another important aspect is that of ‘double jeopardy’, which prevents an accused person from being tried again on the same/similar charges and on the same facts, following a valid acquittal or conviction.\textsuperscript{221} If the issue is raised, evidence will be placed before the court, which will normally rule as a preliminary matter whether the plea is substantiated. If it is projected, trial will be prevented from proceeding. In some countries, such as Canada, Mexico and the United States, the guarantee against being put twice in jeopardy is a constitutional right. In other countries, the protection is afforded by statutory laws. In common law countries, the accused may enter into a preemptory plea of \textit{autrefois acquit} or \textit{autrefois convict},\textsuperscript{222} with the same effect. This doctrine has been originated in Roman Law, in the principle \textit{non bis in idem}, which means an issue once decided must not be raised again.

Another aspect of importance is the notion of the principle of natural justice, which embodies two essential rights, namely; the right to be heard and the right against biasness. These rights are entrenched under Article 21 of the Constitution of India which provides that no person shall be deprived of his life or personal liberty save in accordance with law and all the persons are equal before the law and entitled to equal protection of laws. These two principles in reality form the very basis of our criminal justice system. Implicit in these principles is the right to due process, i.e., right to fair trial which is the paramount consideration in any criminal justice system. In order for this right of fair trial to be effective and operational in the context of

\begin{itemize}
\item Article 20 (2), Constitution of India
\item Article 14 (7), International Covenant on Civil and Political Rights (ICCPR) provides that no one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.
\item Even the \textit{European Convention on Human Rights} under Article 4 provides that no one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he or she has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.
\end{itemize}
our criminal justice system, certain basic and fundamental rights must be accorded to the accused persons.

What then are these fundamental rights as per the Constitution of India, being the supreme law of the land, has expressly laid down several rights that must be made available to an accused person at the pre-trial and trial stages.

These are:

1) right to be presumed innocent until proven guilty;
2) the privilege against self-incrimination;
3) the right to a speedy trial;
4) right to disclosure of documents;
5) right to be tried on evidence not obtained by violation of fundamental rights;
6) right to be informed of the grounds of arrest;
7) right to counsel;
8) right to free legal aid;
9) right not to be subjected to retrospective punishments (ex post facto);
10) right against double jeopardy;
11) right to production before the Magistrate etc.

The other legislation which safeguards the rights of the accused is the Criminal Procedure Code, 1973 (CrPC). CrPC is the procedural law providing the machinery for punishment of offenders under the substantive criminal law, be it Indian Penal Code or any other penal statute. The CrPC contains elaborate details about the procedure to be followed in every investigation, inquiry and trial, for every offence under the IPC or under any other law. It divides the procedure to be followed for the administration of criminal justice system in namely, investigation, inquiry and trial. Investigation is a preliminary stage conducted by the police and usually starts after the recording of an FIR in the police station. If the officer-in-charge of the police station
suspects the commission of an offence from the statement of FIR or when the magistrate directs or otherwise, the officer or any subordinate officer is duty bound to proceed to the spot to investigate facts and circumstances of the case and if necessary, takes measures for the discovery and arrest of the offender.

Investigation primarily consists of ascertaining facts and circumstances of the case. It includes all the efforts of a police officer for collection of evidence, proceeding to the spot, ascertaining facts and circumstances, discovery and arrest of the suspected offender, collection of evidence relating to the commission of offence, which may consist of the examination of various persons including the accused and taking of their statements in writing and the search of places or seizure of things considered necessary for the investigation and to be produced at the trial etc.

Section 303 of Criminal Procedure Code deals with the provisions relating to right of person against whom proceedings are instituted to be defended, it provides that any person accused of an offence before a criminal court, or against whom proceedings are instituted under this court, may of right be defended by a pleader of his choice. The right begins from the moment of arrest i.e. pre-trial stage\textsuperscript{223}. The arrestee could also have consultation with his friends or relatives. The consultation with the lawyer may be in the presence of police officer but not within his hearing.\textsuperscript{224}

3.5.1 Person arrested to be taken before the Magistrate

Article 22 (2) of the Constitution provides that an arrested person must be taken to the Magistrate within 24 hours of arrest.

\textsuperscript{223} Llewelyn, Evans Re. ILR 50 Bom 741: 27 Cri LJ 1169, Moti Bai v. State, AIR 1954 Raj 241.

\textsuperscript{224} Sundar Singh v. Emperor 32 Cri LJ 339.
Similar provision has been incorporated under Section 56 of Criminal Procedure Code. A police officer making an arrest without warrant shall, without unnecessary delay and subject to the provisions herein contained as to bail, take or send the person arrested before a Magistrate having jurisdiction in the case, or before the officer in charge of a police station.

3.5.2 Person Arrested not to be detained more than twenty-four hours

Section 57 of Criminal Procedure Code provides that no police officer shall detain in custody a person arrested without warrant for a longer period than under all the circumstances of the case is reasonable, and such period shall not, in the absence of a special order of a Magistrate under section 167, exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate Court. It may also be noted that the right has been further strengthened by its incorporation in the Constitution as a fundamental right. Article 22(2) of the Constitution provides:

“Every person who is arrested and detained in custody shall be produced before the nearest Magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the Magistrate and no such person shall be detained in custody beyond the said period without the authority of a Magistrate.”

In case of arrest under a warrant the proviso to Section 76 of the Criminal Procedure Code provides a similar rule in substance which reads as below:

The police officer or other person executing a warrant of arrest shall (subject to the provisions
of section 71 as to security) without unnecessary delay brings the person arrested before the Court before which he is required by law to produce such person; Provided that such delay shall not, in any case, exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate’s Court.

The right to be brought before a Magistrate within a period of not more than 24 hours of arrest has been created with aims:

(i) to prevent arrest and detention for the purpose of extracting confessions, or as a means of compelling people to give information;

(ii) to prevent police stations being used as though they were prisons - a purpose for which they are unsuitable;

(iii) to afford an early recourse to a judicial officer independent of the police on all questions of bail or discharge.\(^{225}\) The precautions laid down in Section 57 seem to be designed to secure that within not more than 24 hours some magistrate shall have watch of what is going on and some knowledge of the nature of the charge against the accused, however incomplete the information may be.\(^{226}\)

This healthy provision contained in section 57 of Criminal Procedure Code enables the Magistrates to keep a check over the police investigation and it is necessary that the Magistrate should try to enforce this requirement and where it found disobeyed, come


down heavily upon the police. If a police officer fails to produce an arrested person before a magistrate within 24 hours of the arrest, he shall be held guilty of wrongful detention.

3.5.3 No Right to Police officer to cause death of the accused

Sub-section (3) of Section 46 Criminal Procedure Code enjoins in clear terms that though police officer/any other person making arrest can use all necessary means for the purpose but they have not been given any right to cause the death of a person who is not accused of an offence punishable with death or imprisonment for life. Again Section 49 Criminal Procedure Code provides that ‘the person arrested shall not be subjected to more restraint than is necessary to prevent his escape’. The case law produced by the courts in response to the demand for protecting women has made the Parliament to enact sub-section (4) to Section 46 of Criminal Procedure Code laying down that no woman shall be arrested after sunset and before sunrise, and where such exceptional circumstances exist, the woman police officer shall, by making a written report, obtain the prior permission of the judicial Magistrate of first class within whose jurisdiction the offence is committed or arrest is to be made.

3.5.4 Information of arrest to a nominated person

The rules emerging from decisions such as Joginder Singh v. State of U.P. and D.K. Basu v. State of West Bengal have been

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228 Sharifbai v. Abdul Razak AIR 1961 Bom 42.
233 (1997) 1 SCC 416.
enacted in Section 50-A\textsuperscript{234}. Sub Section (1) of Section 50-A of Criminal Procedure Code provides every police officer or other person making any arrest under this code shall forthwith 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 information. Sub Section (2) of Section 50-A of Criminal Procedure Code provides the Police Officer shall inform the arrested person for the purpose of giving such information of his right under Sub Section (1) as soon as he is brought to police station. Sub Section (3) of Section 50-A of Criminal Procedure Code provides an entry of the fact as to who has been informed of the arrest of such person shall be in a book to be kept in the police station in such form as may be prescribed in this behalf by the State Government. Sub Section (4) of Section 50-A of Criminal Procedure Code provides that it shall be the duty of Magistrate before whom such arrested person is proceed, to satisfy himself that the requirement of sub-section (2) and Sub-Section (3) have been complied with in respect of such arrested person.

These rights are inherent in Article 21 and 22 of the Constitution and required to be recognized and scrupulously protected.

3.5.5 Right to be released on bail in bailable offences

Section 50(2) of Criminal Procedure Code provides that where a police officer arrests without warrant any person other than a person accused of a non-bailable offence, he shall inform the person arrested that he is entitled to be released on bail and that he may arrange for sureties on his behalf. This will certainly be of help to persons who may not know about their rights to be released on bail in case of bailable offences.

\textsuperscript{234} Section 50-A Inserted by Act 25 of 2005 effective from 23-6-2006.
3.5.6 **Right to receive the copy of the receipt after search**

Power to search under Section 51 of Criminal Procedure Code is available only if the arrested person is not released on bail. After search all the articles other than necessary wearing apparel found upon the arrested person are to be seized, and it has been made obligatory to give to the arrested person a receipt showing the articles taken in possession by the police. This would ensure that the articles seized are properly accounted for. In case the arrested person is a woman the search can be made only by a female with strict regard to decency.

3.5.7 **Right of medical examination of arrested person**

Section 54 Criminal Procedure Code gives the accused the right to have himself medically examined to enable him to defend and protect himself properly. It is considered desirable and necessary “that a person who is arrested should be given the right to have his body examined by a medical officer when he is produced before a Magistrate or at any time when he is under custody, with a view to enabling him to establish that the offence with which he is charged was not committed by him or that he was subjected to physical injury. According to the Supreme Court, the arrested accused person must be informed by the Magistrate about his right to be medically examined in terms of Section 54. In case of the examination taking place at the instance of the accused under sub-section (1) a copy shall be given to him.

3.5.8 **Right to free legal aid**

The ‘right to counsel’ would remain empty if the accused due to his poverty or indigent conditions has no means to engage

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236 See Sections 53-A and 54(2) inserted by Act 25 of 2005 brought into force with effect from 23-6-2006.
a counsel for his defence. The state is under a constitutional mandate (implicit in Article 21 of the constitution, explicit in Article 39-A of the constitution—a directive principle) to provide free legal aid to an indigent accused person. Section 304 of the Code of Criminal Procedure also provides such a right to the accused. Section 304 of Criminal Procedure Code deals with the provisions relating to legal aid to accused at State expenses in certain cases. Section 304(1) provides that where, in a trial before the Court of Session, the accused is not represented by a pleader, and where it appears to the Court that the accused has not sufficient means to engage a pleader, the Court shall assign a pleader for his defence at the expense of the State. A failure to inform the accused of this right and non-compliance with this requirement would vitiate the trial as held in *Sukhidas v. Union Territory of Arunachal Pradesh*.  

In *Khatri (II) v. State of Bihar*, the Supreme Court has held that the State is under a constitutional mandate to provide free legal aid to an indigent accused person, and that their constitutional obligation to provide legal aid does not arise only when the trial commences but also when the accused is for the first time produced before the Magistrate as also when he is remanded from time to time. However, this constitutional right of an indigent accused to get free legal aid may prove to be illusory unless he is produced before promptly and duly informed about it by the court when he is produced before it. The Supreme Court has therefore cast a duty on all Magistrate and courts to inform the indigent accused about his right to get free legal aid.

In 1987, Legal Services Authorities Act was enacted to give

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a statutory base to legal aid programmes throughout the country on a uniform pattern. This Act was finally enforced on 9th of November, 1995 after certain amendments were introduced therein by the Amendment Act of 1994. The National Legal Services Authority (NALSA) has been constituted under the Legal Services Authorities Act, 1987 to provide free Legal Services to the weaker sections of the society and to organize Lok Adalats for amicable settlement of disputes. In every State, State Legal Services Authority has been constituted to give effect to the policies and directions of the NALSA and to give free legal services to the people and conduct Lok Adalats in the State. The State Legal Services Authority is headed by Hon’ble the Chief Justice of the respective High Court who is the Patron-in-Chief of the State Legal Services Authority. In every District, District Legal Services Authority has been constituted to implement legal services programmes in the district. The District Legal Services Authority is situated in the District Courts Complex in every District and chaired by the District Judge of the respective district.

These authorities provides legal aid to the needy persons including accused, convicts and victims of criminal cases.

3.5.9 Right of accused to know of the accusation

One basic requirement of a fair trial in criminal cases is to give precise information to the accused as to the acquisition against him. In a criminal trial charge is the foundation. Section 218 of Criminal Procedure Code give the basic rule that for every distinct offence there shall be a separate charge. Fair trial requires that the accused person is given adequate opportunity to defend himself. Such opportunity will have little meaning, or such an opportunity will in substance be the very negation of it, if the accused is not informed of the accusations against him. The Code therefore provides in unambiguous terms that when an
accused person is brought before the court for trial, the particulars of the offence of which he is accused shall be stated to him. In case of serious offences, the court is required to frame in writing a formal charge and then to read and explain the charge to the accused person. Details provisions have been made in the Code in Sections 211-224 of Criminal Procedure Code regarding the form of charge, and the joinder of charges.

3.5.10 Right to be tried in presence of accused

The personal presence of the accused throughout his trial would enable him to understand properly the prosecution case as it is unfolded in the court. This would facilitate in the making of the preparations for his defence. A criminal trial in the absence of the accused is unthinkable. A trial and a decision behind the neck of the accused person is not contemplated by the Code, though no specific provision to that effect is found therein. The requirement of the presence of the accused during his trial can be implied from the provisions which allow the court to dispense with the personal attendance of the accused person under certain circumstances. Section 273 of Criminal Procedure Code requires that the evidence is to be taken in the presence of the accused person; however, the section allows the same to be taken in the presence of the accused’s pleader if the personal attendance of the accused person is dispensed with. Fair trial requires that the particulars of the offence have to be explained to the accused person and that the trial is to take place in his presence. Therefore, as a logical corollary, such a trial should also require the evidence in the trial to be taken in the presence of the accused person. Section 273 attempts to achieve this purpose. The section makes it imperative that all the evidence must be taken in the

239 Ss. 228, 240, 246, 251 of Cr.P.C.
240 Ss. 228, 240, 246 of Cr.P.C.
presence of the accused. Failure to do so would vitiate the trial, and the fact that no objection was taken by the accused is immaterial.\footnote{Ram Singh v. Crown, (1951) 52 Cri. LJ 99, 102: AIR 1951 Punj 178, Bigan Singh v. King-Emperor, (1927) ILR 6 Pat 691: (1928) 29 Cri LJ 260; Ram Shankar v. State of Bihar, 1975 Cri LJ 1402, 1403 (Pat).}

This rule is of course subject to certain exceptions made by the provisions of the Code of Criminal Procedure, viz. Sections 205, 293, 299, 317.

Evidence given by witnesses may become more reliable if given on oath and tested by cross-examination. A criminal trial which denies the accused person the right to cross-examine prosecution witnesses is based on weak foundation, and cannot be considered as a fair trial.\footnote{Sukhra v. State of Rajasthan, AIR 1967 Raj. 267}

Though the burden of proving the guilt is entirely on the prosecution and though the law does not require the accused to lead evidence to prove his innocence, yet a criminal trial in which the accused is not permitted to give evidence to disprove the prosecution case, or to prove any special defence available to him, cannot be any standard to be considered as just and fair. The refusal without any legal justification by a Magistrate to issue process to witnesses named by the accused person was held enough to vitiate the trial.\footnote{Habeeb Mohd. v. State of Hyderabad, AIR 1954 SC 51: 1954 Cri LJ 338, 348 T.N., Janardhanan Pillai v. State, 1992 Cri LJ 436 (Ker.); Sredhar Pillay v. P.J., Alexander, 1992 Cri LJ 3433 (Ker.)}

Though the imperative rule contained in the section confers a right on the accused to be present in the course of the trial, it presupposes that the accused accepts it and does not render its fulfillment and impossibility. This obligation or the right is not so absolute in character that its requirement cannot be dispensed with even in a case where the accused by his own conduct
renders it impossible to comply with its requirements. The right created by the section is further supplemented by Section 278 of Criminal Procedure Code. It, *inter-alia*, provides that wherever the law requires the evidence of a witness to be read over to him after its completion, the reading shall be done in the presence of the accused, or of his pleader if the accused appears by pleader. If any evidence is given in a language not understood by the accused person, the bare compliance with Section 273 of Criminal Procedure Code will not serve its purpose unless the evidence is interpreted to the accused in a language understood by him.

3.5.11 Interpretation of evidence to accused or his pleader

Section 279 of Criminal Procedure Code provides that whenever any evidence is given in a language not understood by the accused, and he is present in Court in person, it shall be interpreted to him in open Court in a language understood by him. If he appears by pleader and the evidence is given in a language other than the language of the Court, and not understood by the pleader, it shall be interpreted to such pleader in that language. When documents are put for the purpose of formal proof, it shall be in the discretion of the Court to interpret as much thereof as appears necessary. However, non-compliance with Section 279(1) of Criminal Procedure Code will be considered as more irregularity not vitiating the trial if there was no prejudice or injustice cause to the accused person.

3.5.12 Rights of the accused where accused does not understand proceedings

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244 State v. Ananta Singh , 1972 Cri LJ 1327, 1331 (Cal).

An accused person, though not of unsound mind, may be deaf and dumb, may be foreigner not knowing the language of the country and no interpreter is available, and if such accused is unable to understand or can not be made to understand the proceedings, there is a real difficulty in giving effect to Section 273 of Criminal Procedure Code in its proper spirit. Section 318 of Criminal Procedure Code attempts to deal with such cases. It provides procedure where accused does not understand proceedings. Section 318 of Criminal Procedure Code provides that if the accused, though not of unsound mind, cannot be made to understand the proceedings, the Court may proceed with the inquiry or trial, and in the case of a Court other than a High Court if such proceedings result in a conviction, the proceedings shall be forwarded to the High Court with a report of the circumstances of the case, and the High Court shall pass thereon such order as it thinks fit.

3.5.13 Right to get copies of police report and other documents

(a) **Where the proceedings is instituted on a police report**

Where a police officer investigating the case finds it convenient to do so, he may furnish to the accused copies of all or any of the documents referred to in Section 173(5) of the Criminal Procedure Code. According to Section 207 of Criminal Procedure Code the magistrate is under an imperative duty to furnish to the accused, free of cost, copies of statements made to the police and of other documents to be relied upon by the prosecution. The object of furnishing the accused person with copies of the statements and documents as mentioned above is to put him on notice of what he has to meet at the time of the 207

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246 S. 173 (1), Cr.P.C
inquiry or trial and to prepare himself for his defence. The right conferred on the accused is confined to the documents enlisted in the section and does not extend to other documents. From the language of Section 207, it appears that the right to have copies of statements recorded by the police is only in respect of statements recorded in the same case, and not in respect of statements recorded in any other case.

At the commencement of the trial in a warrant case it is the duty of the magistrate conducting the trial to satisfy himself that he has complied with the provisions of Section 207. In a summons case instituted on a police report no such duty has been specifically cast on the magistrate conducting the trial. However free copies have to be supplied to the accused in such cases by the magistrate in view of the imperative duty created by Section 207. Similarly in a case exclusively triable by a court of session such a duty is not imposed by any express provision in the Code on the court of session. However if such a duty is implied in a summons case, a fortiori, it is very much implied in a case exclusively triable by a Court of Session.

(b) Where the proceeding is instituted otherwise than on a police report

In cases where cognizance of the offence has been taken otherwise than on a police report, the case is not ordinarily investigated by the police and naturally there are no statements recorded by the police. Therefore the valuable right given to the accused by Section 207

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249 Section 238 Cr.P.C.

Criminal Procedure Code regarding the supply of copies would not be available in such cases. In the absence of any preliminary inquiry preceding trial, and when no police record is available to the accused person before his trial, it might cause considerable hardship to the accused to prepare himself for his defence, particularly when the offence alleged is a serious one exclusively triable by the court of session. Section 208 of Criminal Procedure Code tried to remove this hardship and enables the accused to know the case made against him and to prepare for his defence. Section 207 and 208 of Criminal Procedure Code deals with supply to the accused of copy of police report and other documents and supply of copies of statements and documents to accused in other cases triable by Court of Session respectively.

According to Section 238 of Criminal Procedure Code at the time commencement of the trial in a warrant case it is the duty of the Magistrate to satisfy himself that he has complied with the provisions of Section 207 of Criminal Procedure Code. However in a summons case instituted on a police report no such duty has been specifically cast on the Magistrate conducting the trial. However free copies have to be supplied to the accused in such cases by the Magistrate in view of the imperative duty created by Section 207 of Criminal Procedure Code. If the copies of the statements etc. are not supplied to the accused person as required by Section 207 of Criminal Procedure Code. It is undoubtedly a serious irregularity, however this irregularity in itself will not vitiate the trial. It will have to see whether the omission to supply copies has in fact occasioned a prejudice to the accused person in his defence. It is found in positive, the conviction of the accused person must be set aside, and a fair retrial after furnishing to the accused all the copies to which he is
entitled must be ordered.\textsuperscript{251}

3.5.14 Right to cross-examine prosecution witnesses and to produce defence evidence

Evidence given by witnesses may become more reliable if given on oath and tested by cross-examination. A criminal trial which denies the accused person the right to cross-examine prosecution witnesses is based on weak foundation, and cannot be considered as a fair trial.\textsuperscript{252} It is mandatory that every accused must have assistance of counsel during the time of examination of prosecution witnesses. In \textit{Mohd. Hussain @ Julfikare Ali v. The State (Gouv. of NCT) Delhi}\textsuperscript{253}, it was held that right to have counsel at the cost of state where accused is unable to engage a counsel is part of fair trial. The right of a person charged with crime to have the services of a lawyer is fundamental and essential to fair trial. The right to cross-examine a witness apart from being a natural right is statutory right. In \textit{Mohd. Sukur Ali v. State of Assam}\textsuperscript{254}, it was held that a criminal case should not be decided against accused in the absence of the Counsel. An accused in criminal case should not suffer for the fault of his counsel and in such a situation appoint another counsel as amicus curiae to defend the accused. In \textit{Man Singh & Anr v. State of M.P.}\textsuperscript{255}, it was held that Lawyers in criminal courts are necessities, not luxuries. For an accused lawyer's service is indispensable in all circumstances.

A lawyer is also duty bound to accept the case of all types of accused. In \textit{A.S. Mohammed Rafi v. State of Tamil Nadu rep. by

\textsuperscript{251} S. 465 Cr.P.C.
\textsuperscript{253} AIR 2012 SC 750.
\textsuperscript{254} AIR 2011 SC 1222.
\textsuperscript{255} 8 (4) RCR (Criminal) 55.
Home Dept. and others\textsuperscript{256}, it was held that Professional ethics requires that a lawyer can not refuse a brief, provided a client is willing to pay his fee and lawyer is not otherwise engaged. Bar can not pass a resolution that none of the lawyer shall appear for a particular person whatsoever heinous crime he has committed. Chapter II of the rules by Bar council of India states about "standards of Professional conduct and etiquette."

An advocate is bound to accept any brief in the Court or tribunal or before any of the authorities in or before which he proposed to practice at a fee consistent with his standing at the Bar and the nature of the case. Special circumstances may justify his refusal to accept a particular brief.

Though the burden of proving the guilt is entirely on the prosecution and though the law does not require the accused to lead evidence to prove his innocence, yet a criminal trial in which the accused is not permitted to give evidence to disprove the prosecution case, or to prove any special defence available to him, cannot be any standard to be considered as just and fair. The refusal without any legal justification by a Magistrate to issue process to witnesses named by the accused person was held enough to vitiate the trial.\textsuperscript{257}

3.5.15 Court’s power and duty to examine the accused person

With a view to give an opportunity to the accused person to explain the circumstances appearing in evidence against him, Section 313 of Criminal Procedure Code provides for the examination of the accused by the court. This if of immense help to the accused person, particularly when he is undefended. Most of the accused persons are poor, uneducated and helpless. As observed by Stephen, an ignorant, uneducated man has the

\textsuperscript{256} AIR 2011 SC 308.
greatest possible difficulty in collecting his ideas, and seeing the bearing of facts alleged. He is utterly unaccustomed to sustain attention or systematic thought and the criminal trial proceedings which to an experienced person appear plain and simple, must be passing before the eyes and mind of the accused like a dream which he cannot grasp. Under these circumstances the importance of Section 313 is self-evident; it requires the courts to question the accused properly and fairly so that it is brought home to the accused in clear words the exact case that the accused will have to meet, and thereby an opportunity is given to the accused to explain any such point.258

3.5.16 Accused person as a competent witness

According to provisions of Section 315 of Criminal Procedure Code, the accused can be a competent witness for defence and can give evidence in disproof of the charges made against him or against his co-accused. He may give evidence on oath in disproof of the charges made against him or any person charged together with him at the same trial but he shall not be called as a witness except on his own request in writing and his failure to give evidence shall not be made the subject of any comment by any of the parties or the Court or give rise to any presumption against himself or any person charged together with him at the same trial.

3.5.17 Right to speedy trial

Justice delayed is justice denied. This is all the more true in a criminal trial where the accused is not released on bail during the pendency of the trial and trial is inordinately delayed. However, the code does not in so many words confer any such right on the accused to have his case decided expeditiously.

Section 437(6) of Criminal Procedure Code provides that if the accused is in detention and the trial is not completed within 60 days from the first date fixed for hearing he shall be released on bail. But this only mitigates the hardship of the accused person but does not give him speedy trial and secondly this rule is applicable only in case of proceedings before a Magistrate. The code has given a more positive direction to courts when it says.

In every inquiry or trial the proceedings shall be held as expeditiously as possible, and in particular, when the examination of witnesses 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. A criminal trial which drags on for unreasonably long time is not a fair trial. The court may drop proceedings on account of long delay even in case where the delay was caused due to malafide moves of the accused. But in such a case the court may make the accused to suffer exemplary costs Section 309(1) of Criminal Procedure Code gives directions to the courts with a view to have speedy trials and quick disposals. The right of the accused in this context has been recognized but the real problem is how to make it a reality in actual practice. The provisions with regard to limitation help the accused to certain extent.

In Hussainara Khatoon (IV) V. State of Bihar, the Supreme Court considered the problem in all its seriousness and declared that speedy trial is an essential ingredient of 'reasonable, fair and just' procedure guaranteed by Article 21 and that it is the constitutional obligation of the state of devise such a procedure as would ensure speedy trial to accused. The State

\[\text{Section 309(1) Cr.P.C.}\]

\[\text{AIR 1995 SC 366}\]
cannot avoid its constitutional obligation to provide speedy trial to the accused by pleading financial or administrative inability. The State is under a constitutional mandate to ensure speedy trial and whatever is necessary for this purpose has to be done by the State. It is also the constitutional obligation of this court, as the guardian of the fundamental rights of the people, as a sentinel on the qui vive, to enforce the fundamental right of the accused to speedy trial by issuing necessary directions to the State.\textsuperscript{261}

The spirit underlying these observations have been consistently rekindled by the Supreme Court in several cases.\textsuperscript{262} This has again been expressed in \textit{Raj Deo Sharma (II) v. State of Bihar}\textsuperscript{263} wherein the court ordered to close the prosecution cases, if the trial had been delayed beyond a certain period in specified cases involving serious offences.

The right to speedy trial came to receive examination in the Supreme Court in \textit{Motilal Saraf v. State of J&K}.\textsuperscript{264} Dismissing a fresh complaint made after 26 years of an earlier complaint the Supreme Court explained the meaning and relevance of speedy trial right thus:

The concept of speedy trial is read into Article 21 as an essential part of the fundamental right to life and liberty guaranteed and preserved under our Constitution. The right to speedy trial begins with actual restraint imposed by arrest and consequent incarceration, and continues at all stages, namely, the stage of investigation, inquiry, trial, appeal and revision so that any possible prejudice that may result from impressible and

\begin{footnotesize}
\begin{enumerate}
\item (1998) 7 SCC 507; 1998 SCC(Cri) 1692
\item (2007) 1 SCC (Cri) 180
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avoidable delay from the time of the commission of the offence will if consummates into a finality, can be averted.  

3.5.18 Compensation for wrongful arrest

Section 358 Criminal Procedure Code empowers the court to order a person to pay compensation to another person for causing a police officer to arrest such other person wrongfully. Usually it is the police officer who investigates and makes the arrest and the complainant, if at all can be considered to have a nexus with the arrest, it is rather indirect or remote. For applying Section 358 some direct and proximate nexus between the complainant and the arrest is required. It has been held that there should be something to indicate that the informant caused the arrest of the accused without any sufficient grounds. The Section does not make any express provision for giving an opportunity to the complainant or other concerned person to show that there was sufficient ground for causing the arrest to be made or to show cause as to why an order to pay compensation under this section should not be passed against him. However, looking to the consequences which are likely to follow from the order of payment of compensation, the principles of natural justice would require that such an opportunity should be given to the complainant or other concerned person.

3.5.19 The Right of Appeal

The Supreme Court has observed: “One component of fair procedure is natural justice. Generally speaking and subject to just exceptions, at least a single right of appeal on facts, where criminal conviction is fraught with loss of liberty, is basic to civilized jurisprudence. It is integral to fair procedure, natural justice and normative universality save in special cases like the

\[\text{Ibid}\]
original tribunal being a high bench sitting on a collegiate basis. In short, a first appeal as provided in the Criminal Procedure Code, manifests this value upheld in Article 21.”

Appeal is one of the two important review procedures. An appeal is a complaint to a superior court of an injustice done or error committed by an inferior one, whose judgment or decision the court above is called upon to correct or reverse. An appeal is a creature of statute and there can be no inherent right of appeal from any judgment or determination unless an appeal is expressly provided for by the law itself.

3.6 ARTICLE 22: SAFEGUARDS AGAINST ARBITRARY ARREST AND DETENTION

The Article provides those procedural requirements which are inevitable while depriving a person of his right to life and personal liberty, provided by Article 21.

Article 22 reads as follows:

“Protection against arrest and detention in certain cases:

1. No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest, nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice.

2. Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate.

3. Nothing in clauses (1) and (2) shall apply –

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a. To any person who for the time being is an enemy alien; or

b. To any person who is arrested or detained under any law providing for preventive detention.  

4. No law providing for preventive detention shall authorise the detention of a person for a longer period than three months unless-

a. An Advisory Board consisting of persons who are, or have been, or are qualified to be appointed as, Judges of a High Court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention:

Provided that nothing in this sub-clause shall authorize the detention of any person beyond the maximum period prescribed by any law made by Parliament under sub-clause (a) and (b) of clause (7); or

b. Such person is detained in accordance with the provisions of any law made by Parliament under sub-clauses (a) and (b) of clause (7).

5. When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the ground on which the order has been made and shall afford him the earliest opportunity of making a representation against the order.

6. Nothing in clause (5) shall require the authority making any such order as is referred to in that clause to disclose facts which such authority considers to be against the public interest to disclose.  

7. Parliament, may be law prescribe –

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a. The circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an Advisory Board in accordance with the provisions of sub-clause (a) of clause (4);

b. The maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention; and

c. The procedure to be followed by any Advisory Board in an inquiry under sub-clause (a) and clause (4)

It these procedural requirements are not coupled with, it would then be deprivation of personal liberty which is not in accordance with the procedure established by law.270"

Thus Article 22 prescribes the minimum procedural requirements that must be included in any law enacted by the legislature in accordance with which a person may be deprived of his life and personal liberty.271 In Maneka Gandhi v. U.O.I.272, 1978, the court held, that, a law relating to preventive detention, must now satisfy not only the requirements of Article 22, but also the requirements of Article 21, of the Constitution, i.e. the procedure prescribed under the preventive detention law must be reasonable, just and fair, under Article 14, 19 and 21 of the Constitution273.

Article 22 deals with two different matters:-

Protection to persons arrested under the ordinary law of crimes and; Persons detained under the law of “preventive detention”.

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272 AIR 1978 SC 597.
Cl (1) and (2) of Article 22 deals with detention under the ordinary law of crimes and lay down the procedures which have to be followed when a man is arrested.

Clause (3), (4), (5), (6) and (7), deal with persons detained under a preventive detention law and lays down the procedure and safeguard to be adopted when a person is detained under that law.\(^{274}\)

Article 22(1) and (2) (Rights of Arrested Persons)

Clauses (1) and (2) of Article 22 ensure four safeguards as rights, for a person who is arrested viz.

1. *He shall not be detained in custody without being informed, as soon as may be, of grounds of his arrest.*
   
   *If information is delayed, there must be some reasonable ground justified by the circumstances.*

2. *He shall have the right to consult and to be represented by a lawyer of his own choice.*

3. *Right of the person arrested to be produced before a magistrate within 24 hrs of his arrest.*

4. *No such person is to be detained in custody beyond the said period, without the authority of a Magistrate.*\(^ {275}\)

(These safeguards do not, however, apply to an enemy alien or a person detained under a law of preventive detention.)

3.6.1 The right to be informed of the grounds of arrest

The requirement of communicating the grounds of arrest to the person arrested is to enable him to prepare his defence and to move the court for bail, or writ of habeas corpus. Article 22 directs the arresting authorities to disclose the grounds of arrest of a person immediately. The ground to be given to the arrested person should be intelligible.

The two requirements of Cl (1) of Article 22 are meant to provide the earliest opportunity to the arrested person to remove any

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\(^{275}\) Ibid., 258
mistake, misapprehension, or misunderstanding in the mind of the arresting authority and also to know exactly what the accusation against him is, so that he can exercise the second right, namely and to defend himself.\textsuperscript{276}

In \textit{Joginder Kumar v. State of U.P.}\textsuperscript{277} 1994, SC, the SC has laid down guidelines, governing arrest of a person during the investigation. This is intended to strike a balance between the powers of police, on one hand and the protection of human rights of citizens from oppression and injustice at the hands of law enforcing agencies.

The Court has laid down the following guidelines to be followed in making arrest of a person:

\textbf{i) An arrested person being held in custody is entitled, if he so requests, to have one friend, relative or other person who is known to him or is likely to take an interest in his welfare told, as far as practicable, that he has been arrested and where he is being detained.}

\textbf{ii) Police officer shall inform the arrested person when he is brought to Police Station, of this right.}

\textbf{iii) An entry shall be required to be made in the police diary as to who was informed of the arrest.}

These protections flow from Article 21 and 22 (a) of the Constitution and must be enforced strictly. The Court directed that is shall be the duty of the magistrate, before whom the arrested person is produced to satisfy himself that these requirements have been complied with.\textsuperscript{278}

\textbf{3.6.2 Right to be defended by a lawyer of his own choice:}

This right postulates that when there is an accusation against the person arrested, then he should be enabled to defend himself by

\textsuperscript{277} AIR 1994 SC 1349.
engaging a legal practitioner of his choice. In *Maneka Gandhi v. U.O.I.* 279, the court held that the court would be bound to provide the assistance of a lawyer to a person arrested under an ordinary law also. 280

In *State of Madhya Pardesh v. Shobharam* 281, the court held that a person arrested is entitled to be defended by a counsel at the trial and this right is not lost even if he is released on bail, or is trial by a Court which has no power to impose a sentence of imprisonment. 282 In *Hussainara Khatoon v. Home Secretary, Bihar* 283 1979, the court held that it is the constitutional right of every accused person who is unable to engage a lawyer, and secure legal services on account of reasons such as poverty, indigence or incommunicado situation, to have free legal services provided to him by the state and the state is under constitutional duty to provide a lawyer to such person if the needs of justice so require. If free legal services are not provided the trial itself may be vitiated, as contravening Article 21. 284

**Article 22(2)**

3. *Article 22 Cl (2), provides the most material safeguard, that the arrested person must be produced before a magistrate within 24 hrs. of such arrest, so that an independent authority, exercising judicial powers may without delay apply its mind to his case.*

   It is immaterial whether the magistrate sits in a court or not at the time when that arrested person is produced before him. No detention beyond 24 hours except by the order of Magistrate.

4. The preventive detention of 24 hrs can be extended only under the judicial custody, i.e. only by the order of the magistrate. If the arrested person is not produced before the nearest magistrate,

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279 AIR 1978 SC 597.
281 AIR 1966 SC 1910
283 AIR 1979 SC 1377
within a period of 24 hrs, the arrest would become illegal and unconstitutional.\textsuperscript{285} The right is available to a person arrested under a warrant issued by the speaker of legislative assembly for committing contempt of the \textit{House Ganpati K. Reddy v. Nafisul Hasan}\textsuperscript{286}.

In \textit{C.B.I. v. Anupam J. Kulkarni}\textsuperscript{287}, the court has laid down detailed guidelines, governing arrest of an accused when investigation cannot be completed within 24 hrs. The court held that, when a person is arrested under Section 57 of Cr. P.C., he should be produced before the nearest magistrate within 24 hrs. The Judicial Magistrate can authorise the detention of the accused in such custody i.e., either police or judicial, from time to time, but the total period of detention cannot exceed 15 days, the further remand can only be in Judicial custody. There cannot be any detention in the police custody after the expiry of first 15 days. If the investigation is not completed within 90 days or 60 days then the accused has to be released on bail as provided under Section 167 (2) of the Cr. P.C.\textsuperscript{288}

This period of 90 days or 60 days has to be computed from the date of detention as per the orders of the magistrate and not from the date of arrest by the police.\textsuperscript{289}

\textbf{Article 22 (3)}

Clause (3) provides two exceptions. The Fundamental Rights guaranteed to arrested persons by Cl (1) and (2) do not apply :-

\begin{itemize}
  \item \textit{a)} To enemy aliens
  \item \textit{b)} To persons arrested or detained under any law providing for preventive detention.
\end{itemize}

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\textsuperscript{286} AIR 1954 SC 589
\textsuperscript{287} AIR 1992 SC 283
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