CHAPTER VI
ROLE OF JUDICIARY AND PROTECTION OF HUMAN RIGHTS OF ACCUSED

6.1. Introduction

Human Rights are those minimal rights that every individual must have against the State or other public authority by virtue of being a member of the human family irrespective of any other consideration. These are the rights that are inherent in all the citizens, because of their being human ones Universal Declaration of Human Rights, 1948, has recognised certain basic human rights of an individual, including an accused. The Indian Constitution, in tune with the international endeavours, provided four basic principles to govern the criminal justice system, viz, (1) presumption of innocence, (2) prevention of ex-post facto operation of criminal law (3) protection against double jeopardy and (4) due process concept. Besides the Constitution, The Code of Criminal Procedure, 1973 and Indian Evidence Act, 1872, also deal with the protection of human rights of the accused person. In our criminal justice system, the legal ethics is quite established “let the thousand of criminals beetroot, but a single innocent should not be punished”. Following this principle the judiciary requires all cases to be proved beyond reasonable doubt.1

Article 21 of the Constitution of India confers on every person the right to life and personal liberty and the Supreme Court has interpreted the Article very broadly to include an array of rights that have helped to strengthen the Indian Criminal Justice System. The expansive interpretation of Article 21 by the Judiciary has led to the inclusion of several rights within the right to life and personal liberty and their elevation to the status of a fundamental right. A wide range of rights, like the right to compensation in case of violation of Article 21, the right of undertrials against unreasonable and arbitrary handcuffing, rights of prisoners, right against custodial violence, the right to a fair and speedy trial, right to free legal aid, the right to consult with the legal advisor, the right against any form of torture or cruel, inhuman or degrading treatment, the right to privacy, the right against police atrocities and illegal arrest and detention, etc., have been held to be a part of Article 21 of the Constitution.

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The right to fair trial is at the heart of the Indian criminal justice system. The Supreme Court has held that a fair trial is a part of the fundamental right to life and personal liberty under Article 21 of the Indian Constitution. Post *Maneka Gandhi*, the Supreme Court held that the “procedure prescribed by law has to be fair, just and reasonable, and not fanciful, oppressive or arbitrary,” the ambit of Article 21 and the procedural rights necessary for its realisation have been expanded by the Supreme Court. The most important aspect of the *Maneka Gandhi* case is the interpretation afforded to “procedure established by law” under Article 21. The Court observed:

> The procedure prescribed by law has to be fair, just and reasonable, not fanciful, oppressive or arbitrary. The question whether the procedure prescribed by a law which curtails or takes away the personal liberty guaranteed by Article 21 is reasonable or not has to be considered not in the abstract or on hypothetical considerations like the provisions for a full-dressed hearing as in a courtroom trial, but in the context, primarily, of the purpose which the Act is intended to achieve and of urgent situations which those who are charged with the duty of administering the Act may be called upon to deal with. Secondly, even the fullest compliance with the requirements of Article 21 is not the journey’s end because, a law which prescribes fair and reasonable procedure for curtailing or taking away the personal liberty guaranteed by the Article 21 has still to meet a possible challenge under other provisions of the Constitution like, for example, Articles 14 and 19.

### 6.2 Right to Life and Human Rights of Accused

Another broad formulation of the theme of life to dignity is to be found in *Bandhua Mukti Morcha v. Union of India* Characterizing Art. 21 as the heart of fundamental rights, the Court gave it an expanded interpretation. Bhagwati J. observed:

> “It is the fundamental right of everyone in this country… to live with human dignity free from exploitation. This right to live with human dignity enshrined in Article 21 derives its life breath from the Directive Principles of State Policy and particularly clauses (e) and (f) of Article 39 and Articles 41 and 42 and at the least,

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3 *Ibid*.
4 1994 AIR 1844, 1994 SCC (3) 394
therefore, it must include protection of the health and strength of workers, men and women, and of the tender age of children against abuse, opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity, educational facilities, just and humane conditions of work and maternity relief. These are the minimum requirements which must exist in order to enable a person to live with human dignity and no State neither the Central Government nor any State Government has the right to take any action which will deprive a person of the enjoyment of these basic essentials.”

Following the above stated cases, the Supreme Court in Peoples Union for Democratic Rights v. Union of India, held that non-payment of minimum wages to the workers employed in various Asiad Projects in Delhi was a denial to them of their right to live with basic human dignity and violative of Article 21 of the Constitution. Bhagwati J. held that, rights and benefits conferred on workmen employed by a contractor under various labour laws are clearly intended to ensure basic human dignity to workmen. He held that the non-implementation by the private contractors engaged for constructing building for holding Asian Games in Delhi, and non-enforcement of these laws by the State Authorities of the provisions of these laws was held to be violative of fundamental right of workers to live with human dignity contained in Art. 21.

In Chandra Raja Kumar v. Police Commissioner Hyderabad it has been held that the right to life includes right to life with human dignity and decency and, therefore, holding of beauty contest is repugnant to dignity or decency of women and offends Article 21 of the Constitution only if the same is grossly indecent, scurrilous, obscene or intended for blackmailing. The government is empowered to prohibit the contest as objectionable performance under Section 3 of the Andhra Pradesh Objectionable Performances Prohibition Act, 1956. In State of Maharashtra v. Chandrabhan, the Court struck down a provision of Bombay Civil Service Rules,

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5 1996 AIR 946, 1996 SCC (2) 648
6 Ibid
7 AIR 1973 SC 947
8 AIR 1979 SC 916
1959, which provided for payment of only a nominal subsistence allowance of Re. 1 per month to a suspended Government Servant upon his conviction during the pendency of his appeal as unconstitutional on the ground that it was violative of Article 21 of the Constitution.\(^9\)

The famous case of *Maneka Gandhi v. Union of India\(^{10}\)* has heralded a new era of criminal justice system in India. Emphasising the interwoven nature of the Fundamental Rights under our Constitution; it has been held that Articles 14, 19 and 21 are interrelated and not mutually exclusive. A „law” that deprives an individual of his personal liberty has to meet the requirements of Article 14 and 19. Deprivation of life and personal liberty requires not just any procedure, but rather a procedure which is just, fair and reasonable. The Right to Life, which inheres in all human beings, and is recognised by Article 21, guarantees human dignity and is the foundation for activist jurisprudence of the Apex Court. Expanding the protection available to an individual under the Constitution, several unenumerated rights have been read into Article 21. The word „life” has been given an expansive interpretation to mean life with human dignity, as opposed to mere animal existence.\(^{11}\) Carrying forward the above approach, in *Francis Coralie Mullin v. Administrator, Union Territory of Delhi\(^{12}\)*, the Supreme Court expanded the dimension of rights by holding: “The right to life includes the right to live with human dignity and all that goes along with it, namely the bare necessities of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human being....must include the right to the basic necessities of life and also the right to carry such functions and activities as constitute the bare minimum expressing of human-self. Every act which offends against or impairs human dignity would constitute deprivation of this right to live”. Emphasising the rights of a detenu, the Court observed: “Now obviously, any form of torture or cruel, inhuman or degrading

\(^{9}\) https://www.lawctopus.com/academike/article-21-of-the-constitution-of-india-right-to-life-and-personal-liberty/ Visited on 5/2/2018

\(^{10}\) Supra note.2


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treatment would be offensive to human dignity and constitute an inroad into this right to live and it would, on this view, be prohibited by Article 21 unless it is in accordance with the procedure prescribed by law, but no law which authorises and no procedure which leads to such torture or cruel, inhuman or degrading treatment can ever stand the test of reasonableness and non-arbitrariness: It would plainly be unconstitutional and void as being violative of Articles 14 and 21. It would thus be seen that there is implicit in Article 21 the right to protection against torture or cruel, inhuman or degrading treatment which is enunciated in Article 5 of the Universal Declaration of Human Rights and guaranteed by Article 7 of the International Covenant on Civil and Political Rights.”

“Police is, no doubt, under a legal duty and has legitimate right to arrest a criminal and to interrogate him during the investigation of an offence but it must be remembered that the law does not permit use of third degree methods or torture of accused in custody during interrogation and investigation with a view to solve the crime.... By torturing a person and using third degree methods, the police would accomplish behind the closed doors what the demands of our legal order forbid. No society can permit it”. Police tortures and brutalities are “committed in utter disregard and in all breaches of humanitarian law and human rights as well as in total negation of the constitutional guarantees and human decency.” The Constitution as well Parliamentary statutes condemn the conduct of an official using torture or third degree methods for the purposes of obtaining confessions or information. Such conduct is clearly violative of the basic human dignity. Articles 14, 19 and 21 have been invoked to clarify that prisoners should not be subject to torture or maltreatment and that prisoners have the right to a speedy trial and the right to be released upon bail. The overarching principle is that detainees and prisoners, despite their allegedly deviant behaviour, are nevertheless human beings worthy of respect and ultimately must have their dignity upheld. The directions of the Courts and the guidelines issued by the NHRC are extremely important in the context of prisoners’ rights.

13 Ibid.
Prisons are a State subject and each of the 29 States and 7 Union Territories have their own prison department, their own laws, rules and regulations. Prisons in India continue to be governed by the archaic Prisons Act, 1894, which has been adopted by a huge majority of the States. Those that have enacted their own laws have modelled these closely on this Act. This law does not contain any provisions on prisoner’s rights, their rehabilitation and reformation or for their reintroduction into the society on the completion of sentence. This Act clearly codified a colonial policy suspicious of the indigenous population; providing for restricted access and little supervision, and for the imposition of disciplinary punishments at the discretion of prison superintendents including solitary confinement, impositions of chains and whipping and transportation in irons.

Given the lack of political will to legislate on prison in independent India, it is the judicial pronouncements that have realised the Constitutional right of those held in prisons. The judgments of the Supreme Court are binding on all State agencies across the country and bring some kind of uniformity on prisoner’s rights in India. An officer who wilfully or inadvertently ignores the Supreme Court directives can be subject to disciplinary action, as well as tried under the relevant provisions of the Indian Penal Code, 1860 and/or under the Contempt of Court Act, 1971. Besides the Constitutional rights; there are certain other Statutes which provides the protection to the prisoners like Prison Act, 1894, Prisoners Act, 1900, Prisoners (Attendance in Courts) Act, 1955, and Police Manual, which also have certain rules and safeguards for the prisoners and cast an obligation on the prison authorities to follow these rules. Even all India Jail Reforms Committee under the Chairmanship of Justice A.N.Mulla suggested the setting up a National Prison Commission as a continuing body to bring about modernization of prisons in India.

6.2 Ex Post Facto Laws and Human Rights Of Accused

The Supreme Court of India has played an important role in exploring as well in interpreting the doctrine of ex-post-facto law. There are several cases in which apex court has dealt with the questions regarding operation of such laws. In R.S.Joshi

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17 Except Arunachal Pradesh, which does not have any prisons and all its prisoners are housed in the prisons of Assam.
18 West Bengal is the only exception. It is governed by the West Bengal Correctional Services Act, 1992.
v. Ajit Mills Ltd\textsuperscript{19} Supreme Court said that Art.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 the narrow sense as 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 the charge. The immunity extends only against punishment by courts of a criminal offence under as 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. Similarly, a tax can be imposed retrospectively.\textsuperscript{20} Imposing retrospectively special rates for unauthorized use of canal water is not hit by Art. 20 (1).\textsuperscript{21}

Art. 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 of an offence from a criminal court to an administrative tribunal is not hit by Art. 20 (1).\textsuperscript{22} A change in court entitled to try an offence is not hit by Art. 20 (1).\textsuperscript{23} Similarly, a rule of evidence can be made applicable to the trial of an offence committed earlier. In order to punish corrupt government officers, parliament has enacted the preventive of corruption Act which creates the offence of criminal misconduct. S. 5(3) creates a presumption to the effect that if the government servant for corruption has in his possession property or assets which were wholly disproportionate to his known sources of income and if he cannot explain the same satisfactorily, then he is guilty of criminal misconduct. S. 5(3) was challenged before Supreme Court in Sujjan Singh v. State of Punjab\textsuperscript{24} vis-

à-vis Art. 20 (1).

It was argued that when S.5(3) speaks of the accused being in possession of pecuniary resources, or property disproportionate to his known sources of income, only the pecuniary resources or property acquired after the date of the act is meant. To think otherwise would be to give the Act retrospective operation and for this there is no justification. The Supreme Court rejected the contention that to take into

\textsuperscript{19} AIR 1977 SC 2279
\textsuperscript{21} Jawala Ram v. Pepsi, AIR 1962 SC 1246.
\textsuperscript{22} Union of India v.Sukumar, AIR 1966 SC 1206.
\textsuperscript{23} Shiv Bahadur v. Vindhya Pradesh, AIR 1953 SC 394.
\textsuperscript{24} AIR 1964 SC 464
consideration the pecuniary resources or property in the possession of the accused, or any other person on his behalf, which are acquired before the date of the Act is in any way giving the Act a retrospective operation. The court explained the position as follows: “the statute cannot be said to be retrospective because a part of the requisites for its actions is drawn from a time antecedent to its passing”.

The court also rejected the contention that S. 5(3) creates a new offence in the discharge of official duty. According to the court S. 5(3) does not create a new offence. The court stated further: “it merely prescribes a rule of evidence for the purpose of proving the offence of criminal misconduct as defined in S. 5(1) for which an accused person is already under trial…when there is such a trial which necessarily must be in respect of acts committed after the prevention of corruption Act came into force, S.5 (3) places in the hands of the prosecution a new mode of proving an offence with which an accused has already been charged.

A person can be convicted and punished under a ‘law in force’ which means a law ‘factually’ in existence at the time the offence was committed. A law not factually in existence at the time, enacted subsequently, but by a legislative declaration ‘deemed’ to have become operative from an earlier date (by a fiction of law), cannot be considered to be a law ‘factually’ in force earlier than the date of its enactment and the infirmity applying to an ex-post-facto law applies to it, the reason is that if such a fiction were accepted, and a law passed later were to be treated as a law in existence earlier, then the whole purpose of the protection against an ex-post-facto law would be frustrated, for a legislature could then give a retrospective operation to any law.

A slightly different situation is presented by the following fact-situation. A law was made in 1923, and certain rules were made there under. The Act of 1923 was replaced in 1952 by another Act, but the old rules were deemed to be the rules under the new Act as well. As these rules had been operative all along and did not constitute retrospective legislation, an offence committed in 1955 could be punishable under them as these were factually in existence at the date of the commission of the offence.25

When a late statute again describes an offence describes an offence created by a statute enacted earlier, and the later statute imposes a different punishment, the

earlier statute is repealed by implication. But that is subject to Art. 20(1) against ex-post-facto law providing for a greater punishment. The later Act will have no application if the offence described therein is not her same as in the earlier Act, i.e., if the essential ingredients of the two offences are different. If the later Act creates new offences, or enhances punishment for the same offence, no person can be convicted under such an ex-post-facto law nor can the enhanced punishment prescribed in the later Act apply to a person who had committed the offence before the enactment of the later law.\(^26\) Further, what Art. 20(1) prohibits is conviction and sentence under as 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 the American positions on this point, whereas in America, an ex-post-facto law is in itself invalid, 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.\(^27\) In \textit{lily Thomas v. Union of India}\(^28\) it was argued that the law declared by the Supreme Court in Sarla Mudgal could not be given retrospective effect because of Art. 20(1); it ought to be given only prospective operation so that the ruling could not be applied to a person who had already solemnised the second marriage prior to the date of the \textit{Sarla Mudgal judgment}.\(^29\) However, Supreme Court rejected the contention arguing that it had not laid down any new law in Sarla Mudgal. What the court did in that case was only the law which had always been existence. It is the settled principle that the interpretation of a provision of law relates back to the date of the law itself and cannot be prospective from the date of the judgment because the Court does not legislate but only interprets existing laws.\(^30\)

6.3 Double \textit{Jio Pardy} and Human Rights of Accused

The right secured under clause (2) of Article 20 of the constitution is grounded on the common law maxim \textit{nemo debt bis vexari} – a man shall not be brought into danger for one offence more than once. If a person is charged again for the same offence in an

\(^{26}\) T.Barai v. Henry Ah Hoe, AIR 1983 SC 150
\(^{28}\) AIR 1995 Sc 1531
\(^{29}\) AIR 2000 Sc 1650
\(^{30}\) \url{http://www.legalserviceindia.com/article/l293-Ex-Post-Facto-Laws-and-Indian-Legal-Scenario.html} Visited on 6/2/2018
English court, he can plead, as a complete defence, his former acquittal or conviction, or as it is technically expressed, take the plea of *autrefois acquit* or *autrefois convict*.

The principle of double jeopardy is one of the well known principles of criminal jurisprudence. The main objectives of providing the protection against double jeopardy are: To protect the accused from unnecessary harassment which would be caused to him while undergoing successive criminal proceedings where only one crime has been committed. Thus the basic principle is that no man’s life or liberty shall be twice put in jeopardy for the same set of facts.

The Indian judicial system is already suffering from a heavy backlog. In such a situation it is important to put an end to litigation once it has reached its logical conclusion, i.e., acquittal or conviction. Article 20(2) provides that “No person shall be prosecuted and punished for the same offence more than once.” The fundamental conditions for the applicability of Art. 20(2) is that: There must have been a previous prosecution, The accused must have been punished at such prosecution, The subsequent proceeding must also be one for the prosecution and punishment of the accused, and Proceedings on both the occasions must in relation to the same offence.

The word offence has to be taken in the sense in which it is used in the General Clauses Act, 1897 as meaning ‘an act or omission made punishable by any law for the time being in force’.

The person should have been prosecuted before a Court or a judicial tribunal. The term prosecution means initiation or starting of any proceedings, criminal in nature, before a court, or a judicial tribunal. It means that Art. 20(2) would have no application where the proceedings are held under any revenue authorities.

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33 Ashutosh, Dr., Rights of Accused, Universal Law Publishing Co., Delhi, 2009, p.33
35 supra note 31, p. 156
36 supra note 32, p. 283
In Maqbool Hussain v. State of Bombay, the appellant, a citizen of India, brought from a foreign country some gold without making a declaration. The Customs Authorities took action against him under Sec. 167 of the Sea Customs Act, 1878 and confiscated the gold. Subsequently, he was charged under Sec. 8 of the Foreign Exchange Regulation Act, 1947 and prosecution started against him under the said Act. A Constitution Bench of the Supreme Court held that the Sea Customs Authorities were not a court or a judicial tribunal and confiscation of gold be them did not constitute a judgment. Thus the plea of double jeopardy could not be maintained.

In S.A. Venkataraman v. Union of India, the appellant, a government servant, was charged with committing corruption. An inquiry was held against him under the Public Servants (Inquiries) Act, 1850. As a result of the report of the Enquiry Commissioner, he was dismissed from service. There after he was prosecuted before the court for having committed offences under Secs. 161 and 165 of the Indian Penal Code, 1860 and Sec. 5(2) of the Prevention of Corruption Act, 1947. The Supreme Court Held that the proceeding taken before the Enquiry Commissioner did not amount to be a prosecution for an offence. Therefore, protection of Art 20(2) could not be availed by the accused. Gajendragadkar, J. has stated the protection under Art. 20(2) as follows: “The constitutional right guaranteed by Art. 20(2) against double jeopardy can be successfully be invoked only when the prior proceedings on which reliance is placed are of a criminal nature instituted or continued before a court of law or a tribunal in accordance with the procedure prescribed in the statute which creates the offence and regulates the procedure.”

In the recent case of Suba Singh & Anr. v. Davinder Kaur & Anr. the accused was convicted and sentenced with imprisonment and fine under Sec. 304 IPC. The widow and minor daughter of the deceased claimed compensation as damages from defendants for causing the death of the deceased by their wrongful act. The accused claimed protection against double jeopardy under Art. 20(2) but the Supreme Court held that “it is elementary that an action for civil damages is not prosecution.

37 AIR 1953 SC 325
38 AIR 1954 SC 375
39 supra note 31, p. 157
40 AIR 2011 SC 3163
and a decree of damages is not punishment. The rule of double jeopardy, therefore, has no application to this case”.

The person must have been punished after his prosecution before a Court or judicial tribunal. The protection against double jeopardy under this article would be applicable only if the accused has been not only prosecuted but also punished after such prosecution. Therefore, if there is no punishment for the offence as a result of the prosecution this article will have no application.41

The words “prosecuted and punished” are not to be taken distributively so as to mean prosecuted or punished. Both the factors must co-exist.42 The person must be prosecuted for the second time before a Court or a judicial tribunal. Art. 20(2) would have no application where the person is prosecuted and punished for the second time, but the subsequent proceedings is merely the continuance of the previous proceeding, as is the case of an appeal.43

The offence must be the same in both the proceedings. Further, Art. 20(2) can operate as a bar only when the second prosecution and punishment is for the identical offence for which the person concerned has already been prosecuted and punished earlier. The same offence means an offence whose ingredients are the same. If the offences are distinct, there is no question as to the rule of double jeopardy being applicable. If one and same act of a person constitutes two different offences, then the punishment for one offence does not bar the prosecution and punishment for the other offence.44 The Supreme Court has explained the legal position in the case of State of Bombay v. Apte,45 “To operate as a bar the second prosecution and the consequential punishment there under, must be for the ‘same offence’. The crucial requirement therefore for attracting the article is that the offences are the same, i.e., they are identical. If however the two offences are distinct, then notwithstanding that the allegations of facts in the two complaints might be substantially similar, the benefit of the ban cannot be invoked.” In Apte’s case, a person was convicted under Sec. 409

41 supra note 32, p. 284
42 supra note 34, p. 243
43 supra note 32, p. 285
45 AIR 1961 SC 1
IPC for criminal breach of trust.\textsuperscript{46} His later prosecution on the same facts under Sec. 105 of the Insurance Act would not be barred under Art. 20 (2) because the ingredients of the two offences were different.\textsuperscript{47}

The Code of Criminal Procedure, 1973 which is the major procedural law with regard to the criminal cases has incorporated this doctrine which has been provided in section 300 of this code. Section 300.

(1) A person who has once been tried by a court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence 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 (2) thereof.

(2) A person acquitted or convicted of any offence may be afterwards tried, with the consent of State Government, for any distinct offence for which a separate charge might have been against him at a former trial under sub section (1) of section 220.

(3) A person convicted of any offence constituted by any act causing consequences which together with such act, constituted a different offence from that of which he was convicted, may be afterwards tried for such last mentioned offence, if the consequences had not happened, or were not known to the court to have happened, at the time when he was convicted.

(4) A person acquitted or convicted of any offence constituted by any acts may, notwithstanding such acquittal or conviction, be subsequently charged with, and tried for, any other offence constituted by the same acts which he may have


\textsuperscript{47} supra note 46 p.1061
committed if the court by which he was first tried was not competent to try the offence with which he is subsequently charged.

(5) A person discharged under section 258 shall not be tried again for the same offence except with the consent of the Court by which he was discharged or of any other Court to which the first mentioned court is subordinate. (6) Nothing in this section shall affect the provisions of section 26 of the General Clauses Act, 1897 or of section 188 of this code.

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 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.

1. 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 the 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.

2. 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.

3. 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.

4. 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.

5. 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*⁴⁸ 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.

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

⁴⁸ AIR 1999 SC 2640
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 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. 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 sub ordinate. 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 visualised 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. It was held in the case of *State of M.P v. Bireshwar Rao*\(^{49}\) that there cannot be any prohibition to a trial and conviction under section 409 of the IPC in a case where the accused had been tried and acquitted of an offence under Section 52 of the Prevention of Corruption Act, 1947 constituted on identical facts.

### 6.4 Analysis of the Statutory Provision

The provision was previously mentioned in the section 403 of the old code. The section 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. This rule is actually based on common law maxim *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

\(^{49}\) AIR 1957 SC 592
system. A detailed study of this section will bring out that the conditions necessary for
the application of this provision. All the sub sections of Section 300 except sub
section 3 specifically lay down that both conviction and acquittal act as a bar to the
subsequent trial of the same person in various circumstances. In such a situation I find
the statutory provision of Cr.PC and the Constitutional mandate in conflict with each
other. However this is known that in any circumstance any Constitutional provision
will prevail over other statutes. No doubt the principles of autrefois acquit and
autrefois convict which were pre-existing in the old Cr.PC as well as the General
Clauses Act, 1897 formed the basis for incorporation of this as a fundamental right
when the Constitution was enacted in India, though with some reservations which
limit the ambit and scope of the doctrines.\footnote{https://www.lawctopus.com/academike/autrefois-acquit-autrefois-convict/ Visited on 6/2/2018}

6.7 Preventive Detention: Constitutional Safeguards and Protection Rights Of Accused

Detention can be of two types: punitive and preventive, Preventive detention
means the detention of a person without any trial or conviction by a court of law, but
merely on suspicion in the mind of an executive authority.' Explaining the nature of
the detention under regulation 14(B) Defence of Realm Act, 1914 Lord Finlay
observed that it is not a punitive, but a precautionary measure.? Similarly it was
observed in connection with the emergency regulations made during the world war
by Lord Macmillon that the question is one of preventive detention justified by
reasonable probability, not of criminal conviction which can only be justified by
legal evidence." The object of such detention is to prevent the individual not merely
from acting in a particular way, but from achieving a particular object. Preventive
detention has not been unknown in other democratic countries like England- and the
United States." but only as a war time and not a peace time measure. In India, it has
been given a constitutional status and resorted to even in peace time.\footnote{B.R.Sharma, Constitutional Law and Judicial Activism, 1\textsuperscript{st} Edition ,Ashish Publishing House, New Delhi,1990 PP.1}
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 his much broader right, against self-incrimination.\(^{52}\)

This clause gives protection only if the following ingredients are present:

1. It is a protection available 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**” as resulting in his giving evidence against himself.\(^{53}\)

Self-incrimination has been extensively discussed in the case of **Nandini Satpathy v. P.L Dani**.\(^{54}\) In this case, the appellant, a former Chief Minister of Orissa was directed to appear at Vigilence Police Station, for being examined in connection to a case registered against her under the Prevention of Corruption Act, 1947 and under S. 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

\(^{52}\) [https://www.lawctopus.com/academike/immunity-self-incrimination/](https://www.lawctopus.com/academike/immunity-self-incrimination/) Visited on 7.2.2018

\(^{53}\) Ibid

\(^{54}\) AIR 1978 SC 1025
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. The protection contained in Article 20(3) is against compulsion “to be a witness” against oneself. In *M.P Sharma v. Satish Chandra*\(^{55}\) the Supreme Court gave a wide interpretation of the expression “to be a witness” which was inclusive of oral, documentary and testimonial evidence. The Court also held that the protection not only covered testimonial compulsion in the Court room but also included compelled testimony previously obtained from him. In *V.S Kuttan Pillai v. Ramakrishnan*\(^{56}\) the Supreme Court held that search of the premises occupied by the accused without the accused being compelled to be a party to such a search would not be violative of the constitutional guarantee enshrined in Article 20(3). S.27 of the Indian Evidence Act, 1872, provides that during investigation when the discovery of evidence by the police is led by some fact that was disclosed by the accused then so much of the information as relates to the facts discovered, may be proved irrespective of the fact whether that information amounts to a confession of not. It was held that the provisions of this section are not prohibited within the scope of Article 20(3) unless compulsion had been used in obtaining the information. The protection under Article 20(3) is available only against compulsion of the accused to give evidence against him. Thus, if the accused voluntarily makes an oral statement or voluntarily produces documentary evidence, incriminatory in nature, Article 20(3) would not be attracted.

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 at hand would be *Mohd. Dastagir v. State of Madras*\(^{57}\) where the appellant went to the residence of the Deputy Superintendent of Police and handed

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\(^{55}\) AIR 1954 SC 300  
\(^{56}\) AIR 1980 SC 185  
\(^{57}\) AIR 1960 SC 756
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 accused at the time the currency notes were seized from him. Hence in this case the scope of Article 20(3) was not applicable. The issue of involuntary administration of certain scientific techniques, like narco-analysis tests, polygraph examination, etc. for the purpose of improving investigation efforts in criminal cases has gained a lot of attention. For a long time, there was a debate about whether such tests were violative of Article 20(3) or not and the same issue were brought to the Supreme Court in the case of Selvi v. State of Karnataka\textsuperscript{58}.

In this case the Hon’ble Chief Justice, Justice K.G Balakrishnan spoke of behalf of the Apex Court, and drew the following conclusions:

1. The right against self-incrimination and personal liberty are non-derogable rights; their enforcement therefore is not suspended even during emergency.
2. The right of police to investigate an offence and examine any person do not and cannot override constitutional protection in Article 20(3);
3. The protection is available not only at the stage of trial but also at the stage of investigation;
4. That the right protects persons who have been formally accused, suspects and even witnesses who apprehend to make any statements which could expose them to criminal charges or further investigation;
5. The law confers on ‘any person’ who is examined during an investigation, an effective choice between speaking and remaining silent. This implies that it is for the person being examined to decide whether the answer to a particular question would be inculpatory or exculpatory;

\textsuperscript{58} AIR 2010 SC 1974
6. Article 20(3) cannot be invoked by witnesses during proceedings that cannot be characterised as criminal proceedings;

7. Compulsory narco-analysis test amounts to ‘testimonial compulsion’ and attracts protection under Article 20(3);

8. Conducting DNA profiling is not a testimonial act, and hence protection cannot be granted under Article 20(3);

9. That acts such as compulsory obtaining signatures and handwriting samples are testimonial in nature, they are not incriminating by themselves if they are used for the purpose of identification or corroboration;

10. That subjecting a person to polygraph test or narco-analysis test without his consent amounts to forcible interference with a person’s mental processes and hence violates the right to privacy for which protection can be sought under Article 20(3);

11. That court cannot permit involuntary administration of narco-tests, unless it is necessary under public interest.

6.5 Preventive Detention under the Constitution

In India provisions relating to preventive detention have been dealt with in Article 22 of the Constitution. The Constitution divides the legislative power in respect of preventive detention between Parliament and the State Legislature. Parliament can enact a law providing for preventive detention for "reasons connected with defense, foreign affairs and the security of India," and also for "reasons of the security of the State, the maintenance of public order, and the supplies and services essential to the community. The State Legislature is given a concurrent power to make a law providing for preventive detention. But its power is subject to parliamentary legislation under List III entry 3. Thus, Parliament has a wider legislative jurisdiction in matters of preventive detention as it can enact a law providing for such detention for reasons connected with all the six heads enumerated in Lists I and 1II. In exercise of the above power, the Parliament enacted the Preventive Detention Act, 1950, which remained on the statute book till 1969. But thereafter no vacuum was created in the area of preventive detention. The State legislatures immediately passed laws relating to preventive detention. This state of
affairs continued until the passing of the *Maintenance of Internal Security Act*, 1971. How the Act operated is not the subject matter of this discussion but it must be said that the Act was used and abused during the operation of 19 months emergency in India. During this period, a large number of persons were put behind the bars without trial and without affording them any basic safeguards. In 1974, Parliament also enacted another legislation namely, *Conservation of Foreign Exchange and Preventive of Smuggling Activities Act*, 1974. It was passed to prevent smuggling activities etc. But by the *Constitution (39th amendment) Act*, 1975, both these Acts were included in the 9th Schedule of the Constitution. 59

Clauses (1) and (2) of Article 22 confer four rights upon a person who has been arrested. Firstly, he shall not be detained in custody without being informed, as soon as may be, of the grounds of his arrest. If information is delayed, there must be some reasonable ground justified by the circumstances. Secondly, he shall have the right to consult and to be represented by a lawyer of his own choice. "This right too is not lost if he is released on bail." Thirdly, every person who has been arrested has the right to be produced before the nearest Magistrate within 24 hours of his arrest. In computing this period of 24 hours, the time spent on the journey from the place of arrest to the court of the Magistrate is to be excluded. This requirement is dispensed with if the person arrested is admitted to bail." Fourthly, he is not to be detained in custody beyond the said period of 24 hours without the authority of the Court." Even if an accused was initially illegally detained, the detention became lawful when subsequently he was within 24 hours. But where remand orders are obtained by the police from the magistrate or a judge without producing the arrested person before such magistrate or judge within 24 hours, Article 22(2) is violated." An under trial prisoner need not be arrested separately for every criminal case pending against him. A subsequent lawful detention is not vitiated by the earlier illegal detention.

The two requirements of clause (1) of Article 22 are meant to afford the earliest opportunity to the arrested person to remove any 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,

59 Id PP 5
of consulting a legal practitioner of his choice and to be defended by him. In *Joginder Kumar v. State of U.P.*\(^6\) emphasizing that the right not to be arrested except for heinous offences and to have someone informed of the arrest and to consult privately with lawyers is inherent in Articles 21 and 22(1) of the Constitution and required to be recognized and scrupulously protected, the Court issued necessary directions for the recognition and protection of these rights. Clause (2) of Article 22 provides the next and most material safeguard that the arrested person must be produced before a magistrate within 24 hours of such arrest so that an independent authority exercising judicial powers may without delay apply its mind to his case. The CrPC contains analogous provisions in Sections 56 and 303, but Constitution-makers were anxious to make these safeguards an integral part of the fundamental rights. Thus, once it is shown that the arrests made by the police officers were illegal, it is necessary for the State to establish that at the stage of remand the magistrate directed detention in jail custody after applying his mind to all relevant matters.

It has been held\(^6\) that there are two conditions for the application of clause (1). Firstly, the fundamental rights secured to arrested persons by Article 22(1) give protection against such arrests as are effected otherwise than under a warrant issued by a court on the allegation or accusation that the arrested person has or is suspected to have committed or is about or likely to commit an act of criminal or quasi-criminal nature or some activity prejudicial to the public or the State interest. In other words, clause (1) of Article 22 is designed to give protection against the act of the executive or other non-judicial authorities, including an arrest made under a warrant issued by the Speaker of a State Legislature.\(^6\) The reason is that a person who is arrested under a warrant of a court is made acquainted with the grounds of his arrest before the arrest is actually effected. Secondly, the person must have been taken into custody on the allegation or accusation of an actual or suspected or apprehended commission by that person of any offence of a criminal or quasi-criminal nature or some act prejudicial to the State or public interest.\(^1\) Thus in State of Punjab v. Ajaib Singh\(^\text{1}\) the taking into custody of an abducted person by a police officer and the delivery of

\(^6\) AIR1994Sc1349

\(^6\) State of Punjab v. Ajaib Singh AIR 1953S C10

such person by him into the custody of the officer in charge of the nearest camp under Section 4 of the Abducted Persons (Recovery and Restoration) Act, 1949, was held not to constitute 'arrest and detention' within the meaning of Article 22(1) and (2) of the Constitution because there was no allegation or accusation of any actual or apprehended commission by that person of any offence of a criminal or quasi-criminal nature.

Following the decision of the Supreme Court in Ajaib Singh case\(^\text{63}\) it has been held that the removal of a minor girl from a brothel or from premises which are used as a brothel under Section 13 of the Bengal Suppression of Immoral Traffic Act, 1923, is not an arrest within the meaning of clauses (1) and (2) of Article 22. Likewise, an arrest and detention of a defaulter who fails to pay income tax does not come within the purview of clauses (1) and (2) because the purpose of arrest is not to punish him for an offence but to make him pay the arrears.

In view of wide misuse of power of arrest and detention including custodial death the Supreme Court in D.K. Basu v. State of W.B.\(^\text{64}\), has given detailed directions for arrest and detention in police custody to be followed by the concerned authorities. Court has also recognised the right of arrestee against torture and entitlement of compensation for its violation.

**State of M.P. v. Shobharam**\(^\text{65}\), considered the nature and limits of the right of an arrested person to be defended by a legal practitioner of his choice. In that case, the respondents were arrested on a complaint of criminal trespass. The arrest was effected under the provisions of the Code of Criminal Procedure and the trial was held in the nyaya panchayat, functioning under the Madhya Pradesh Panchayat Act, which sentenced them to a fine of Rs 75 each. The High Court quashed the conviction in revision on the ground that Section 63 of the M.P. Panchayat Act was ultra vires inasmuch as it provided that no lawyer could plead a case before a nyaya panchayat. This, the High Court held, was violative of Article 22(1) of the Constitution. Bachawat, J., while agreeing with the reasoning of the High Court, held that the High Court ought not to have logically quashed the conviction because the accused had

\textit{\textsuperscript{63} Supra Note 61}

\textit{\textsuperscript{64} AIR1997SC610}

\textit{\textsuperscript{65} AIR1997Sc610}
made no claim before the nyaya panchayat to the right to be defended by a legal practitioner. The appeal, therefore, was allowed, but Section 63 was struck down. Hidayatullah, J. in his minority judgment held that since the section was void the appeal should also be dismissed. The plea that the right was not claimed formally did not, in substance, matter much, because the claim, had it been made, would have been doomed to failure. In matters of fundamental rights, an afterthought of this nature was not belated. Sarkar, C.J., in his dissenting opinion, held that Section 63 was not violative of Article 22(1), because, firstly, the exclusion of the right to be defended by a lawyer of one's choice by Section 63 had no application to arrest. Secondly, the denial of defense by a lawyer of the accused's choice at the trial before the nyaya panchayat did not affect the right of the petitioners because under the impugned Act, the nyaya panchayats could only impose fine and not send any person to prison. It is submitted that the opinion of Sarkar, C.J. is too narrow a view of Article 22(1) and the importance of the right which it confers. There is no force in the argument that if there is only a punishment of fine, there is no danger to personal liberty and the protection of Article 22 is not available. As Hidayatullah, J. pointed out: "A person arrested and put on his defence against a criminal charge which may result in penalty, is entitled to the right to defend himself with the aid of counsel and any law that takes away this right offends against the Constitution." There is no fundamental right to be represented by a lawyer except to the extent provided in Article 22(1) or as created under Article 21 discussed above and therefore a law which excludes the representation by a lawyer in a civil litigation does not violate Article 22. It will be emphasised that Article 22(2) is applicable only at a stage when a person has been arrested and is accused of some offence or other act and it can have no application after such person has been adjudged guilty of the offence and is detained in pursuance of the conviction by the court.

It appears reasonable to expect that the grounds should be communicated to the arrested person in the language understood by him otherwise it would not amount

68 Keshav Singh v. Speaker, Legislative Assembly, AIR 1965 All 349.
to sufficient compliance with the constitutional requirement. The words as soon as may be in Article 22(1) would mean as early as possible in the circumstances of the case, however, the word forthwith is section 50(1) of the code creates an sticker duty on the part of police officer making the arrest and would mean immediately.\(^\text{69}\) In *Rajkumari And Another v. Sho Noida And Others*\(^\text{70}\) the provisions of *section 50 crpc* were not complied with and she was not informed as to why she...pleaded that the provisions of *section 50 crpc* were fully complied with and the directions issued in the case of Joginder Kumar and D.K Basu were not violated. It is further *Subhash Bhandari v. State of U.P.*\(^\text{71}\) parties in the night between 10/11-8-86. They were not informed of the grounds of their arrest as required under *Section 50CrPC* and article 22 (1) of the constitution of India...not bees informed of the grounds of their arrest when they were arrested, in consequence of which there was violation of *section 50 (1) crpc* and article 22 (1) of...affidavit or in the General Diary, that the petitioners had been informed of the reasons of their arrest and of the offences registered against them, does not satisfy the requirements of *Section 50 (1) CrPC* in *State of Punjab v. Balbir Singh.*\(^\text{72}\) would have been over. As laid down in *Section 50* the steps contemplated thereunder namely informing and taking him to the Gazetted Officer should be done before the search. When the search is already over in the usual course of inve...the question of complying with *Section 50* would not arise. 6. At this juncture we may also dispose of one of the contentions that failure to comply with the provisions of *CrPC* in...HP a Division Bench of the High Court held that the provisions of *section 50 sub-section (1)* are mandatory and violation thereof per se would be fatal to the prose.

Unlike the American Constitution the Indian Constitution does not provide for the right to speedy trial. Probably this accounted for the absence of any litigation by the under trial prisoners in spite of there being a large number of them languishing in various prisons in this vast country. The unmasking of the horrendous situation prevalent in the Bihar Jails where a few hundreds of under trial prisoners were

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\(^{70}\) CASE NO.: Writ Petition (crl.) 337-338 of 1997

\(^{71}\) 1988 AIR 74 1988 SCR (1) 773 1987

\(^{72}\) 994 AIR 1872 1994 SCC (3) 299 JT 1994 (2)
waiting for their trials for periods longer than the terms for which they would have been sentenced had they been convicted of the offences charged against them, has made the Indian Supreme Court to read the right of speedy public trial in Article 21 of the Constitution.

The Indian judiciary plays a significant role in protecting the rights of the people and it has tried to give certain rights like right to speedy trial, right to fair trial etc. a constitutional status by including all these rights within the purview of Article 21 of our Constitution. The judiciary in India has played a dynamic role in the dispensation of justice by providing fair and just trial to all its citizens. There are catena of pronouncements of the Supreme Court and High Courts on the subject of trial wherein the Courts have questioned the delays and discharged the accused. The most glaring malady which has afflicted the judicial concern is the tardy process and inordinate delay that takes place in the disposal of cases. The piling arrears and accumulated workload of different Courts present a frightening scenario. As a matter of fact, the whole system is crumbling down under the weight of pending cases which go on increasing every day. Justice V.R. Krishna Iyer and Justice P.N. Bhagwati were aware of all these maladies. However, judicial delays in India are endemic. No person can hope to get justice in a fairly reasonable period. Proceedings in criminal cases go on for years, sometimes decades. Civil cases are delayed even longer. This is despite the legal position strongly favouring speedy trial. The Court’s concern about problem of delay in trial finds reflection in the following judgments. In *State of West Bengal v. Anwar Ali Sarkar*, 73 a Bench of seven judges of the Supreme Court held that “the necessity of a speedy trial is too vague and uncertain to form the basis of valid and reasonable classification .It is too indefinite as there can hardly be any definite objective test to determine it. It is no classification at all in the real sense of the term as it is not based on any characteristics which are peculiar to persons or to cases which are to be subjected to the special procedure prescribed by the Act” In *Machander v. State of Hyderabad*, 74 the Supreme Court refused to remand the case back to the trial court for fresh trial because of delay of five years between the commission of the offence and the final judgment of the Supreme Court. The

73 AIR 1952 SC 75.
74 AIR 1955 SC 792.
Chapter VI  Role of Judiciary and Protection of Human Rights of Accused

Supreme Court has categorically observed: “We are not prepared to keep persons on trial for their live and under indefinite suspense because trial judges omit to do their duty … We have to draw a nice balance between conflicting rights and duties …… While it is incumbent on us to see that the guilty do not escape, it is even more necessary to see that the person accused of crimes are not indefinitely harassed …. While every reasonable latitude must be given to those concerned ‘with the detection of crime and entrusted with administration of justice, but limits must be placed on the lengths to which they may go.” In another case of Chajoo Ram v. Radhey Shayam, delay in trial was one of the factors on the basis of which the Supreme Court dropped the further proceedings. In State of Uttar Pradesh v. Kapil Deo Shukla, though the Court found the acquittal of the accused unsustainable, it refused to order a remand or direct a trial after a lapse of 20 years. The Supreme Court in Maneka Gandhi v. Union of India has stated clearly held that Article 21 of the Constitution of India confers a fundamental right on every individual not to be deprived of his life or personal liberty except according to procedure established by law and such procedure as required under Article 21 has to be “fair, just and reasonable” and not “arbitrary, fanciful or oppressive”. The court has further stated that “If a person is deprived of his Liberty under a procedure which is not ‘reasonable’, ‘fair’ or ‘just’, such deprivation would be violative of his fundamental right under Article 21 and he would be entitled to enforce such fundamental right and secure his release.” The apex Court has observed that in the broad sweep and content of Article 21 right to speedy trial is implicit. The apex Court’s decision in Hussainara Khatoon(iv) v. Home Secretary, State of Bihar is a landmark in the development of speedy trial jurisprudence. In the instant case, a writ of habeas corpus was filed on behalf of men and women languishing in jails in the State of Bihar awaiting trial. Some of them had been in jail for a period much beyond what they would have spent had maximum sentence been imposed on them for the offence of which they were accused. Alarmed by the shocking revelations made in the writ petition and concerned about the denial of the basic human rights to those “victims of

75 AIR 1971 SC 1367.
76 (1972) 3 SCC 504.
77 (1978) 1 SCC 248.
78 (1980) 1 SCC 81.
callousness of the legal and judicial system”, Supreme Court went on to give a new
direction to the Constitutional jurisprudence. In doing so, the Court heavily relied on
its decision in an earlier case in which the Court gave a very progressive interpretation
to Article 21 of the Constitution. Taking this interpretation to its logical end, P.N.
Bhagwati J., in Hussainara khatoon’s case said: “…Procedure prescribed by law for
depriving a person of his liberty cannot be reasonable, fair or just unless that
procedure ensures a speedy trial for determination of the guilt of such person. No
procedure which does not ensure a reasonably quick trial can be regarded as
‘reasonable, fair or just’ and it would fall foul of Article 21. There can, therefore, be
no doubt that speedy trial, and by speedy trial we mean reasonably expeditious trial, is
an integral and essential part of the fundamental right to life and liberty enshrined in
Article 21.” Bhagwati, J. also added that the State cannot be permitted to deny the
constitutional right to speedy trial on the ground that the State has no adequate
financial resources to incur the necessary expenditure needed for improving the
administrative and judicial machinery with a view to ensuring speedy trial. As far as
the question of consequences of violation of the right to speedy trial is concerned, it
was raised but left unanswered by the Court. The decision in this case proved to be
the plinth of right to speedy trial in India. The Court Categorically stated that “it is
also the constitutional obligation of this Court as the guardian of the fundamental
rights of the people, as sentinel on the qui vive, to enforce the fundamental right of
the accused to speedy trial by issuing necessary directions to the state which may
include taking of positive action, such as augmenting and strengthening the
investigative machinery, setting up new courts, building new court houses, providing
more staff and equipment to the Courts, appointment of additional judges and other
measures calculated to ensure speedy trial.” The law laid down in Hussainara
Khatoon’s case was followed in a number of subsequent decisions of the Supreme
Court. In State of Bihar v. Uma Shankar Ketriwal, the High Court quashed the
proceedings on the ground that the prosecution which commenced 16 years ago and
still in progress, is an abuse of the process of the Court and should not be allowed to
go further. Refusing to interfere with the decision of the High Court in the appeal, the
Supreme Court said with regard to the delay that such protraction itself means

considerable harassment to the accused and that there has to be a limit to the period for which criminal litigation is allowed to go on at the trial stage. The Court further observed that “We cannot lose sight of the fact that the trial has not made much headway even though no less than 20 years have gone by, such protection itself means considerably harassment to the accused not only monetarily but also by way of constant attention to the case and repeated appearances in Court, apart from anxiety. It may be said that the respondents themselves were responsible in a large manner for the slow pace of the case in as much as quite a few orders made by the trial Magistrate were challenged in higher Courts, but then there has to be a limit to the period for which criminal litigation is allowed to go on at the trial stage.” The Court again considered the applicability of the right to speedy trial in State of Maharashtra v. Champalal Punjaji Shah and observed that while deciding the question whether there has been a denial of the right to a speedy trial, the Court is entitled to take into consideration whether the delay was unintentional, caused by over-crowding of the court’s docket or understaffing of the prosecutors and whether the accused contributed a fair part to the time taken. This decision was severely criticized by Prof. Upendra Bakshi, who said that even if the accused prefers interlocutory appeals it cannot be inferred that he contributed to delay, as by doing so he merely avails the opportunity-structure provided by the law of the land. Moreover, legal strategies are determined by the accused person’s counsel and not by the accused himself as he cannot be expected to understand subtleties of law and its procedures. He further added that delay caused by failure on the part of the courts to assign priority to the organization of day to day work cannot be said to be unintentional. In Kadra Pahadiya v. State of Bihar, P.N. Bhagwati, J. observed “8 more years have passed, but they are still rotting in jail, not knowing what is happening to their case. They have perhaps reconciled to their fate, living in a small world of their own cribbed, cabined and confined within the four walls of the prison. The outside world just does not exist for them. The Constitution of India has no meaning and significance, and human rights no relevance for them. It is a crying shame upon our adjudicatory

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81 Upendra Bakshi; “Right to Speedy Trial:Geese ,Gender And Judicial Sauce”; 2 nd ed.1986; p. 243.
82 (1983)2 SCC 104.
system which keeps man in jail for years on end without a trial.” The Court further observed that: “any accused that is denied this right of speedy trial is entitled to approach this Court for the purpose of enforcing such right and this court in discharge of its constitutional obligation has the power to give necessary directions to the state governments and other appropriate authorities for securing this right to the accused.”

**Mantoo Majumdar v. State of Bihar**\(^83\) is another case on under trials. In this case Justice Krishna Iyer found that two petitioners had spent seven years in jail without trial. He found further that the Government of Bihar was unwilling to furnish the facts sought by the Court and was insensitive to the plight of the under trials rotting in jails for long years. He found that even Magistrates “have bidden farewell to their primary obligation, perhaps fatigued by over work and uninterested in freedom of other.” He said that under Section 167 Criminal Procedure Code: “The Magistrate concerned have been mechanically authorizing repeated detentions, unconscious of the provisions which obligated them to monitor the proceedings which warrant such detention.” He drew the attention to the failure of the police to investigate promptly and the prison staff to find out how long these under trials should languish in jail. In the fact of this failure of the limbs of law and justice, the judge wondered like any of us. ‘If the salt hath lost its savour, wherewith shall it be salted’? He ordered the release of the two petitioners on their own bonds and without sureties. **Salim Khan v. State of Uttar Pradesh**\(^84\) shows that in Uttar Pradesh too, under trials face similar trials and tribulations. The Court found in this case that the respondent was in jail since November, 1978 awaiting trial. The counsel for the respondent alleged that there were serious charges against the petitioner, but when directed by the court to produce a single case in which charge sheet was submitted against the petitioner, he was unable to do so. On the contrary the counsel informed the Court that in some cases the petitioners had been tried and acquitted. The Court, therefore, ordered his release on a personal bond of Rs. 500 deploring the government’s cavalier attitude towards the petitioner’s freedom. In **Raghubir Singh v. State of Bihar,**\(^85\) a Bench of two judges of the Supreme Court held that the right to speedy trial is one of the dimensions of the

\(^{83}\) AIR 1980 SC 847.  
\(^{84}\) (1983) 2 SCC 347.  
\(^{85}\) AIR 1987 SC 149
fundamental right to life and liberty guaranteed by Article 21. The question whether
the right to speedy trial has been infringed depends upon various factors. A host of
question may arise for consideration: Was there delay? Was the delay inevitable
having regard to the nature of the case? Was the delay unreasonable? Was the delay
casted by the tactics of the defence? There may be other questions as well. But
ultimately the question of infringement of the right to speedy justice is one of fairness
in the administration of criminal justice even as ‘acting fairly’ is the essence of the
principle of natural justice and “a fair and reasonable procedure” is what is
contemplated by the expression “procedure established by law” in Article 21. In
Madhu Mehta v. Union of India, the Supreme Court held that “Article 21 is relevant
in all stages. Speedy trial in criminal cases, though may not be a fundamental right, is
implicit in the broad sweep and content of Article 21. Speedy trial is part of one’s
fundamental right to life and personal liberty” In T.V. Vatheeswaran v. State Tamil
Nadu, the Court again reiterated the significance of the right to speedy trial. In this
case, the accused persons were acquitted by the trial court whereupon an appeal was
filed before the High Court which allowed it after a period of six years and remanded
the case for retrial. Reversing the decision of the High Court, the Supreme Court held
that the pendency of criminal appeal for six years before the High Court is itself a
regrettable feature of this case and a fresh trial nearly seven years after the alleged
incident is bound to result in harassment and abuse of judicial process.

The Supreme Court in Sheela Barse v. Union of India addressed the
question left unanswered in Hussainara Khatoon’s case and dealt specifically with the
procedure to be followed in matters where accused was less than 16 years of age. The
Court held that where a juvenile is accused of an offence punishable with
imprisonment of 7 years or less, investigation was to be completed within 3 months of
the filing of F.I.R. or else the case was to be closed. Further, all proceedings in respect
of the matter had to be completed within further six months of filing of the charge-
sheet. The apex Court observed: “The right to speedy trial is a right implicit in Article
21 of the Constitution and the consequence of violation of this right could be that the

87 (1983) 2 SCC 68.
prosecution itself would be liable to be quashed on the ground that it is in breach of the fundamental right.” In Mihir Kumar v. State of West Bengal,\(^89\) where a criminal proceeding had been pending for 15 years from the date of the offence, the Supreme Court held that it amounted to violation of the constitutional right to speedy trial of a ‘fair, just and reasonable’ procedure, hence the accused was entitled to be set free. The Supreme Court in Abdul Rahman Antulay v. R.S. Nayak,\(^90\) gave a landmark decision and finally adjudicated upon the questions left open in Hussainara khatoon’s case, like the scope of the right, the circumstances in which it could be invoked, its consequences and limits etc. The salient features of the decision are as follows: (a) Right to speedy trial flowing from Article 21 encompasses all the stages namely, the stage of investigation, inquiry, trial, appeal, revision and retrial. (b) In every case, where right to speedy trial is alleged to have been infringed, the first question to be put and answered is who is responsible for the delay? Proceedings taken by either party in good faith, to vindicate their rights and interests, as perceived by them, cannot be taken as delaying tactic nor can the time taken in pursuing such proceedings be counted towards delay. (c) While determining whether undue delay has occurred one must have regard to all the circumstances, including nature of offence, number of accused and witnesses, the workload of the Court concerned, prevailing local conditions and so on. (d) Each and every delay does not necessarily prejudice the accused. However, inordinately long delay may be taken as presumptive proof of prejudice. Prosecution should not be allowed to become a persecution. But when does the prosecution become persecution, depends upon the facts of a given case. (e) Accused’s plea of denial of speedy trial cannot be defeated by saying that the accused didn’t demand a speedy trial. (f) The Court has to balance and weigh the several relevant factors- ‘balancing test’ and ‘balancing processes – and determine in each case whether the right to speedy trial has been denied in a given case. (g) Charge or conviction is to be quashed if the Court comes to the conclusion that right to speedy trial of an accused has been infringed. But this is not the only course open; it is open to the Court to make such other appropriate order – including an order to conclude the trial within a fixed time where the trial is not concluded or the sentence where the trial

\(^89\) 1990 Cr. LJ 26 (Cal).
\(^90\) (1992) 1 SCC 225.
has concluded, as may be deemed just and equitable in the circumstances of the case.

(h) It is neither advisable nor practicable to fix any time limit for trial of offences
because time required to complete trial of a case depends on the nature of the case. (i)
An objection based on denial of right to speedy trial and for relief on that account
should first be addressed to the High Court. Even if the High Court entertains such a
plea, ordinarily it should not stay the proceedings, except in a case of grave and
exceptional nature. Such proceedings in High Court must be disposed of on a priority
basis. After the decision of **Abdul Rehman Antulay v. R.S. Naik**

91 there is no need to elaborate on this aspect of personal liberty, the Constitution Bench speaking
through Jeevan Reddy, J., has traversed the entire ground. The judgment is
illuminating and exhaustive. All the aspects of the matter which have any relevance to
speedy trial were canvassed before the Court and the Bench did full justice to the
submissions. The petitioners A.R. Antulay and Ranjan submitted before the Court that
the right to speedy trial be made meaningful, enforceable and effective and there
ought to be an outer limit beyond which continuance of proceedings would be
violative of Article 21. In this connection, it was submitted that having regard to the
prevailing circumstances, a delay of more than 7 years ought to be considered as
unreasonable and unfair –this period of 7 years must be counted from the registration
of the crime till the conduct of the trial; retrial ought not to be ordered beyond this
period and the proceeding should be quashed. The counter arguments which were
advanced in the case of Ranjan on the State of Bihar coming on appeal against the
Full Bench Judgment of the Patna High Court have been noted in paragraph 21,
wherein Jethmalani first stated that despite our Constitution
-makers being aware of
the VIth Amendment to the Constitution of the United States specifically providing
for the right of speedy trial, did not incorporate the same in our Constitution, and so
no proceeding should ever be quashed because of the delay in trial. Indian Courts
have, therefore, to reconcile justice and fairness with many other interests which are
compelling and paramount. The Supreme Court has emphasized the above
propositions again and again. In **Kartar Singh v. State of Punjab,**

92 the Supreme
Court has observed: “The concept of speedy trial is read into Article 21 as essential

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91 Ibid
92 (1994) 3 SCC 569: 1994 SCC (Cri) 899
part of the Fundamental Right to Life and Liberty guaranteed and preserved in our Constitution. This right to speedy trial begins with the actual restraint imposed by arrest and consequent incarceration and continues at all the stages of investigation, enquiry, trial, appeal and revision so that any possible prejudice that may result from impermissible and avoidable delay from the time of the commission of the offence till it consummates into finality, can be averred.” In Union of India v. Ashok K. Mehta⁹³ there was delay in trial but it was not attributable only to the prosecution and the respondent himself had contributed to the delay. Refusing to quash the prosecution in the instant case, the Court observed that the respondent could not be allowed to take advantage of his own wrong and take shelter under speedy trial to escape from prosecution. The guidelines laid down in Antulay’s case⁹⁴ were adhered to in a number of cases which came to be considered by the Court subsequently. But a different note was struck in “Common Cause” a Registered Society through its Director v. Union of India.⁹⁵ In this case, the Court directed release of under-trials on bail if the trial is going on for a certain period and the accused has been in prison for a certain period of time. The Supreme Court has stated in Common Cause Case⁹⁶ that even persons accused of minor offences have to wait for their trials for long periods. If they are poor and helpless, they languish in jails as there is no one to bail them out. The very pendency of criminal proceedings for long periods by itself operates as an engine of oppression. Accordingly, to protect and effectuate the right to life and liberty of the citizens guaranteed by Article 21, the Court issued certain general directions for releasing the under-trials on bail or personal bonds where trials had been pending for one year or more. These directions are as follows: (i) Where the offence under IPC or any other law for the time being in force for which the accused are charged before any Criminal Court are punishable with imprisonment not exceeding three years with or without fine and if the trial for such offences are pending for one year or more and the accused concerned haven’t been released on bail but are in jail for a period of six month or more, the Court shall release such accused on bail or on personal bond to be executed by the accused on such conditions as may

⁹⁴ Supra note 91
⁹⁶ Ibid.
be found necessary. (ii) Where the offence under Indian Penal Code or any other law for the time being in force for which the accused are charged before any Criminal Court are punishable with imprisonment not exceeding five years with or without fine and if the trial for such offences are pending for two years or more and the accused concerned haven’t been released on bail but are in jail for a period of six month or more, the Court shall release such accused on bail or on personal bond to be executed by the accused and subject to such conditions as may be found necessary. (iii) Where the offence under Indian Penal Code or any other law for the time being in force for which the accused are charged before any Criminal Court are punishable with imprisonment not exceeding seven years with or without fine and if the trial for such offences are pending for two years or more and the accused concerned haven’t been released on bail but are in jail for a period of six month or more, the Court shall release such accused on bail or on personal bond to be executed by the accused and subject to such conditions as may be suitable in the light of Section 437, of Code of Criminal Procedure. (iv) Where criminal proceedings are pending regarding traffic offences in any criminal Court for more than two years on account of non-serving of Summons to the accused or for any other reason whatsoever, the Court may discharge the accused and close the case. (v) Where the cases pending in Criminal courts for more than two years under Indian Penal Code or any other law for the time being in force are compoundable with the permission of the Court and if in such a case trials have still not commenced, the Criminal Court shall, after hearing the public Prosecutor and other parties or their representatives before it, discharge or acquit the accused, as the case may be, and close the case. It also directed acquittal or discharge of an accused where for an offence punishable with imprisonment for a certain period, the trial had not begun even after a lapse of the whole or 2/3rd of the period. But the Court excluded certain economic and other offences from the application of these guidelines. In a subsequent case, the Supreme Court clarified its order in Common Cause Case ⁹⁷ and excluded from its application those cases where the pendency of criminal proceedings was wholly or partly attributable to the dilatory tactics adopted by the accused or on account of any other action on the part of the accused which resulted in prolonging the trial. The Court also explained the expressions, “pendency

⁹⁷ Ibid.
of trial” and “non commencement of trial” in *M.V Chauhan v. State of Gujrat*, the facts of the case was that a government employee was prosecuted and convicted on certain charges of corruption. The incident was of 1983 and the prosecution started in 1985. In an appeal against the conviction in 1997, the Supreme Court found that the sanction given by the government for this prosecution was invalid. The Court barred initiation of fresh prosecution against the appellant. The apex Court observed: “Normally when the sanction order is held to be bad, the case is remitted back to the authority for reconsideration of the matter and to pass a fresh order of sanction in accordance with law. But, in the instant case, the incident is of 1983 and, therefore, after a lapse of fourteen years, it will not, in our opinion, be fair and just to direct that the proceedings may again be initiated from the stage of sanction so as to expose the appellant to another innings of litigation and keep him on trial for an indefinitely long period contrary to the mandate of Article 21 of the Constitution which, as part of Right to Life, philosophizes early end of criminal proceedings through a speedy trial.”

Another attempt was made to concretize the right to speedy trial in *Raj Deo Sharma v. State of Bihar* *99* In this case, the Court issued certain directions for effective enforcement of the right to speedy trial as recognized in Antulay case and prescribed time limits for completion of prosecution evidence on completion of two years in cases of offences punishable with imprisonment for period not exceeding 7 years and on completion of 3 years in cases of offences punishable with imprisonment for period exceeding 7 years. But again the effect of this judgment was whittled down in the subsequent clarification order. In the clarification order it was laid down that the following periods could be excluded from the limit prescribed for completion of prosecution evidence in *Raj Deo Sharma’s case* *100*: (a) Period of pendency of appeal or revision against interim orders, if any, preferred by the accused to protract the trial; (b) Period of absence of presiding officer in the trial court; (c) Period of three months, in case the office of public prosecutor falls vacant (for any reason other than expiry of tenure). The Supreme Court in *Rang Bahadur Singh v. State of U.P.* *101* has held as follows: “The time tested rule is that acquittal of a guilty person should be preferred

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98 AIR 1997 SC 3400.
100 Ibid.
101 AIR 2000 SC 1209.
to conviction of an innocent person. Unless the prosecution establishes the guilty of the accused beyond reasonable doubt a conviction cannot be passed on the accused. In Rajiv Gupta v. State of Himachal Pradesh,\textsuperscript{102} the apex Court held that if the trial of a case for an offence which is punishable with imprisonment up to three years has been pending for more than two years and if the trial is not commenced, then the criminal court is required to discharge and acquit the accused In Anil Rai v. State of Bihar,\textsuperscript{103} the Supreme Court observed that the justice should not only be done but should also appear to have been done. Similarly, whereas justice delayed is justice denied, justice withheld is even worse than that. In All India Judges’ Association v. Union of India,\textsuperscript{104} the apex Court held that it is a constitutional obligation of this Court to ensure that the backlog of cases is decreased and efforts are made to increase the disposal of cases. Apart from the steps which may be necessary for increasing the efficiency of the judicial officers, it appears that the time has come for protecting one of the pillars of the Constitution, namely, the judicial system, by directing increase in the judges strength from the existing ratio of judge-population ratio. In N.S Sahni v. Union of India,\textsuperscript{105} the Supreme Court held that the right of an accused to have a speedy trial is now recognized as a right under Article 21. The procedural fairness required by Article 21 including the right to speedy trial has, therefore, to be observed throughout and to be born in mind. In Durga Datta Sharma v. State,\textsuperscript{106} the prosecution under the Prevention of Corruption Act has not commenced after a period of 25 years. No charges had been framed and chances of commencing and concluding the trial in near future were not strong. Observing that the accused persons had already suffered a lot both mentally and physically during the last 25 years, the Court dropped all charges against the accused. In Moti Lal Saraf v. State of Jammu and Kashmir,\textsuperscript{107} the court has clearly stated that no general guidelines could be fixed. Each case must be examined on its facts and circumstances. During the criminal prosecution, no single witness was examined in last 26 years without there being any

\textsuperscript{102} (2000) 10 SCC 68.  
\textsuperscript{104} (2002) 4 SCC 247.  
\textsuperscript{106} 2004(1) Crimes 171  
\textsuperscript{107} 2006 Cr. LJ 4765 (SC).
lapse on part of accused. Its continuation further would be total abuse of process of law, was liable to be quashed. In Puran singh v. State of Uttaranchal, the apex Court acquitted Puran Singh in a murder case that had run for 29 years. The most important is that the court heard his appeal out of turn. But for this, the case would have lingered on much longer. In Pankaj Kumar v. State of Maharastra and others, the Court came to the conclusion that the right to speedy trial of the accused has been infringed, the charges or the conviction, as the case may be, may be quashed unless the court feels that having regard to the nature of offence and other elegant circumstances, quashing of proceedings may not be in the interest of justice. In such a situation, it is open to the court to make an appropriate order as it may deem just and equitable including fixation of time for conclusion of trial. Tested on the touchstone of the broad principles enumerated we are of the opinion that in the instant case, appellant’s ground that the first information report was recorded on 12th May, 1987 for the offences allegedly committed in the year 1981, and after unwarranted prolonged investigations involving financial irregularities, the charge sheet for which was submitted. In another case of Vakil Prasad Singh v. State of Bihar, the appellant an Assistant Engineer in BSEB was alleged to have demanded illegal gratification for release of payment for civil work executed by a civil contractor. Investigation conducted by an officer having no jurisdiction to do so, were successfully challenged by the appellant. Further, the prosecution was found to have slept over the matter for almost 17 years, without any explanation. The stated delay was held to be a clear violation of constitutional guarantee of a speedy investigation and trial under Article 21. Any further continuance of criminal proceedings was said to be unwarranted. Despite the fact that allegations against him were quite serious, the apex Court referring to their earlier decisions quashed the proceedings pending against the appellant. In the case of Bhawna Karir v. the State and Anr, the right to speedy trial was alleged to have been infringed, the first question to be put and answered was that the person to liable for the delay. Proceedings taken by either party in good faith, to indicate their rights and interest, as perceived by them, cannot

108 Appeal (Crl.) 437 of 2006.
110 AIR 2009 SC 1822.
111 Decided on 20 March, 2012.
be treated as delaying tactics nor can the time taken in pursuing such proceedings be counted towards delay. It goes without saying that frivolous proceedings or proceedings taken merely for delaying the day of reckoning cannot be treated as proceedings taken in good faith. The mere fact that an application / petition is admitted and an order of stay granted by a superior court is by itself no proof that the proceeding is not a frivolous. Very often these stays obtained on ex parte representation. The prosecution should not be allowed to become a persecution. Hence, an accuser’s pleas of denial of speedy trial cannot be defeated by saying that the accused has delayed the proceedings. In a recent case,\textsuperscript{112} the Supreme Court has said that it was apprehensive about fixing a time limit for completion of a criminal trial as it could be misused by intelligent criminals. A Division Bench consisting of Justices H.L. Dattu and C. K. Prasad during the hearing on a petition by advocate Ranjan Dwivedi, who has sought quashing of the trial proceedings against him in the L.N. Mishra murder case on the ground of inordinate delay of 37 years – long trial has blighted him personally, physically and socially. The apex Court has declared that right to speedy trial was a requirement under Article 21 guaranteeing right to life. But, the trial has dragged on for 37 years. In 1992, the Supreme Court had directed day-to-day trial in this case for speedy conclusion. Two decades later, we are no where near the end. The bench said there was no denying that delay had been frequent in the judicial system in India. “Delay will continue to happen given the system we have. Delay definitely effects the trial but can the Supreme Court fix a time limit for completion of a criminal trial. The Supreme Court had earlier in a judgment specifically struck down fixation of a time limit for completion of trial,” it said. The Court further stated that “it is a unique case. But if we quash the proceedings, we may be sending a wrong signal, which may be used by an intelligent accused at a later date. We do not want this to happen because of our order.” The bench said since the trial has reached the fag end after dragging for nearly four decades, it could ask the trial court to complete it in the next three months by holding proceedings on a day-to-day basis refusing adjournment on any ground to the accused and prosecution.\textsuperscript{113}


Right to Legal Aid

As political philosopher, Charles de Montesquieu said that, "In the state of nature...all men are born equal, but they cannot continue in this equality. Society makes them lose it, and they recover it only by the protection of the law." The protection of law to poor, illiterate and weak is important to ensure equal justice. Legal aid is one of the means to ensure that the opportunities for securing justice are not denied to any person by reason of poverty, illiteracy, etc.

Legal aid is free legal assistance to the poor and weaker sections of the society with the object to enable them to exercise the rights given to them by law. Justice P.N.Bhagwati has rightly said that "the poor and the illiterate should be able to approach the Courts and their ignorance and poverty should not be an impediment in the way of their obtaining Justice from the Courts."

The Constitution of India gives much emphasis on the constitutionalism and rule of law. In India the rule of law is regarded as a part of the basic structure of the Constitution and also of natural justice. The rule of natural justice says that individuals should not penalized by decisions affecting their rights or legitimate expectations unless they have been given prior notice of the cases against them, a fair opportunity to answer them, and the opportunity to present their own cases.

The preamble of the Constitution secures to its citizen, social, economic and political justice. Article 14 of the Constitution makes it clear that the State shall not deny to any person equality before law or the equal protection of the laws within the territory of India. The aim of Article 14 is to ensure equal justice. The guarantee of equal justice is meaningless if the poor or illiterate or weak persons cannot enforce their rights because of their poverty or illiteracy or weakness.

Articles 38 and 39, of the Constitution of India lay down clear mandate in this regard. According to Article 38 (1) the State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic or political, shall inform all the institutions of the national life.
Article 39-A directs the State to ensure that the operation of the legal system promotes justice on a basis of equal opportunity and shall, in particular, provide free legal aid by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

Right to free legal aid or free legal service is an essential fundamental right guaranteed by the Constitution. It forms the basis of reasonable, fair and just liberty under Article 21 of the Constitution of India, which says, “No person shall be deprived of his life or personal liberty except according to procedure established by law”.

In State of Maharashtra v. Manubhai Pragaji Vashi,114 The Supreme Court has made it quite clear that it is now well established that the failure to provide free legal aid to an accused at the cost of the State unless refused by the accused, would vitiate the trial. In M.H Hoskot v. State Of Maharashtra,115 Justice KrishnaIyer observed that providing free legal aid is the State's duty and not Government's charity.

The Code of criminal Procedure and the Code of Civil Procedure also contain provisions in relation to the free legal aid. Section 304 of the Criminal Procedure Code 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. Section 304 makes it clear that the State is under an obligation to provide legal assistance to a person charged with offence triable before the Court of Session. It enables the State Government to direct that these provisions shall apply in relation to any class of trials before other courts in the State.

Order 33 of the Civil Procedure Code provides in respect of the suit by indigent person. On the application to sue as indigent person is being granted the plaintiff shall not be liable to pay court fee and in case he is not represented by a

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115 1978 AIR 1548 1979 SCR (1) 192 1978 SCC (3) 544
pleader, the Court may, if the circumstances of the case so requires, assign a pleader to him. This benefit has now been extended to the dependant also.

A separate legislation, The Legal Services Authority Act, 1987 has been enacted to constitute the Legal Service Authorities to provide free and competent legal services to the weaker sections of the society to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities and to organise Lok Adalats to secure that the operation of the legal system promotes justice. The Legal Services Authorities Act establishes statutory legal services authorities at the National, State and District level. It makes provisions in relation to Lok Adalat. The main object of the Lok Adalat is to provide quick justice at less expense.

International Covenant on Civil and Political Rights also under Article 14 (3)(d) guarantees to everyone: “Right to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it”

In a democracy, where rule of law is supreme; it is essential to ensure that even the weakest amongst the weak, poorest among the poor, in the country does not suffer injustice arising out of any abrasive action on the part of State or private person. As a way forward there is need to ensure capacity building for legal aid movement. This requires strengthening the skills of stakeholders of legal aid; law teachers, lawyers, law students, volunteers such as aaganwadi workers, Members of local panchayat etc to act as intermediates between rural people and legal service institutions. In State of Maharashtra v. Manubhai Pragaji Pragaji vashi, the Supreme Court has highlighted the necessity for capacity building and held that in order to provide the "free legal aid" it is necessary to have well-trained lawyers in the country. This is only possible if there are adequate number of law colleges with necessary infrastructure, good teachers and staff.
Chapter VI  Role of Judiciary and Protection of Human Rights of Accused

The major drawback of legal aid movement in India is the lack of legal awareness. People are not aware of rights and protection available under the law. It needs to be realized that the promotion of awareness regarding legal aid is not the exclusive duty of the Legal fraternity. It is equally the concern and responsibility of the society at large. Constitutional commitment for legal aid can only be cherished if society comes forward to care for its vulnerable population.  

6.5 Right to Health and Medical Treatment of Accused

The Hon’ble Supreme Court in series of cases held “right to health care” as an essential ingredient under Article 21 of the Constitution. Article 21 casts an obligation on the State to preserve life. A doctor at the Government hospital positioned to meet this state obligation is, therefore, duty bound to extend medical assistance for preserving life. Every doctor whether at a Government hospital or otherwise has the professional obligation to extend his services with due expertise for protection of life. No law or State action can intervene to avoid/delay the discharge of the paramount obligation cast upon members of the medical profession. The obligation being total, absolute and paramount, law of procedure whether in statutes or otherwise which should interfere therefore with the discharge his obligation cannot be sustained and must therefore give way.  

Denial of the Government’s hospital to an injured person on the grounds of non availability of bed amounts to violation of ‘right to life’ under Article 21. Article 21 imposes an obligation on the State to provide medical assistance to injured person. Preservation of human life is of paramount importance.  

The right to medical treatment is the basic human right. The Gujarat High Court directed the jail authorities to take proper care of ailing convicts. The petitioners convicted in the Central Prison, Vadodara suffering from serious ailments were deprived of proper and immediate medical treatment for want of jail escorts required to carry them to hospital. The Gujarat High Court expressed shock and called

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116 http://pib.nic.in/newsite/mbErel.aspx?relid=118011  Visited on 8/2/2018
I.G. Prison and Addl. Chief Secretary and they both acted with promptness and issued with necessary directions in this regard and held that negligent Officers were to be held personally liable. In 2005, same High Court issued directions to State Government, that all Central and District jails should be equipped with ICCU, pathology lab, expert doctors, sufficient staff including nurses and latest instruments for medical treatment in a suo mo to writ. Delhi High Court held that where the Unit has obtained an interim order directing the Union of India to continue providing anti-retroviral treatment to the petitioner who was provided the same in Tihar jail and has since been released on bail.

6.6 Person Arrested not to be Detained more than Twenty- Four Hours

It is the right of the accused that he is brought before a magistrate within 24 hours of arrest, excluding the time taken in transportation from the place of custody to the magistrate. If no judicial magistrate is immediately available then he may be taken before an executive magistrate who can remand him to custody for a maximum of 7 days following which he must be taken before a judicial magistrate. In Central Bureau of Investigation, Special Investigation Cell-I, New Delhi v. Anupam J.Kulkarni the question regarding arrest & detention in custody was dealt with it was held that the magistrate under S.167(2) can authorise the detention of the accused in such custody as he thinks fit but it should not exceed fifteen days in the whole. Therefore the custody initially should not exceed fifteen days in the whole. The custody can be police custody or judicial custody as the magistrate thinks fit.

The words “such custody” and “for a term not exceeding fifteen days in whole” are very significant. On a combined reading of S.167(2) and (2A) it emerges that the Judicial Magistrate to whom the Executive Magistrate has forwarded the arrested accused can order detention in such custody namely police custody) or judicial custody under S.167(2) for the rest of the first fifteen days after deducting the

119 Rasikbhai Ramsing Rana v. State of Gujarat, (DB) 1997 Cr LR (Guj) 442
120 Gujarat Smachar, Ahmedabad Ed. dated 20th May, 2005
121 L X v. Union of India, 2004 (Delhi HC)
122 AIR 1992 SC 1768
period of detention order by the Executive Magistrate. The detention thereafter could only be in judicial custody.

There are also specific rights during arrest and custody, governing the right of medically unfit prisoners. These are that women accused of any offence, if arrested so soon after child birth that they cannot at once be taken before the Magistrate without personal suffering and risk to health should not ordinarily be removed until they are in a proper condition to travel.

They should be allowed to remain under proper charge in the care of their relations, or be sent to the nearest dispensary, and suffered to remain there until the officer in charge of the dispensary certifies that they are sufficiently recovered. In such cases, sanction must be obtained by the police from the nearest Magistrate for their detention at their homes, or in the dispensary, beyond the period of 24 hours as allowed by section 57 of the code of criminal procedure 1973. The same procedure should be followed in the case of other accused persons who are too ill to travel.

The other right that is accorded to the accused is a derivative of the principles of natural justice which would dictate that the police proceed as swiftly as possible with the investigation so as to cause minimum suffering to all parties concerned. In the case of Elumalai v. State of Tamil Nadu 123 the court has held that “For a speedy trial, the prosecution agencies also must take a prompt step in completing their investigations and filing their final reports as contemplated under the Code as expeditiously as possible.

In case the investigating officer fails to take speedy action in a case registered against any person arrested under S. 41(1), S. 151(1) or any other penal provision of the law, and keeps it in cold storage, forgetting his obligation to the society and in contravention of the principles of natural justice and allow, by his conduct, the arrested persons to be kept behind the bars, for months together and if the Courts without being conscious of the mandatory provisions of S. 167(2), mechanically authorise repeated detention and also do not show any diligence in completing the

123 1983 Mad LW (Cri) 121
trial of the case speedily, the result would be that prisoners, especially those coming from the society of have not, have to suffer untold physical and mental agony and spend their lives in the jail without having any ray of hope of their release.

If the arrest is invalid on account of breach of procedure or violation of any other right or if the custody is not passed within the framework of the law by a competent magistrate who has jurisdiction over the issue, the person so detained can file a writ of habeas corpus under Article 32 or 226 of the Constitution of India. However it must be noted that a writ does not lie against a legal custody, no matter what rights may have been violated before the lawful custody.

In Kami Sanyal v Dist. Magistrate,124 Darjeeling the Supreme Court observed that “while a person is committed to jail custody by a competent Court by an order, which prima facie does not appear to be without jurisdiction or wholly illegal, a writ of habeas corpus in respect of that person cannot be granted”. It has been held that the crucial date when the legality of the remand is to be looked into is the date when the petition comes up for hearing, in Kana v. State of Rajasthan125 the Jaipur Bench of the Rajasthan High Court, referring to the Full Bench decision of the Patna High Court, in Babunandan Mallah v. State126 held that “if the detention of the accused is legal, when the bail application is preferred, his previous illegal detention should not be considered.”127

6.7 Handcuffing of Under Trial Prisoner is Unconstitutional

The Hon’ble Justice Krishna Iyer, while delivering the majority judgement held that the provisions of Punjab Police Rules, that every under trial who was accused on non-bailable offence punishable with more than three years jail term would be handcuffed, were violative of Articles 14, 19 and 21 of the Constitution of India. Hence they were held unconstitutional.128 The Hon’ble Supreme Court again

124 1990 Cri LJ 2685
125 1980 Cri LJ 344
126 1972 Cri LJ 423
128 Prem Shankar v. Delhi Administration, AIR 1980 SC 1535
held, where an undertrial prisoner challenged the action of Superintendent of jail putting him into bar fetters and kept him in solitary confinement was an unusual and against the spirit of Constitution and declared it a violation of right of locomotion.\textsuperscript{129}

**Undertrial prisoner cannot be kept in “leg irons”:**

It was held by the Supreme Court in the case of Kadra Pehadiya\textsuperscript{130} that, it was difficult to see how the four petitioners who were merely undertrial prisoners awaiting trial could be kept in leg irons contrary to all prisons regulations and in gross violation of the decision of this court in Sunil Batra’s case.\textsuperscript{131} The court directed the Superintendent to immediately remove leg irons from the feet of the four petitioners. The court also directed that no convict or undertrial prisoner shall be kept in leg irons except in accordance with the ratio of the decision of Sunil Batra’s case. Later on the Supreme Court declared, directed and laid down a rule that handcuffs or other fetters shall not be forced on a prisoner, convict or undertrial, lodged in a jail anywhere in the country or while transporting or in transit from one jail to another or from jail to court and back, the police and the jail authorities, on their own, shall have no authority to direct the handcuffing of any inmates of a jail in the country or while transporting from one jail to another or from jail to court and back. While intending to enforce the order, the court emphasised that if any violation of any of the direction issued by Supreme Court by any rank of the police in the country of member of the jail establishment shall be summarily punished under the Contempt of Court Act apart from other penal consequences under law.\textsuperscript{132}

**6.8 Right to Bail During the Pendency of Appeal**

The Hon’ble Supreme Court held that “refusal to grant bail” in a murder case without reasonable ground would amount to deprivation of personal liberty under Article 21. In this case six appellants were convicted by the Session Judge in a murder case and High Court in appeal also convicted the appellants and sentenced them to life imprisonment. The appellants suffered sentence of 20 months. These appellants were

\textsuperscript{129} Sunil Batra v. Delhi Administration, AIR 1980 SC 1579
\textsuperscript{130} Sunil Gupta v. State of MP, (1990) 3 SCC 119
\textsuperscript{131} Sunil Batra v Delhi Administration, (1978) 4 SCC 494
male members of their family and all of them were in jail. As such their defence was likely to be jeopardized. In the instance case, any conduct on their part suggestive of disturbing the peace of the locality, threatening anyone in the village or otherwise thwarting the life of the community or the course of justice, had not been shown on the part of these appellants, while they were on bail for a long period of five years during the pendency of appeal before High Court. The appellants applied for bail during pendency of their appeal before the Supreme Court, while granting the bail, the court held that refusal to grant bail amounts to deprivation of personal liberty of the accused persons. Personal liberty of an accused or convict is fundamental right and can be taken away only in accordance with procedure established by law. So, deprivation of personal liberty must be founded on the most serious consideration relevant to the welfare objectives of the society specified in the Constitution. In the circumstances of the case, the court held that subject to certain safeguards, the appellants were entitled to be released on bail.\textsuperscript{133} All the undertrial prisoners, who have been in remand for offences other than the specific offences under the various Acts, who have been in jail for period of not less then one half of the maximum period of punishment prescribed for the offence shall be released on bail forthwith in accordance with the direction of the Supreme Court.\textsuperscript{134} Andhra Pradesh High Court directed that all the criminal courts including the Sessions Courts, shall try the offences where the undertrial prisoners cannot be released, on the priority basis by following the provisions of section 309 of the Code. All the undertrial prisoners have been in jails for maximum term of which they could be sentenced on conviction, shall be released on bail on furnishing a personal bond of an appropriate amount. For the purpose of above directions for release on bail, all the criminal courts on the next date fixed for extension of remand or otherwise shall sou motu on the authority of this order shall consider the bail cases and grant bail to the undertrial prisoners on furnishing personal bond for appropriate amount and/or the appropriate sureties as necessary. All the mentally challenged / mentally retarded undertrial prisoners, who

\textsuperscript{133} Babu Singh v. State o f UP, AIR 1978 SC 527
have been under detention for 18 years, 15 years and 6 years, shall be dealt with in accordance with the provisions of Chapter XXV of the Code. If, the Medical Officer of the State Government certifies that the undertrial prisoner is not mentally healthy, all such undertrial prisoners who completed maximum sentence period shall be released forthwith; and all such persons of unsound mind shall forthwith be shifted to any government institute of mental health pending necessary order from the competent criminal court for release of such persons. Further, the court emphasised that the direction issued by the court in the order, shall be complied within a period of two weeks. The court also directed that all the district judges shall regularly visit the Central Jails, District Jails, and sub-jails in their jurisdiction and take appropriate action as per the provisions of the Code.

6.9 Conclusion

Every citizen of India has a fundamental right of freedom under Article 21 of the Indian Constitution. Since we are governed by the rule of law, freedom of every individual within the territory of India is subject to the rule of law. In other words, if any individual violates the rule of the land, he is bound to face consequences under the law and in such a case, his freedom can be restricted. Whenever any person, arrested by police approaches the court to release him on bail, it is the solemn and bounded duty of court to decide his bail application at the earliest by a reasoned order.

To conclude all the judicial pronouncements related to Right to speedy trial one thing should be noted that people of India not getting speedy justice. Inordinate delay has become a common feature of Indian legal system. A number of Judgments given by judiciary for elimination of delay and a number of Steps have been formulated by State but the object of speedy trial remains a myth and has not, so far, translated into reality. There is need to enact a new comprehensive law on the speedy trial of cases. Criminal laws should be suitably amended to achieve the object of speedy trial of offences. There should be awareness campaign for speedy trial of

offences. It is revealed that although the Constitution of India does not directly talk of the right to speedy trial but the same has been given a status of fundamental right by way of interpretation of Article 21 of the Constitution of India. Besides the Constitution of India, the Code of Criminal Procedure also guarantees the right to speedy trial in its various provisions. The judiciary which is instrumental in giving this right the status of fundamental. No person can hope to get justice in a fairly reasonable period. Proceedings in criminal cases go on for years, sometimes decades. This is despite the legal position strongly favouring speedy trial.

Like in the case of all law enforcement in India, the right of the underprivileged always becomes harder to protect. The provisions of section 167b Cr.P.C extends to allowing the person bail if there isn’t sufficient cause to hold him in custody. The section, however also explicitly states that if the accused is unable to furnish bail then he continues to remain in custody. It was observed in Laxmi Narain Gupta v. State137 that ”Along with the present petition at least another 20 cases have been listed, where the accused are in judicial custody, merely because they are poor. In each of those cases, directions have been passed by the Courts concerned, for admitting them to bail. They are in judicial customary because they have not been able to arrange a surety while the orders for their judicial remands are being passed in a routine manner.” This drawback also persists when the accused is unaware of his rights. While this section has been made clear by the statute, the same cannot be said for provisions relating to the inability of the police to get a person into custody due to medical or other reasons. The law is not clear if the 15 day limit must be suspended during the period of inability to hold in physical custody. It becomes clear that the while the law provides for safeguards against abuse, it needs to be amended to remove all obscurities and contradiction. The magistrates must also see to the background of the victims before passing orders. Section 167 must also be expanded so that remedies must be available for past illegal detentions or arrest even if in the present case custody is legal. Lastly, the executive must also play a role by ensuring that more and more people are aware of their right.

137 2002 CriLJ 2907