CHAPTER - III

HUMAN RIGHTS OF ACCUSED AND JUVENILE DELINQUENTS IN INDIA

3.1. Introduction

The three segments of Criminal Justice System viz., the police, the judiciary and the correctional institutions ought to function in harmonious and cohesive manner. But in practice, one often finds that it is not the case. The police, instead of protecting and promoting human rights, are often found to violate them. The National Human Rights Commission has been receiving reports of custodial deaths, non-registration of cases, arbitrary arrests, custodial violence etc. A person in custody of the police, an under-trial or a convicted individual does not lose his human and fundamental rights by virtue of incarceration. The two cardinal principles of criminal jurisprudence are that the prosecution must prove its charge against the accused beyond shadow of reasonable doubt and the onus to prove the guilt of the accused to the hilt is stationary on the prosecution and it never shifts. The prosecution has to stand on its own legs so as to bring home the guilt of the accused conclusively and affirmatively and it cannot take advantage of any weakness in the defence version. The intention of the legislature in laying down these principles has been that hundreds of guilty persons may get scot free but even one innocent should not be punished. Indian Constitution itself provides some basic rights/safeguards to the accused persons which are too followed by the authorities during the process of criminal administration of justice. The Criminal Procedure Code deals with the procedural aspects of arrest of an accused person and provides various rights to accused/arrested persons. Criminal justice system of India treats differently for different crimes and also gives some exceptions and leniency to some class of people. These exceptions are mentioned in Indian penal code, while the court is lenient for giving punishment in case of juveniles and separate act has also been made for juveniles. Juvenile has been defined differently in different acts but as per latest act i.e. The Juvenile justice (care and protection) Act, juveniles are those who has not attained the age of 18 years. There is a juvenile justice system that treats juveniles differently than adults because our society believes juveniles are different from adults, both in terms of level of responsibility and potential for rehabilitation.
Although there is concern with public safety and holding juvenile offenders accountable for their actions, there is greater emphasis on rehabilitation than on punishment in the juvenile justice system. “Rehabilitation” means to restore someone to a useful life through therapy and education. For example, a juvenile who commits an offense may be required to participate in counselling or a program to help him or her make better decisions in the future. But in the light of the present scenario does the “Rehabilitation” really lead to a reformation in the child? Inspite of the presence of the welfare laws for juveniles, there is a rise in the number of Juvenile offenders across the country. Juveniles are sent to the rehabilitation centre in order to make their future better. There are some provisions which expressly and directly create important rights in favour of the accused/arrested person.

3.2 Provisions of Indian Constitution and Criminal Procedure Code

Following are some important provisions creating rights in favour of the accused/arrested persons:

3.2.1 Protection against Ex Post Facto Law

Clause (1) of Article 20 of the Indian Constitution says that “no person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence. Article 11, para 2 of the Universal Declaration of Human Rights, 1948 provides freedom from ex-post facto laws.\(^1\)

An ex post facto law is a law which imposes penalties retrospectively, i.e., on acts already done and increases the penalty for such acts. The American Constitution also contains a similar provision prohibiting ex post facto laws both by the Central and the State Legislatures. If an act is not an offence at the date of its commission it cannot be an offence at the date subsequent to its commission. The protection afforded by clause (1) of Article 20 of the Indian Constitution is available only against conviction or sentence for a criminal offence under ex post facto law and not against the trial. The protection of clause (1) of Article 20 cannot be claimed in case of preventive

\(^1\) Article 15 of International Covenant on Civil and Political Rights, 1966.
detention, or demanding security from a person. The prohibition is just for conviction and sentence only and not for prosecution and trial under a retrospective law. So, a trial under a procedure different from what it was at the time of the commission of the offence or by a special court constituted after the commission of the offence cannot ipso facto be held unconstitutional. The second part of clause (1) protects a person from ‘a penalty greater than that which he might have been subjected to at the time of the commission of the offence.’ In Kedar Nath v. State of West Bengal, the accused committed an offence in 1947, which under the Act then in force was punishable by imprisonment or fine or both. The Act was amended in 1949 which enhanced the punishment for the same offence by an additional fine equivalent to the amount of money procured by the accused through the offence. The Supreme Court held that the enhanced punishment could not be applicable to the act committed by the accused in 1947 and hence, set aside the additional fine imposed by the amended Act. In the criminal trial, the accused can take advantage of the beneficial provisions of the ex-post facto law. The rule of beneficial construction requires that ex post facto law should be applied to mitigate the rigorous (reducing the sentence) of the previous law on the same subject. Such a law is not affected by Article 20(1) of the Constitution.

3.2.2 Doctrine of “Autrefois Acquit” and “Autrefois Convict”

According to this doctrine, if a person is tried and acquitted or convicted of an offence, he cannot be tried again for the same offence or on the same facts for any other offence. This doctrine has been substantially incorporated in the Article 20(2) of the Constitution and is also embodied in Section 300 of the Criminal Procedure Code, 1973. When once a person has been convicted or acquitted of any offence by a competent court, any subsequent trial for the same offence would certainly put him in jeopardy and in any case would cause him unjust harassment. Such a trial can be considered anything but fair, and therefore has been prohibited by the Code of Criminal Procedural as well as by the Constitution. The doctrine of “autrefois acquit” and “autrefois convict” has been embodied in Section 300 of Criminal Procedure Code as follows:

2 AIR 1953 SC 404.
Person once convicted or acquitted not to be tried for same offence - (1) a person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted for such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under sub-section 1 of section 221, or for which he might have been convicted under sub-section (2) thereof.

The dismissal of a complaint, or the discharge of the accused, is not an acquittal for the purposes of this section. Constitutional provision to the same effect is incorporated in Article 20 (2) which provides that no person shall be prosecuted and punished for the same offence more than once. These pleas are taken as a bar to criminal trial on the ground that the accused person had been once already charged and tried for the same alleged offence and was either acquitted or convicted. These rules or pleas are based on the principle that “a man may not be put twice in jeopardy for the same offence”.

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

In order to get benefit of the basic rule contained in Sec 300(1) of Criminal Procedure Code is necessary for an accused person to establish that he had been tried by a “court of competent jurisdiction” for an offence. An order of acquittal passed by a court which believes that it has no jurisdiction to take cognizance of the offence or to try the case, is a nullity and the subsequent trial for the same offence is not barred by the principle of autrefois acquit. To operate as a bar the second prosecution and consequential punishment there under, must be for the “same offence”. The crucial requirement for attracting the basic rule is that the offences are the same, i.e. they should be identical. It is therefore necessary to analyze and compare not the allegations in the two complaints but the ingredients of the two offences and see

whether their identify is made out. Section 300 of Criminal Procedure Code bars the trial for the same offence and not for different offences which may result from the commission or omission of the same set of the act. Moreover, the principle of issue-estoppel, as enunciated and approved in several decisions of the Supreme Court, is simply is, that where an issue of fact has been tried by a competent court on a former occasion and a finding has been reached in favour of an accused, such a finding would constitute an estoppel or res judicata against the prosecution not as a bar to the trial and conviction of the accused for a different or distinct offence but as precluding the reception of evidence to disturb that finding of fact when the accused is tried subsequently even for a different offence which might be permitted by law.4

3.2.3 Prohibition against Self-Incrimination

Clause (3) of Article 20 provides that no person accused of any offence shall be compelled to be a witness against himself. Thus Article 20(3) embodies the general principles of English and American jurisprudence that no one shall be compelled to give testimony which may expose him to prosecution for crime. The cardinal principle of criminal law which is really the bed rock of English jurisprudence is that an accused must be presumed to be innocent till the contrary is proved.5 It is the duty of the prosecution to prove the offence. The accused need not make any admission or statement against his own free will. The fundamental rule of criminal jurisprudence against self-incrimination has been raised to a rule of constitutional law in Article 20(3). The guarantee extends to any person accused of an offence and prohibits all kinds of compulsions to make him a witness against himself. Explaining the scope of this clause in M.P. Sharma v. Satish Chandra,6 the Supreme Court observed that this right embodies the following essentials:

(a) It is a right pertaining to a person who is “accused of an offence.”

(b) It is a protection against “compulsion to be a witness”.

5 Article 11, Clause 1 of Universal Declaration of Human Rights, 1948 which lays down: “Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.”
6 AIR 1954 SC 300.
(c) It is a protection against such compulsion relating to his giving evidence “against himself.”

In *Nandini Satpathy v. P.L. Dani*, the Supreme Court has considerably widened the scope of clause (3) of Article 20. The Court has held that the prohibitive scope of Article 20(3) goes back to the stage of police interrogation not commencing in court only. It extends to, and protects the accused in regard to other offences-pending or imminent, which may deter him from voluntary disclosure. The phrase compelled testimony ‘must be read as evidence procured not merely by physical threats or violence but by psychic (mental) torture, atmospheric pressure, environmental coercion, tiring interrogatives, proximity, overbearing and intimidatory methods and the like. Thus, compelled testimony is not limited to physical torture or coercion, but extend also to techniques of psychological interrogation which cause mental torture in a person subject to such interrogation.

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

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

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7 AIR 1978 SC 1025.
8 Article 5 of Universal Declaration of Human Rights, 1948.
10 2010 (2) R.C.R. (Criminal) 896.
(ii) Section 53, 53-A and 54 of Criminal Procedure Code permits the examination include examination of blood, blood-stains, semen swabs in case of sexual offences, sputum and sweat, hair samples and finger nail dipping by the use of modern and scientific techniques including DNA profiling. But the scientific tests such as Polygraph test, Narcoanalysis and BEAF do not come within the purview of said provisions.

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

(iv) Voluntary administrations of impugned techniques are, however, permissible subject following safeguards, but test results by themselves cannot be admitted in evidence.

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

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

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

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

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

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

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

(h) A full medical and factual narration of the manner of the information received must be taken on record.
The underlying rational of right against self incrimination is as under

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

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

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

(iv) During trial stage the onus is on the prosecution to prove the charges leveled against the defendant and the ‘right against self-incrimination’ is a vital protection to ensure that the prosecution discharges the said onus.11

3.2.4 PERSON ARRESTED TO BE INFORMED OF GROUNDS OF ARREST

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

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

(ii) When a subordinate officer is deputed by a senior police officer to arrest a person under Section 55 of Criminal Procedure Code, he shall deliver to the officer required to make the arrest an order in writing, specifying the person to be arrested and the offence or other cause for which the arrest is made and the officer so required shall, before making the arrest, notify to the person to be arrested the substance of the...

11 Ibid.
order and, if so required by such person, shall show him the order. Non-compliance with this provision will render the arrest illegal.\(^{12}\)

(iii) In case of arrest to be made under a warrant, Section 75 provides that the police officer or other person executing a warrant of arrest shall notify the substance thereof to the person to be arrested, and if so required, shall show him the warrant. If the substance of the warrant is not notified, the arrest would be unlawful.\(^ {13}\)

The right to be informed of the grounds of arrest is recognized by Sections 50, 55 and 75 in cases where the arrest is made in execution of a warrant of arrest or where the arrest is made by a police officer without warrant. If the arrest is made by a magistrate without a warrant under Section 44, the case is covered neither by any of the Sections 50, 55 and 75 nor by any other provision in the Code requiring the Magistrate to communicate the grounds of arrest to the arrested person. This lacuna in the Code, however, will not create any difficulty in practice as the Magistrate would still be bound to state the grounds under Article 22(1) of the constitution. The word “forthwith” in section 50 (1) of the Code of Criminal Procedure creates a stricter duty on the part of police officer making the arrest and would mean immediately. The right to be informed of the grounds of arrest is a precious right of the arrested person.\(^ {14}\) The grounds of arrest should be communicated to the arrested person in the language understood by him; otherwise it would not amount to sufficient compliance with constitutional requirements.

### 3.2.5 Right To Be Defended By A Lawyer

It is one of the fundamental rights enshrined in our Constitution. Article 22 (1) of the Constitution provides, *inter alia*, that no person who is arrested shall be denied the right to consult and to be defended by a legal practitioner of his choice. The right of the accused to have a counsel of his choice is fundamental and essential to fair trial. The right is recognized because of the obvious fact that ordinarily an accused person does not have the knowledge of law and the professional skill to defend himself before a court of law wherein the prosecution is conducted by a competent

\(^{13}\) Satish Chandra Rai v. Jodu Nandan Singh, ILR 26 Cal 748; Abdul Gafur v. Queenmpress, ILR 23 Cal 896.
and experienced prosecutor. This has been eloquently expressed by the Supreme Court of America in *Powell v. Alabama*.\(^\text{15}\) The Court observed that “The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and the knowledge adequately to prepare his defence, even though he has a perfect one. He requires the guiding hand of counsel at every step of the proceeding against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect?”\(^\text{16}\)

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

In *Huassainara Khatoon (IV) v. Home Secretary, State of Bihar*,\(^\text{17}\) the Supreme Court after adverting to Article 39-A of the Constitution and after approvingly referring to the creative interpretation of Article 21 of the constitution as propounded in its earlier epoch-making decision in *Maneka Gandhi v. Union of India*,\(^\text{18}\) has explicitly observed as follows:

The right to free legal services is, therefore, clearly an essential ingredient of ‘reasonable, fair and just’ procedure for a person accused of an offence and it must be held implicit in the guarantee of Article 21. This is a constitutional right of every accused person who is unable to engage a lawyer and secure legal services on account of reasons such as poverty, indigence or incommunicado situation and the State is

\(^{15}\) 287 US 45 (1932).

\(^{16}\) Ibid.


under a mandate to provide a lawyer to an accused person if the circumstances of the case and the needs of justice so required, provided of course the accused person does not object to the provision of such lawyer.\textsuperscript{19}

It has been categorically laid down by the Supreme Court that the constitutional right of legal aid cannot be denied even if the accused failed to apply for it. It is now therefore clear that unless refused, failure to provide legal aid to an indigent accused would vitiate the trial, entailing setting aside of conviction and sentence.\textsuperscript{20}

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

Section 303 of Criminal Procedure Code deals with the provisions relating to right of person against whom proceedings are instituted to be defended, it provides that any person accused of an offence before a criminal court, or against whom proceedings are instituted under this court, may of right be defended by a pleader of his choice. The right begins from the moment of arrest i.e. pre-trial stage.\textsuperscript{21} The


\textsuperscript{20} Suk Das v. Union Territory of Arunachal Pradesh, (1986) 2 SCC 401: 1986 SCC (Cri) 166.

\textsuperscript{21} Llewelyn, Evans Re. ILR 50 Bom 741: 27 Cri LJ 1169, Moti Bai v. State, AIR 1954 Raj 241.
arrestee could also have consultation with his friends or relatives. The consultation with the lawyer may be in the presence of police officer but not within his hearing.  

3.2.6 Person arrested to be taken before the Magistrate

Article 22 (2) of the Constitution provides that an arrested person must be taken to the Magistrate within 24 hours of arrest. Similar provision has been incorporated under Section 56 of Criminal Procedure Code. A police officer making an arrest without warrant shall, without unnecessary delay and subject to the provisions herein contained as to bail, take or send the person arrested before a Magistrate having jurisdiction in the case, or before the officer in charge of a police station.

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

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

Article 22(2) of the Constitution provides:

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

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

The police officer or other person executing a warrant of arrest shall (subject to the provisions of section 71 as to security) without unnecessary delay brings the person

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arrested before the Court before which he is required by law to produce such person; 
Provided that such delay shall not, in any case, exceed twenty-four hours exclusive of 
the time necessary for the journey from the place of arrest to the Magistrate’s Court.

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

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

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

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

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

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

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

Sub-section (3) of Section 46 Criminal Procedure Code enjoins in clear terms 
that though police officer/any other person making arrest can use all necessary means 
for the purpose but they have not been given any right to cause the death of a person

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24 Dwarkadas Haridas v. Ambalal Ganpatram, 28 CWN 850, 853, Manoj v. State of 
State of Bihar, 1999 Cri LJ 4400 (Pat).
25 Khatri (II) v. state of Bihar, 1981 SCC (Cri) 228, 233-34: (1981) 1 SCC 627, D.G. 
who is not accused of an offence punishable with death or imprisonment for life.\textsuperscript{27} Again Section 49 Criminal Procedure Code provides that ‘the person arrested shall not be subjected to more restraint than is necessary to prevent his escape’.\textsuperscript{28}

The case law produced by the courts in response to the demand for protecting women has made the Parliament to enact sub-section (4) to Section 46 of Criminal Procedure Code laying down that no woman shall be arrested after sunset and before sunrise, and where such exceptional circumstances exist, the woman police officer shall, by making a written report, obtain the prior permission of the judicial Magistrate of first class within whose jurisdiction the offence is committed or arrest is to be made.\textsuperscript{29}

\textbf{3.2.9 Information of Arrest to a Nominated Person}

The rules emerging from decisions such as \textit{Joginder Singh v. State of U.P.}\textsuperscript{30} and \textit{D.K. Basu v. State of West Bengal}\textsuperscript{31} have been enacted in Section 50-A.\textsuperscript{32} Sub Section (1) of Section 50-A of Criminal Procedure Code provides every police officer or other person making any arrest under this code shall forthwith give the information regarding such arrest and place where the arrested person is being held to any of his friends, relatives or such other persons as may be disclosed or nominated by the arrested person for the purpose of giving such information. Sub Section (2) of Section 50-A of Criminal Procedure Code provides the Police Officer shall inform the arrested person for the purpose of giving such information of his right under Sub Section (1) as soon as he is brought to police station. Sub Section (3) of Section 50-A of Criminal Procedure Code provides an entry of the fact as to who has been informed of the arrest of such person shall be in a book to be kept in the police station in such form as may be prescribed in this behalf by the State Government. Sub Section (4) of Section 50-A of Criminal Procedure Code provides that it shall be the duty of Magistrate before whom such arrested person is proceed, to satisfy himself that the requirement

\begin{itemize}
\item \textsuperscript{27} Karam Singh v. Hardayal Singh, 1979 Cri LJ 1211, 1215 (P&H).
\item \textsuperscript{29} Inserted By the Code of Criminal Procedure (Amendment) Act, 2005. It came into force with effect from Jun 23, 2006.
\item \textsuperscript{30} (1994) 4 SCC 260.
\item \textsuperscript{31} (1997) 1 SCC 416.
\item \textsuperscript{32} Section 50-A Inserted by Act 25 of 2005 effective from 23-6-2006.
\end{itemize}
of sub-section (2) and Sub-Section (3) have been complied with in respect of such arrested person.

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

3.2.10 Right to Be Released On Bail in Bailable Offences

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

3.2.11 Right to receive the copy of the receipt after search

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

3.2.12 Right of medical examination of arrested person

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

3.2.13 Right to free legal aid

The ‘right to counsel’ would remain empty if the accused due to his poverty or indigent conditions has no means to engage a counsel for his defence. The state is under a constitutional mandate (implicit in Article 21 of the constitution, explicit in Article 39-A of the constitution—a directive principle) to provide free legal aid to an indigent accused person. Section 304 of the Code of Criminal Procedure also provides such a right to the accused. Section 304 of Criminal Procedure Code deals with the provisions relating to legal aid to accused at State expenses in certain cases. Section 304(1) provides that where, in a trial before the Court of Session, the accused is not represented by a pleader, and where it appears to the Court that the accused has not sufficient means to engage a pleader, and the Court shall assign a pleader for his defence at the expense of the State. A failure to inform the accused of this right and non compliance with this requirement would vitiate the trial as held in Sukhdas V. Union Territory of Arunachal Pradesh. In Khatri (II) V. State of Bihar, the Supreme Court has held that the State is under a constitutional mandate to provide free legal aid to an indigent accused person, and that their constitutional obligation to provide legal aid does not arise only when the trial commences but also when the accused is for the first time produced before the Magistrate as also when he is remanded from time to time. However this constitutional right of an indigent accused to get free legal aid may prove to be illusory unless he is produced before promptly and duly informed about it by the court when he is produced before it. The Supreme Court has therefore cast a duty on all Magistrate and courts to inform the indigent accused about his right to get free legal aid.

In 1987, Legal Services Authorities Act was enacted to give a statutory base to legal aid programmes throughout the country on a uniform pattern. This Act was finally enforced on 9th of November, 1995 after certain amendments were introduced.

34 See Sections 53-A and 54(2) inserted by Act 25 of 2005 brought into force with effect from 23-6-2006.
therein by the Amendment Act of 1994. The National Legal Services Authority (NALSA) has been constituted under the Legal Services Authorities Act, 1987 to provide free Legal Services to the weaker sections of the society and to organize Lok Adalats for amicable settlement of disputes. In every State, State Legal Services Authority has been constituted to give effect to the policies and directions of the NALSA and to give free legal services to the people and conduct Lok Adalats in the State. The State Legal Services Authority is headed by Hon’ble the Chief Justice of the respective High Court who is the Patron-in-Chief of the State Legal Services Authority. In every District, District Legal Services Authority has been constituted to implement legal services programmes in the district. The District Legal Services Authority is situated in the District Courts Complex in every District and chaired by the District Judge of the respective district.

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

### 3.2.14 Right of Accused to Know of The Accusation

One basic requirement of a fair trial in criminal cases is to give precise information to the accused as to the acquisition against him. In a criminal trial charge is the foundation. Section 218 of Criminal Procedure Code gives the basic rule that for every distinct offence there shall be a separate charge. Fair trial requires that the accused person is given adequate opportunity to defend himself. Such opportunity will have little meaning, or such an opportunity will in substance be the very negation of it, if the accused is not informed of the accusations against him. The Code therefore provides in unambiguous terms that when an accused person is brought before the court for trial, the particulars of the offence of which he is accused shall be stated to him.\(^{37}\) In case of serious offences, the court is required to frame in writing a formal charge and then to read and explain the charge to the accused person.\(^{38}\) Details provisions have been made in the Code in Sections 211-224 of Criminal Procedure Code regarding the form of charge, and the joinder of charges.

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\(^{37}\) Ss. 228, 240, 246, 251 of Cr.P.C.

\(^{38}\) S s. 228,240,246 of Cr.P.C.
3.2.15 Right to Be Tried In Presence Of Accused

The personal presence of the accused throughout his trial would enable him to understand properly the prosecution case as it is unfolded in the court. This would facilitate in the making of the preparations for his defence. A criminal trial in the absence of the accused is unthinkable. A trial and a decision behind the neck of the accused person is not contemplated by the Code, though no specific provision to that effect is found therein. The requirement of the presence of the accused during his trial can be implied from the provisions which allow the court to dispense with the personal attendance of the accused person under certain circumstances. Section 273 of Criminal Procedure Code requires that the evidence is to be taken in the presence of the accused person; however, the section allows the same to be taken in the presence of the accused’s pleader if the personal attendance of the accused person is dispensed with. Fair trial requires that the particulars of the offence have to be explained to the accused person and that the trial is to take place in his presence. Therefore, as a logical corollary, such a trial should also require the evidence in the trial to be taken in the presence of the accused person. Section 273 attempts to achieve this purpose. The section makes it imperative that all the evidence must be taken in the presence of the accused. Failure to do so would vitiate the trial, and the fact that no objection was taken by the accused is immaterial. This rule is of course subject to certain exceptions made by the provisions of the Code of Criminal Procedure, viz. Sections 205, 293, 299, 317.

Evidence given by witnesses may become more reliable if given on oath and tested by cross-examination. A criminal trial which denies the accused person the right to cross-examine prosecution witnesses is based on weak foundation, and cannot be considered as a fair trial.

Though the burden of proving the guilt is entirely on the prosecution and though the law does not require the accused to lead evidence to prove his innocence, yet a criminal trial in which the accused is not permitted to give evidence to disprove the prosecution case, or to prove any special defence available to him, cannot be any

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standard to be considered as just and fair. The refusal without any legal justification by a Magistrate to issue process to witnesses named by the accused person was held enough to vitiate the trial.\textsuperscript{41} Though the imperative rule contained in the section confers a right on the accused to be present in the course of the trial, it presupposes that the accused accepts it and does not render its fulfillment and impossibility. This obligation or the right is not so absolute in character that its requirement cannot be dispensed with even in a case where the accused by his own conduct renders it impossible to comply with its requirements.\textsuperscript{42} The right created by the section is further supplemented by Section 278 of Criminal Procedure Code. It, \textit{inter-alia}, provides that wherever the law requires the evidence of a witness to be read over to him after its completion, the reading shall be done in the presence of the accused, or of his pleader if the accused appears by pleader. If any evidence is given in a language not understood by the accused person, the bare compliance with Section 273 of Criminal Procedure Code will not serve its purpose unless the evidence is interpreted to the accused in a language understood by him.

\subsection*{3.2.16 Interpretation of Evidence To Accused Or His Pleader}

Section 279 of Criminal Procedure Code provides that whenever any evidence is given in a language not understood by the accused, and he is present in Court in person, it shall be interpreted to him in open Court in a language understood by him. If he appears by pleader and the evidence is given in a language other than the language of the Court, and not understood by the pleader, it shall be interpreted to such pleader in that language. When documents are put for the purpose of formal proof, it shall be in the discretion of the Court to interpret as much thereof as appears necessary. However, non-compliance with Section 279(1) of Criminal Procedure Code will be considered as more irregularity not vitiating the trial if there was no prejudice or injustice cause to the accused person.\textsuperscript{43}

\subsection*{3.2.17 Rights of the accused where accused does not understand proceedings}


\textsuperscript{42} State v. Ananta Singh , 1972 Cri LJ 1327, 1331 (Cal).

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

3.2.18 Right to get copies of police report and other documents

(a) Where the proceedings is instituted on a police report - where a police officer investigating the case finds it convenient to do so, he may furnish to the accused copies of all or any of the documents referred to in Section 173(5) of the Criminal Procedure Code.\(^44\) According to Section 207 of Criminal Procedure Code the magistrate is under an imperative duty to furnish to the accused, free of cost, copies of statements made to the police and of other documents to be relied upon by the prosecution. The object of furnishing the accused person with copies of the statements and documents as mentioned above is to put him on notice of what he has to meet at the time of the inquiry or trial and to prepare himself for his defence.\(^45\) The right conferred on the accused is confined to the documents enlisted in the section and does not extend to other documents. From the language of Section 207, it appears that the right to have copies of statements recorded by the police is only in respect of statements recorded in the same case, and not in respect of statements recorded in any other case.\(^46\)

\(^{44}\) S. 173 (1), Cr.P.C.


At the commencement of the trial in a warrant case it is the duty of the
magistrate conducting the trial to satisfy himself that he has complied with the
provisions of Section 207.\footnote{Section 238 Cr.P.C.} In a summons case instituted on a police report no such
duty has been specifically cast on the magistrate conducting the trial. However free
copies have to be supplied to the accused in such cases by the magistrate in view of
the imperative duty created by Section 207. Similarly in a case exclusively triable by
a court of session such a duty is not imposed by any express provision in the Code on
the Court of Session. However if such a duty is implied in a summons case, a fortiori,
it is very much implied in a case exclusively triable by a Court of Session.

\textbf{(b) Where the proceeding is instituted otherwise than on a police report:-}

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

According to Section 238 of Criminal Procedure Code at the time
commencement of the trial in a warrant case it is the duty of the Magistrate to satisfy
himself that he has complied with the provisions of Section 207 of Criminal
Procedure Code However in a summons case instituted on a police report no such
duty has been specifically cast on the Magistrate conducting the trial. However free
copies have to be supplied to the accused in such cases by the Magistrate in view of
the imperative duty created by Section 207 of Criminal Procedure Code. If the copies
of the statements etc. are not supplied to the accused person as required by Section 207 of Criminal Procedure Code. It is undoubtedly a serious irregularity; however this irregularity in itself will not vitiate the trial. It will have to see whether the omission to supply copies has in fact occasioned a prejudice to the accused person in his defence. It is found in positive; the conviction of the accused person must be set aside, and a fair retrial after furnishing to the accused all the copies to which he is entitled must be ordered.\footnote{S. 465 Cr.P.C.}

3.2.19 Right to Cross-Examine Prosecution Witnesses and To Produce Defence Evidence

Evidence given by witnesses may become more reliable if given on oath and tested by cross-examination. A criminal trial which denies the accused person the right to cross-examine prosecution witnesses is based on weak foundation, and cannot be considered as a fair trial.\footnote{Sukanraj v. State of Rajasthan, AIR 1967 Raj 267, 268: 1967 Cri LJ 1702.} It is mandatory that every accused must have assistance of counsel during the time of examination of prosecution witnesses. In \textit{Mohd. Hussain @ Julfiakre Ali v. The State (Govt. of NCT) Delhi},\footnote{AIR 2012 SC 750.} it was held that right to have counsel at the cost of state where accused is unable to engage a counsel is part of fair trial. The right of a person charged with crime to have the services of a lawyer is fundamental and essential to fair trial. The right to cross-examine a witness apart from being a natural right is statutory right. In \textit{Mohd. Sukur Ali v. State of Assam},\footnote{AIR 2011 SC 1222.} it was held that a criminal case should not be decided against accused in the absence of the Counsel. An accused in criminal case should not suffer for the fault of his counsel and in such a situation appoint another counsel as amicus curiae to defend the accused. In \textit{Man Singh & Anr v. State of M.P.},\footnote{2008 (4) RCR (Criminal) 55.} it was held that Lawyers in criminal courts are necessities, not luxuries. For an accused lawyer's service is indispensable in all circumstances.

A lawyer is also duty bound to accept the case of all types of accused. In \textit{A.S. Mohammed Rafi v. State of Tamil Nadu rep. by Home Dept. And others},\footnote{AIR 2011 SC 308.} it was held that Professional ethics requires that a lawyer cannot refuse a brief, provided a...
client is willing to pay his fee and lawyer is not otherwise engaged. Bar can not pass a resolution that none of the lawyer shall appear for a particular person whatsoever heinous crime he has committed. Chapter II of the rules by Bar council of India states about "standards of Professional conduct and etiquette."

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

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

3.2.20 Court’s Power and Duty to Examine The Accused Person

With a view to give an opportunity to the accused person to explain the circumstances appearing in evidence against him, Section 313 of Criminal Procedure Code provides for the examination of the accused by the court. This if of immense help to the accused person, particularly when he is undefended. Most of the accused persons are poor, uneducated and helpless. As observed by Stephen, an ignorant, uneducated man has the greatest possible difficulty in collecting his ideas, and seeing the bearing of facts alleged. He is utterly unaccustomed to sustain attention or systematic thought and the criminal trial proceedings which to an experienced person appear plain and simple, must be passing before the eyes and mind of the accused like a dream which he cannot grasp. Under these circumstances the importance of Section 313 is self-evident; it requires the courts to question the accused properly and fairly so that it is brought home to the accused in clear words the exact case that the accused

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will have to meet, and thereby an opportunity is given to the accused to explain any such POINT.55

3.2.21 Accused Person as A Competent Witness

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

3.2.22 Right to Speedy Trial

Justice delayed is justice denied. This is all the more true in a criminal trial where the accused is not released on bail during the pendency of the trial and trial is inordinately delayed. However, the code does not in so many words confer any such right on the accused to have his case decided expeditiously. Section 437(6) of Criminal Procedure Code provides that if the accused is in detention and the trial is not completed within 60 days from the first date fixed for hearing he shall be released on bail. But this only mitigates the hardship of the accused person but does not give him speedy trial and secondly this rule is applicable only in case of proceedings before a Magistrate. The code has given a more positive direction to courts when it says.

In every inquiry or trial the proceedings shall be held as expeditiously as possible, and in particular, when the examination of witnesses has once begun, the same shall be continued from day today until all the witnesses in attendance have been examined unless the court finds the adjournment of the same beyond the following day to be necessary for reasons to be recorded.56 A criminal trial which drags on for unreasonably long time is not a fair trial. The court may drop proceedings on account of long delay even in case where the delay was caused due to malafide

56 Section 309(1) Cr.P.C.
moves of the accused. But in such a case the court may make the accused to suffer exemplary costs Section 309(1) of Criminal Procedure Code gives directions to the courts with a view to have speedy trials and quick disposals. The right of the accused in this context has been recognized but the real problem is how to make it a reality in actual practice. The provisions with regard to limitation help the accused to certain extent.

In Hussainara Khatoon (IV) V. State of Bihar, the Supreme Court considered the problem in all its seriousness and declared that speedy trial is an essential ingredient of ‘reasonable, fair and just’ procedure guaranteed by Article 21 and that it is the constitutional obligation of the state of devise such a procedure as would ensure speedy trial to accused. The State cannot avoid its constitutional obligation to provide speedy trial to the accused by pleading financial or administrative inability. The State is under a constitutional mandate to ensure speedy trial and whatever is necessary for this purpose has to be done by the State. It is also the constitutional obligation of this court, as the guardian of the fundamental rights of the people, as a sentinel on the qui vive, to enforce the fundamental right of the accused to speedy trial by issuing necessary directions to the State.

The spirit underlying these observations have been consistently rekindled by the Supreme Court in several cases. This has again been expressed in Raj Deo Sharma (II) v. State of Bihar wherein the court ordered to close the prosecution cases, if the trial had been delayed beyond a certain period in specified cases involving serious offences. The right to speedy trial came to receive examination in the Supreme Court in Motilal Saraf v. State of J&K Dismissing a fresh complaint made after 26 years of an earlier complaint the Supreme Court explained the meaning and relevance of speedy trial right thus:

The concept of speedy trial is read into Article 21 as an essential part of the fundamental right to life and liberty guaranteed and preserved under our Constitution.

57 AIR 1995 SC 366
60 (1998) 7 SCC 507; 1998 SCC(Cri) 1692
61 (2007) 1 SCC (Cri) 180
The right to speedy trial begins with actual restraint imposed by arrest and consequent incarceration, and continues at all stages, namely, the stage of investigation, inquiry, trial, appeal and revision so that any possible prejudice that may result from impressible and avoidable delay from the time of the commission of the offence will if consummates into finality, can be averted.62

3.2.23 Compensation for Wrongful Arrest

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

3.2.24 Right of Appeal

The Supreme Court has observed: “One component of fair procedure is natural justice. Generally speaking and subject to just exceptions, at least a single right of appeal on facts, where criminal conviction is fraught with loss of liberty, is basic to civilized jurisprudence. It is integral to fair procedure; natural justice and normative universality save in special cases like the original tribunal being a high bench sitting on a collegiate basis. In short, a first appeal as provided in the Criminal Procedure Code manifests this value upheld in Article 21.”63 Appeal is one of the two important review procedures. An appeal is a complaint to a superior court of an injustice done or

62 Ibid
error committed by an inferior one, whose judgment or decision the court above is called upon to correct or reverse. An appeal is a creature of statute and there can be no inherent right of appeal from any judgment or determination unless an appeal is expressly provided for by the law itself.

3.3 Human Rights and Preventive Detention Laws

Preventive Detention laws have been enacted primarily to curb terrorism and other anti-national activities. Terrorism problem is not new and it is not only the national problem but it is old and international problem. Terrorism can be controlled by deterrent method of criminal administration of justice. However, misguided youths can be reformed by reformative theory of criminal administration of justice. According to reformative theory of criminal jurisprudence man can learn the system of reform in every stage of life. There is no limit and time to learn the co-operation and co-existing activities of the society. This can be achieved by reformative process of criminal administration of justice. Reformative theory prescribes that the offences are committed under the influence of motive upon character. Therefore, they can be checked either by the change of motive or by the change of their activities. The basic purpose of reformative theory is to reform the criminal is pathological aberration. On the basis of reformative theory terrorists can be reformed by the social change of his surroundings. Though terrorists created problem is crime against the humanity. However, this problem can be solved by the sociological treatment. If terrorists’ problems are in organized manner, it means their ideology is polluted by habitual criminal activities. They have no religion, no caste, no creed and humanity. Their behaviour is in human and antisocial. Thus, the deterrent method of administration of criminal justice is administered on the habitual hardcore criminal terrorists.

3.3.1 Human Rights and Concept Of Terrorists Under Preventive Detention Laws

Terrorists denotes an attempt to take control over Government by force. Terrorist’s means, a person fighting against the Government or armed forces of their own country. The definition of terrorists shows the act of unwanted person. Section 15 of the Unlawful Activities (Prevention) Amendment Act 2008 provides:

Whoever does any act with intent to threaten or likely threaten to the unity, integrity, security or sovereignty of India or with intent to strike terror in the people or any section of the people in India or in any foreign country –

a) By using bombs, dynamite or other explosive substance or firearms or other lethal weapons or poisonous or noxious gases or other chemical or by any other substances (whether biological, radioactive, nuclear or otherwise) of a hazardous nature or by any other means of whatever nature to cause or likely to cause-

i. Death of, or injuries to, any person or persons; or

ii. Loss of, or damage to, or destruction of, property; or

iii. Disruption of any supplies or services essential to the life of the community in India or in any foreign country. Or

iv. Damage or destruction of any property in India or in Foreign country used or intended to be used for the defence of India or in connection with any purposes of the government of India, any state government or any of their agencies; or

b) Overawes by means of means of criminal force or show of criminal force or attempts to do so to causes death of any public functionary or attempts to cause death of any public functionary: or

c) Detains kidnaps or abducts any person and threatens to kill or injury to such person or does any other act in order to compel the Government of India, any state Government or the Government of a foreign country or any other person to do or abstain from doing any act, commits a terrorist act.

Explanation- for the purpose of this section public functionary means Constitutional authorities and other functionary notified in the official Gazette by the Central Government as a public functionary.

The above act of terrorist can be controlled by deterrent method, because they are violating the human rights of innocent persons. Human rights denote inherent dignity, equality and inalienable rights of all members of the human family. Human
rights are the foundation of freedom, justice and peace in the world. Threaten or likely to threaten the unity and integrity of any nation is the violation of human rights of the community and to cause and is likely to cause death of any person is violence of human rights of the community and to cause and likely to cause death of any person is violence of life and liberty of individual person which is the foundation of freedom of human being. A new concept is in new definition of terrorist as provided by Unlawful Activities (Prevention) Amendment Act 2008 is that “if there is any threat to foreign country by the activities of the terrorist that will also amount the terrorist activities and the Indian law will apply in such matters.” Other text of the definition is the same as provided by Section 3(1) of the Prevention of Terrorists Act (POTA) 2002. Henceforth, due to the new activities of cross border terrorism the definition amended and incorporated in the Unlawful Activities (Prevention) Amendment Act 2008.

The term terrorism has come to mean different things to different people over different times. Those once called terrorists can easily be legitimized and may as is the situation in Zimbabwe is called liberation fighters. The 2002 Report of United Nation Policy Working Group on the UN and Terrorism offers some guidelines that without attempting a comprehensive definition of terrorism it would be useful to delineate some broad characteristics of the phenomenon. Terrorism is, in most cases, essentially a political act. It is meant to inflict dramatic and deadly injury on civilians and to create an atmosphere of fear, generally for a political or ideological (whether secular or religious) purpose. Terrorism is a criminal act, but it is more than mere criminality. To overcome the problem of terrorism it is necessary to understand its political nature as well as its basic criminality and psychology. Moreover, every kind of activity of the terrorist is in violation of human rights of general public.

3.3.2 Preventive Detention Statutes and Quest Of Human Rights

India is facing terrorist problem since last 20 years. To solve this problem Indian Parliament enacted national Security Guard Act, 1986. The Terrorist and Disruptive Activities Act, 1985, known as TADA was one of the controversial law in

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contradiction of human rights protection. Thus, it was repealed in 1996. Another Act known as the Prevention of Terrorist Act 2002 was enacted by the Parliament in the regime of the National Democratic Alliance (NDA) Government. The Prevention of Terrorist Act 2002 was controversial on the ground of gross violation of fundamental freedom of human beings. Henceforth, this law was repealed by the parliament in 2004 and amendment was made in Unlawful Activities (Prevention) Act 1967 in the same year, another amendment was made in 2008 for providing more teeth to the Police investigating agencies. After these amendments, still there is continuous demand from the opposition to enact separate law like POTA, nevertheless the Union Progressive Alliance (UPA) Government is not interested to enact the separate law because of the violation of the human rights, moreover, the Unlawful Activities (Prevention) Act amended twice. Whereas, it is also germane and apt to discuss the legal provisions of Unlawful Activities (Prevention) Act 2008, which are either in contravention of the human rights or controversial on the ground of the violation of human rights.

The most important portion of the said law is Preamble of the Act. In preamble there are some important words, which are the anxiety of human rights activist on the basis of violation of inherent human rights of property. It has mentioned in the preamble “Security Council of the United Nations requires the States to take action against certain terrorists and terrorist organizations to freeze the assets and economic resources.” On the basis of this direction of the Security Council, Indian Parliament incorporated Section 51 A in the Unlawful Activities (Prevention) Act, it provides that “for the prevention of and for coping with terrorist activities the Central Government shall have power to – (a) freeze, seize or attach funds and other financial assets or economic resources held by, on behalf of or at the direction of the individuals or entities listed in the schedule to the order or any other person engaged in or suspected to be engaged in terrorism.

67 The Terrorism and Disruptive Activities Act, 1985 repealed in 1996. this was the most controversial law because of violation of basic fundamental freedoms as well as human rights of accused under preventive detention.
68 Article 17 (1) of the Universal Declaration of Human Rights, 1948 provides that everyone has the right to own property alone as well as association with others, and clause (2) provides that no one shall be arbitrarily deprived of his property.
The direction given by the Security Council to freeze the assets of the member of the terrorist organization and engaged in terrorist activities has confined up to freeze of the assets, however, the provision incorporated in the Unlawful Activities (Prevention) Act 1967 is wider than the direction of the Security Council because the words used by the legislature under Sec. 51 A (a) are to freeze, seize or attach. It means Central Government can attach the assets of the persons only on the ground of member of the terrorist organization. The meaning of the freeze, seize or attach is totally different to each other, freeze means congeal, turn to ice, harden, immobilize; chill, ice, frost, kill., fix and stabilize etc. in the same way the meaning of seize is that to grasp, clutch, capture, arrest, appropriate, confiscate, afflict, detain, comprehend and understand etc., Whereas attach means adjunct and legal seizure etc. this shows under the attachment process the property will be attached with the control and property of the another person. Henceforth, this is also the question of violation of human rights of a person, who is under the presumption as offender under Section 15 read with Section 43E of the unlawful Activities (Prevention) Amendment Act 2008. Presumption clause provides that on the basis of fulfilling the requirement of Section 43E of the Act the person deemed to be offender. Thus, presumption clause should not be treated to be absolute and conclusive evidence unless the corroborative evidence will not support this.

Thus presumption clause is one of the obstacles in the protection of human rights. The basis of presumption for determining the offender and attach his property is in violation of Article 17 (2) of the Universal Declaration of Human Rights, 1948. Because of presumption clause for depriving from the property is the arbitrary aspect of the law. Hence, it can be said against the human rights. In this context, it is relevant and apt to quote here the resolutions No. 1267 (1999), 1333 (2000), 1363 (2001), 1390 (2002), 1455 (2005), 1735 (2006) and 1822 (2008) of the Security Council of United States that “to take action against certain terrorists and terrorist organizations to freeze the assets and other economic resources to prevent the entry into or the transit through their territory and prevent direct or indirect supply, sale or transfer of arms and ammunitions to the individuals or entries listed in the schedule.” These resolutions clearly indicate that if any person is the member of any terrorist

69 Under this law at the place of presumption of innocence, the presumption of guilt has been provided.
organization his property can freeze. It has not been mentioned in the resolutions that the property can seize or attach, these words are the extra words in section 51A (a) of Unlawful Activities (Prevention) Amendment Act, 2008. Thus, by way of this correlative aspect of the resolutions of Security Council of United Nations and provisions of the Unlawful Activities (Prevention) Amendment Act, 2008 it can be said that resolutions adopted by the Security Council of United Nations is within the parameters of the provisions of human rights buts provisions legislated by Indian legislators is out of purview of the human rights laws.\(^70\)

Another controversial aspect of the Unlawful Activities (Prevention) Amendment Act 2008 as extraordinary laws and protection of human rights is Sec. 43C which provides modified application of certain provisions of the Criminal Procedure Code.” This provision proves the extraordinary aspect of a cognizable offence within the meaning of Clause (C) of Section 2 of the Code, and “cognizable case” as defined in that clause shall be construed accordingly.

(2) Section 167 of the Code shall apply in relation to a case involving an offence punishable under this Act subject to the modification that in sub-section (2) – (a) the references to “fifteen days”, wherever they occur, shall be construed as reference to “thirty days” “ninety days” respectively: and (b) after the proviso, the following provisions shall be inserted, namely:

Provided further that if it is not possible to complete the investigation within the said period of ninety days, the Court may if it is satisfied with the report of the Public Prosecutor indicating the progress of the investigation and the specific reasons for the detention of the accused beyond the said period of ninety days, extend the said period up to one hundred and eighty days:

Provided also that if the police officer making the investigation under this Act requests, for the purpose of investigation, for police custody from judicial custody of any person in judicial custody, he shall file affidavit stating the reasons for doing so and shall also explain the delay, if any, for requesting such police custody.

\(^70\) The Terrorist and Disruptive Activities Act, 1985 (TADA) and Prevention of Terrorists Act, 2002 were enacted as strict criminal laws for terrorists.
Supreme Court said in *Moti Ram v. State of M.P.* that the release on bail is crucial to the accused as the consequences of the pre-trial detention are grave. If release on bail is denied to the accused, it would mean that though he is presumed to be innocent till the guilt is proved beyond reasonable doubt he would be subjected to the psychological and physical deprivations of jail life. The jailed accused loses his job and is prevented from contributing effectively to the preparation of his defence. Equally important, the burden of his detention frequently falls heavily on the innocent members of his family. In *Hussainara Khatoon v. State of Bihar*, Supreme Court also said that it is the duty of the Magistrate to inform the accused that he has the right to be released on bail under the proviso to Section 167(2) of the Criminal Procedure Code. Thus, the laws for prevention of the activities of terrorists are different from the original law of the land. Capital punishment or life imprisonment is also prescribed by terrorist activities prevention laws, thus not to release to the terrorists up to one hundred eighty days under the Unlawful Activities (Prevention) Amendment Act 2008 is contradiction of the Section 167 of Criminal Procedure Code 1973. In this reference, it is also relevant to quote here that murder and threat to State is a same category of offence, whether the offender commits it under the Indian Penal Code or Terrorists Prevention laws. Thus laws should not provide the different legal provisions for the bail. Hence different treatment of trial can be said legal discrimination; therefore it is violation of human rights jurisprudence.

Second controversial aspect of the law in Unlawful Activities (Prevention) Amendment Act 2008 is that according to Section 43D (4) of the said Act, bail provisions as prescribed under Section 438 of the Code shall not apply in the matters of terrorists activities and arrested person under the Unlawful Activities (Prevention) Act. Human rights protection law provides that “no one shall be subjected to arbitrary arrest, detention or exile.” Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a Court in order that Court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful, henceforth, only on the basis of apprehension of involvement in terrorist activities bail cannot be denied. Such provision can also be in violation of

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71 AIR 1978 SC 1594.
72 1979 Cr. LJ. 1052 (SC).
73 Article 9, Universal Declaration of Human Rights, and Article 9(1) to (5) of the International Covenant on Civil and Political Rights.
human rights of human being, because proviso of Section 43 D (5) of Unlawful Activities (Prevention) Amendment Act 2008 provides that accused who involves in terrorist activities and accusation against such person is *prima facie* true shall not be released on bail. The meaning of this provision clearly indicates that person against whom the *prima-facie* case is lodged, he cannot be released on bail. In the same manner the bail shall not be granted to a person accused of an offence punishable under this Act, if he is not an Indian citizen and has entered the country unauthorized or illegally except in very exceptional circumstances and for reasons to be recorded in writing.\textsuperscript{74}

### 3.3.3 State Legal Instruments and Human Rights

Besides the Union legislations there are other laws, which are enacted by the States. These are the Andra Pradesh Control of Organized Crime Act 2001, Bihar Control of Crime Act 1981, the Delhi Control of Carrying Explosive Regulations 1980. The Karnataka Control of organized Crimes Act 2000. The Madhya Pradesh Rajaya Suraksha Adhiniyam 1990, the Maharashtra Control of Organized Rules 1999, the Maharashtra prevention of Communal Anti-Social and other Dangerous Activities Act 1980, the Rajasthan Dacoits Affected Areas Act 1986, the Uttar Pradesh Gangsters and Anti-Social Activities(Prevention) Act 1986 and Uttar Pradesh Control of Goondas Act 1970 etc.

In this way, it can be said that there are number of laws enacted by the parliament and state legislatures but there is a serious problem of the successful legislations for the purpose of protection of human rights and combating terrorism problem.

The 21\textsuperscript{st} century is the century of technology e.g. chemical weapons, explosive, explosive devices and digital terrorism etc. thus the new techniques are for the development of the society. But terrorists are misusing this technology. Terrorism problem is a global problem. It is not a problem in India but every developed and developing country is facing this problem. Thus on 12\textsuperscript{th} April 2010 in Washington International Nuclear Security Summit (NSS) discussed the matter of nuclear weapons by the terrorist. It was suggested that nuclear material should physically

\textsuperscript{74} *Ibid.*
secure around the world, so that terrorists don’t get hold of them—with an element of smoke and mirrors. In this Summit the then Indian Prime Minister Dr. Man Mohan Singh focused on nuclear terrorism and the proliferation of sensitive nuclear materials and technologies. The consensus documents, which was released by the summit, speaks to keep all nuclear material physically secure, regardless of how the State, which owns it, intends to use it.

Terrorism is the serious, heinous, inhuman and barbaric crime. It is a crime against the humanity. Though India is facing this problem from long back, however, it is not only the problem of India but it is the problem of the all world countries that are facing this problem.

In the human rights era of civilized society every human being wants to live with dignity, liberty, justice, peace and tranquility. But in complex society these desires of human beings are violating by unwanted elements of the society. In violating of these golden principles of civilized society these questions are most relevant that who are those elements? How they become unwanted? What is the remedy or how they will come into the main stream of the society? All these questions and their answers are very much essential for the protection of human rights of accused as well as victims and society as a whole.

3.4 Other Provisions for Human Rights of Accused

The above said rights are not the exhaustive rights of accused/arrested persons; other rules have also been made in the consideration of interest of them. Some of them have been created by the judiciary and later on incorporated in the concerned laws. The idea underlying is to protect the basic human rights of accused in all circumstances. Some of these are as following.

3.4.1 Rules for Bail

‘Bail not Jail’ is the celebrated dictum of Justice Krishna Iyer. The law of bail “has to dovetail two conflicting demands, namely, on one hand, the requirements of the society for being shielded from the hazards of being exposed to the misadventures of a person alleged to have committed a crime; and on the other, the fundamental canon of criminal jurisprudence, viz., the presumption of innocence of an accused till he is found guilty. The quality of a nation's civilisation can be largely measured by the
methods it uses in the enforcement of criminal law. The Supreme Court in \textit{Nandini Satpathy v. P.L. Dani}^{75} quoting Lewis Mayers and stated:

To strike the balance between the needs of law enforcement on the one hand and the protection of the citizen from oppression and injustice at the hands of the law-enforcement machinery on the other is a perennial problem of statecraft. The pendulum over the years has swung to the right. We have earlier spoken of the conflicting claims requiring reconciliation. Speaking pragmatically, there exists a rivalry between societal interest in effecting crime detection and constitutional rights which accused individuals possess. Emphasis may shift, depending on circumstances, in balancing these interests as has been happening in America. Since Miranda there has been retreat from stress on protection of the accused and gravitation towards society's interest in convicting law-breakers. Currently, the trend in the American jurisdiction according to legal journals, is that 'respect for (constitutional) principles is eroded when they leap their proper bounds to interfere with the legitimate interests of society in enforcement of its laws...'. (Couch v. United State). Our constitutional perspective has, therefore, to be relative and cannot afford to be absolutist, especially when torture technology, crime escalation and other social variables affect the application of principles in producing humane justice.

\subsection*{3.4.1 Maximum Detention of Under Trial Person}

In \textit{Hussainara Khatoon (II) v. Home Secretary},^{76} the Supreme Court came to know that there were many prisoners who were in jail and had spent more time than punishment would entail to them. On this our legislature took a serious view and added Section 436-A in the Criminal Procedure Code by 2005 Amendment Act.

In case titled \textit{Common Cause v. Union of India & others}^{77} decided on 01-05-1996, it was held as under:

I (a) Where the offences 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 trials for such offences are pending for one year or more and the concerned accused have not been

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\begin{itemize}
  \item \textsuperscript{75} (1978) 2 SCC p.433, para 15.
  \item \textsuperscript{76} AIR 1997 SC 1369.
  \item \textsuperscript{77} AIR 1996 SC 1619.
\end{itemize}
released on bail but are in jail for a period of six months or more, the concerned criminal Court shall release the accused on bail or on personal bond to be executed by
the accused and subject to such condition if any, as may be found necessary, in the
light of Section 437 of the Criminal Procedure Code.

(b) Where the offences under IPC or any other law for the time being in force for
which the accused are changed 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 concerned accused have not been
released on bail but are in jail for a period of six months or more, the concerned
Criminal Court shall release the accused on bail or on personal bond to be executed
by the accused and subject to the imposing of suitable conditions, if any, in the light
of Section 437 Criminal Procedure Code.

(c) Where the offences 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
seven years or less, with or without fine, and if the trials for such
offences are pending for two years or more and the concerned accused have not been
released on bail but are in jail for a period of six months or more, the concerned
Criminal Court shall release the accused on bail or on personal bond to be executed
by the accused and subject to the imposing of suitable conditions, if any, in the light
of Section 437 Criminal Procedure Code.

II (a) 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 and cases.

(b) Where the cases pending in Criminal Courts for more than two years under
IPC or any other law for the time being in force are compoundable with permission of
the Court and if in such cases trials have still not commenced, the Criminal Court
shall, after hearing the public prosecutor and other parties represented before it or
their advocates, discharge or acquit the accused, as the case may be, and close such
cases.
(c) Where the cases pending in Criminal Courts under Indian Penal Code or any other law for the time being in force pertain to offences which are non cognizable and bailable and if such pendency is for more than two years and if in such cases trials have still not commenced, the Criminal court shall discharge or acquit the accused, as the case may be, and close such cases.

(d) Where the cases pending in Criminal Courts under Indian Penal Code or any other law for the time being in force are pending in connection with offences which are punishable with fine only and are not of recurring nature, and if such cases trial have still not commenced, the Criminal court shall discharge or acquit the accused, as the case may be and close such cases.

(e) Where the cases pending in Criminal Courts under Indian Penal Code or any other law for the time being in force are punishable with imprisonment up to one year with or without fine, and if such pendency is for more than one year and if in such cases trials have still not commenced, the Criminal court shall discharge or acquit the accused, as the case may be and close such cases.

(f) Where the cases pending in Criminal Courts under Indian Penal Code or any other law for the time being in force are punishable with imprisonment up to three years with or without fine, and if such pendency is for more than two years and if in such cases trials have still not commenced, the Criminal court shall discharge or acquit the accused, as the case may be and close such cases.

III For the purpose of directions contained in clauses (i) and (ii) above, the period of pendency of Criminal Cases shall be calculated from the date the accused are summoned to appear in the Court.

IV Directions(i) and (ii) made herein above shall not apply to cases or offences involving:

(a) corruption, misappropriation of public funds, cheating, whether under the Indian Penal Code, Prevention of Corruption Act or any other statute,

(b) smuggling, foreign exchange violation and offences under the Narcotics Drugs and Psychotropic Substances Act,
(c) essential Commodities Act, Food Adulteration Act, Acts dealing with Environment or any other economic offences,

(d) offences under Arms Act, Explosive Substances Act, Terrorists and Disruptive Activities Act,

(e) offences relating to the Army, Navy and Air Force,

(f) public tranquility,

(g) offences relating to public servants,

(h) offences relating to coins and Government stamps,

(i) offences relating to elections,

(j) offences relating to giving false evidence and offences against public justice,

(k) any other type of offences against the State,

(l) offences under the taxing enactments and

(m) offences of defamation as defined in Section 499, IPC.

The aforesaid judgment was clarified by the Hon’ble Supreme Court in the subsequent case, also titled Common Cause v. Union of India,\(^78\) decided on 28-11-1996) wherein it was held as under:

(i) The time limit mentioned regarding the pendency of criminal cases in paragraphs from 2(a) to 2(f) of our judgment shall not apply to cases wherein such pendency of the criminal proceedings is wholly or partly attributable to the dilatory tactics adopted by the concerned accused or on account of any other action of the accused which results in prolonging the trial. In other words, it should be shown that the criminal proceedings have remained pending for the requisite period mentioned in the aforesaid clauses of paragraph 2 despite full cooperation by the concerned accused to get these proceedings disposed off and the delay in the disposal of these cases is not at all attributable to the concerned accused, nor such delay is caused on account of such accused getting stay of criminal proceedings from higher Courts. Accused concerned are not entitled to earn any discharge or acquittal as per paragraphs 2(a) to

\(^78\) AIR 1997 SC 1539.
2(f) of our judgment if it is demonstrated that the accused concerned seek to take advantage to their own wrong or any other action of their own resulting in protraction of trials against them.

(ii) The phrase ‘pendency of trials’ as employed in paragraphs from 1(a) to 1(c) and the phrase ‘non-commencement of trial’ as employed in paragraphs from 2(b) to (f) shall be constructed as under:

(a) In case of trials before Sessions Court, the trials shall be treated to have commenced when charges are framed under Section 228 of the Code of Criminal Procedure, 1973 in the concerned cases.

(b) In cases of trials of warrant cases by Magistrates if the cases are instituted upon police report, the trials shall be treated to have commenced when charges are framed under section 240 of the Code of Criminal Procedure, 1973 while in trials of warrant cases by Magistrates when cases are instituted otherwise than on police report such trials shall be treated to have commenced when charges are framed against the concerned accused under section 246 of the Code of Criminal Procedure, 1973.

(c) In cases of trials of summons cases by magistrates, the trials would be considered to have commenced when the accused who appear or are brought before the Magistrate are asked under section 251 whether they plead guilty or have any defence to make.

(iii) In paragraph 4 of our judgement in the list of offences to which directions contained in paragraphs 1 and 2 shall not apply, the following additions shall be made:

(n) matrimonial offences under Indian Penal Code including Section 498-A or under any other law for the being in force;

(o) offences under the Negotiable Instruments Act including offences under Section 138 thereof;

(p) offences relating to criminal misappropriation of property of the complainant as well as offences relating to criminal breach of trust under Indian Penal Code or under any other law for the time being in force;
(q) offences under Section 304-A of the Indian Penal Code or any offence pertaining to rash and negligent acts which are made punishable under any other law for the time in force;

(r) offences affecting the public health, safety, convenience, decency and morals as listed in Chapter XIV of the Indian Penal Code or such offences under any other law for the time in force.

It is further directed that in criminal cases pertaining to offences mentioned under the above additional categories (n) to (r) wherein accused are already discharged or acquitted pursuant to our judgement dated 1st May, 1996 and they are liable to be proceeded against for such offences pursuant to the present order and are not entitled to be discharged or acquitted as aforesaid, the concerned Criminal Court shall *suo moto* or on application by the concerned aggrieved parties issue within three months of the receipt of this clarificatory order at their end, summons or warrants, as the case may be, to such discharged or acquitted accused and shall restore the criminal cases against them for being proceeded further in accordance with law. It is however made clear that in trials regarding other offences which are covered by the time limit specified in our earlier order dated 1st May 1996 wherein the concerned accused are already acquitted or discharged pursuant to the said order, such acquitted or discharged accused shall not be liable to be recalled for facing such trials pursuant to the present clarificatory order which qua such offences will be treated to be purely prospective and no such cases which are already closed shall be reopened pursuant to the present order.

Subsequent thereto, in the case titled *Raj Deo Sharma v. The State of*[^79]

(i) In cases where the trial is for an offence punishable with imprisonment for a period not exceeding seven years, whether the accused is in jail, or not, the court shall close the prosecution evidence on completion of a period of two years from the date of recording the plea of the accused on the charges framed whether the prosecution has examined all the witnesses or not, within the said period and the court can proceed to the next step provided by law for the trial of the case.

(ii) In such cases as mentioned above, if the accused has been in jail for a period of not less than one half of the maximum period of punishment prescribed for the offence, the trial court shall release the accused on bail forthwith on such conditions as it deems fit.

(iii) If the offence under trial is punishable with imprisonment for a period exceeding 7 years, whether the accused is in jail or not, the court shall close the prosecution evidence on completion of three years from the date of recording the plea of the accused on the charge framed, whether the prosecution has examined all the witnesses or not within the said period and the court can proceed to the next step provided bylaw for the trial of the case, unless for very exceptional reasons to be recorded and in the interest of justice the court considers it necessary to grant further time to the prosecution to adduce evidence beyond the aforesaid time limit.

(iv) But if the inability for completing the prosecution evidence within the aforesaid period is attributable to the conduct of the accused in prolonging the trial, no court is obliged to close the prosecution evidence within the aforesaid period in any of the cases covered by clauses (1) to (3).

In the case titled *Dharam Pal v. State of Haryana*\(^{80}\) reported in decided on 08-09-1999, it has been held by a Division Bench of our own Hon’ble Punjab and Haryana High Court that the under mentioned category of convicts who apply for bail during the pendency of the hearing of their appeals against convictions ordered by the trial courts are entitled to be released on bail.

(i) Life convicts who have undergone five years of imprisonment, of which three years should after conviction, should be released on bail pending hearing of their appeals.

(ii) Same principles ought to apply to those convicted by court martial.

(iii) Period of five years should be reduced to four years for females and minors, with at least two years imprisonment after conviction. It was however held in the aforesaid judgement that the above referred directions will not apply in cases where grant of bails is forbidden by law and nor to those who are convicted of heinous

\(^{80}\) 1999 (4) RCR (Crl.) 600.
offences such as dacoity with murder, rape with murder or murder of a child below 14 years of age.

The Court rightly emphasized that right to bail is not to be denied merely because of the sentiments of the community against the accused. This admonition was necessary because of the media frenzy surrounding hearing of bail applications of corporate honcho and which reflected the public misconception that when bail is granted, the accused is acquitted and is set free. The reason for granting bail is that there is no justification for depriving an accused of his fundamental right to personal liberty guaranteed under Article 21 of the Constitution unless the prosecution by cogent evidence establishes that the accused when temporarily set free by grant of bail will thwart the criminal trial.

3.4.2. Media Trial and Its Effect on Bail of Accused

Are the trials courts judges in high profile case like 2G scam working under media pressure to deny bail to the accused? The assurance from the top court came after senior advocates Ranjit Kumar and Mukul Rohtagi without specifically mentioning the 2G case, made an apparent reference to it with Kumar stating that the trial court judges were working under “tremendous media pressure” and fearing that any adverse publicity to their orders in high profile cases might affect their “annual confidential report (ACR)”. Due to such a pressure, the basic principle that “bail is a rule and jail an exception” as laid down by the Supreme Court was being given a go by. “The bail is even denied in cases where maximum punishment is only five or seven years,” Kumar said while arguing for the bail of Vikas Kumar Sinha, an alleged front man of former Jharkhand Chief Minister Madhu Koda, facing charges of corruption. Kumar said Sinha had been chargesheeted by the CBI with offences carrying minimum sentence of 3 years and maximum seven years almost a year back and he was in jail for two years now.

3.4.3 Venue of the Trial

The provisions regarding venue i.e. the place of inquiry or trial, are contained in Sections 177 to 189. Basic rule as stipulated in Section 177 is that every offence shall ordinarily be inquired into and tried by a court within whose local jurisdiction, it was committed. If the place of trial is highly inconvenient to the accused person and
causes various impediments in the defence preparation, the trial at such a place cannot be considered as fair trial. Apart from exceptional circumstances, it would be convenient both to the prosecution and to the defence if the trial is conducted by a court within whose local jurisdiction the crime was committed. Trial at any other distant place would generally mean hardship to the parties in the production of evidence.

3.4.4 Right against Solitary Confinement

Although, one of the mode of punishment is solitary confinement, but certain restrictions have imposed on the type of punishment to protect the right of convict to mingle with other convicts. In Sunil Batra (1) v. Delhi Administration,\(^{81}\) it was held 'if by imposing solitary confinement there is total deprivation of camaraderie (friendship) among co-prisoners commingling and talking and being talked to, it would offend Article 21 of the Constitution. The liberty to move, mix mingle, talk, share company with co-prisoners if substantially curtailed would be violative of Article 21 unless curtailment has the backing the law. The Court held that continuously keeping a prisoner in fetters day and night reduces the prisoners from a human being to an animal and that this treatment was cruel and unusual that the use of bar fetters was against the spirit of the Constitution.

3.4.5 Right against Inhuman Treatment

The accused and convict in criminal system of the country have the rights to live with dignity. Therefore, they should not be subjected to the inhuman treatment. In Kishore Singh v. State of Rajasthan\(^{82}\) the Supreme Court held that the use of third degree method by police is violative of Article 21 and directed the Government to take necessary steps to educate the police so as to inculcate a respect for the human person. The Court also held that punishment of solitary confinement for a long period from 8 to 11 months and putting bar fetters on the prisoners in jail for several days on flimsy ground like loitering in the prison, behaving insolently and in an uncivilized manner, tearing of his history ticket must be regarded as barbarous and against human dignity and hence violative of Article 21, 19 and 14 of the Constitution Krishna Iyer.

\(^{81}\) AIR 1978 SC 1575.
\(^{82}\) AIR 1981 SC 625.
J. declared, "Human dignity is a clear value of our Constitution not to be bartered away for mere apprehension entertained by jail officials.

Similarly, torture and ill treatment of women suspects in police lockups has been held to be violative of Article 21 of the Constitution. The Court gave detailed instructions to concern authorities for providing security and safety in police lockup and particularly to women suspects. The female suspects should be kept in separate police lockups and not in the same in which male accused are detained and should be guarded by female constables. The Court directed the I.G. prisons and State Board of Legal Aid Advice committee to provide legal assistance to the poor and indigent accused male and female whether they are under trials or convicted prisoners.83

3.4.6 Fair Trial

The fair trial is the foremost requirement of criminal proceedings and it is utmost right of an accused. In the recent case titled as Dr. Rajesh Talwar and another v. C.B.I. and another84 the Supreme Court observed that Article 12 of the universal declaration of Human Rights provides for the right to a fair trial what is enshrined in Article 21 of our Constitution. Therefore, fair trial is the heart of Criminal jurisprudence and, in a way, an important facet of democratic polity and is governed by rule of law. Denial of fair trial is crucifixion of human rights.

Fair Trial is the main object of criminal procedure and such fairness should not be hampered and threatened in any manner. Fair Trial entails the interests of the accused, the victim and of the society. Thus, fair trial must be accorded to every accused in the spirit of right to life and personal liberty and the accused must get a free and fair, just and reasonable trial on the charge imputed in a criminal case. Any breach or violation of public rights and duties adversely affects the community as a whole and it becomes harmful to the society in general. In all circumstances, the Courts have a duty to maintain public confidence in the administration of justice and such duty is to vindicate and uphold the majesty of the law and the Court can not turn a blind eye to vexations or oppressive conduct that occurs in relation to criminal proceedings.

84 2013 (4) R.C.R.(Criminal) 687.
Denial of fair trial is as much injustice to the accused as is to the victim and the society. It necessarily requires a fair trial before an impartial judge, a fair prosecutor and an atmosphere of judicial calm. Since the object of the trial is to mete out justice and to convict the guilty and protect the innocent, the trial should be a search for truth and not about over technicalities and must be conducted under such rules as will protect the innocent and punish the guilty. Justice should not only be done but should be seen to have been done. Therefore, free and fair trial is a sine qua non of Article 21 of the Constitution. Right to get a fair trial is not only a basic fundamental right but a human right also. Therefore, any hindrance in a fair trial could be violative of Article 14 of Constitution.\(^8^5\) In so many judgment the Supreme Court has expressed the importance of fair trial to accused.\(^8^6\)

### 3.4.7 Curative Petitions

The Supreme Court has ruled in *Rupa Ashok Hurra v. Ashok Hurra*\(^8^7\) that while certainly of law is important in India, it cannot be at the cost of justice. The court has observed in this connection that in the area of personal liberty for some time now, this is the manifestation of the “dynamic constitutional jurisprudence” which the Supreme Court is evolving in this area. A curative petition can be filed by accused himself or on his behalf by any other person in the Supreme Court to review the earlier order of the Supreme Court itself.

### 3.4.8 Right to Information under Right to Information Act, 2005

Even when a person is convicted and deprived of his liberty in accordance with the procedure established by law, a prisoner still retains the residue of constitutional rights. Article 14, 19 and 21 “are available to prisoners as well as freemen. Prison walls do not keep out Fundamental Rights.” The arrestee has a right to submit an application through Superintendent Jail for receipt of documents/information as permissible under the Right to Information Act, 2005.

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\(^8^5\) *Ibid*.


\(^8^7\) (2002) 4 SCC388.
3.5 Human Rights of Juvenile Delinquent

3.5.1 Indian Penal Code, 1860

The Indian Penal Code (IPC) is the primary law relating to crime in India. Under the IPC, no act is considered an offence if committed by a child under seven years of age. Under this age, there is a presumption that the child is incapable of forming a malicious or criminal intent (*doli incapax*). For children aged between seven and twelve, an act, which may otherwise have been criminal, may not be considered as an offence if the child has not attained sufficient maturity of understanding to judge the nature and consequences of his conduct. The lack of understanding is to be specifically pleaded and proved. If no evidence is brought before the court, it will be presumed that the accused intended to do what he really did.\(^{88}\)

3.5.2 The Apprentices Act, 1850

It was the first law which required that children between the ages of 10-18 convicted in Courts, to be provided vocational training as part of their rehabilitation process. 1897 – Reformatory school Act, Under the Act, the court could detain delinquents in a reformatory school for a period of two to seven years but after they had attained the age of eighteen years, the court would not keep them in such institutions.

3.5.3 Madras Children Act, 1920

The Juvenile Court philosophy was first introduced in the Madras Children Act 1920, (followed by the Bengal Children Act (1922) and the Bombay Children Act (1924), thereafter by many other Children Acts).

3.5.4 The Juvenile Justice Act, 1986

The Juvenile Justice Act, 1986, was enacted to provide for care, protection, treatment, development and rehabilitation of neglected and delinquent juveniles and for the adjudication of certain matters related to the disposition of delinquent juveniles.

It repealed all other Children Acts and provided for a uniform legal framework for the juvenile justice system throughout the country.

3.5.5. The Juvenile Justice (Care and Protection) Act, 2000

The Juvenile Justice (Care and Protection) Act was re-enacted with some modifications. It came into effect in April 2001. The ‘Central Rules’ were notified in June 2001. The Juvenile Justice (Care and Protection) Act (2000) has ensured that irrespective of religion, children in need of care and protection are provided the benefits of a separate judicial process. However, in addition to the Juvenile Justice (Care and Protection) Act (2000), Hindu and Muslim personal laws also govern children in India.

3.5.6 Juvenile Justice (Care And Protection Of Children) Act, 2015

The act permits a Juvenile Justice Board, which would include psychologists and sociologists, to decide whether a juvenile criminal in the age group of 16–18 should be tried as an adult or not. The act introduced concepts from the Hague Convention on Protection of Children and Cooperation in Respect of Inter-Country Adoption, 1993 which were missing in the previous act. This act also seeks to make the adoption process of orphaned, abandoned and surrendered children more streamlined. The act introduces foster care in India. Families will sign up for foster care and abandoned, orphaned children, or those in conflict with the law will be sent to them. Such families will be monitored and shall receive financial aid from the state. In adoption, disabled children and children who are physically and financially incapable will be given priority. Parents giving up their child for adoption will get 3 months to reconsider, compared to the earlier provision of 1 month.

A person giving alcohol or drugs to a child shall be punished with 7 years imprison and/or 100,000 fine. Corporal punishment will be punishable by 50,000 or 3 years of imprisonment. A person selling a child will be fined with 100,000 and imprisoned for 5 years.

3.6 Conclusion

"Human rights" as the expression goes, means certain rights which are considered to be very basic for an individual's full physical, mental and spiritual
development. Human rights encompasses the fundamental principles of humanity and these are the rights which every human being is entitled to enjoy on the basis of the fact of being born human. Indeed, the conception of rights, which every human being is entitled to enjoy by virtue of being a member of human society, has evolved through the history of struggles for the recognition of these rights. In plain simple words, human rights are the rights which every human being possesses by virtue of being a human. The dictionary meaning of the word right is a “privilege”. But when it is used in the context of “human rights” it is about something more basic. Human rights are fundamental to the stability and development of countries all around the world. Great emphasis has been placed on international conventions and their implementation in order to ensure adherence to a universal standard of acceptability.

The very idea of human being in custody or during trial saves for protection and nurturing is an anathema to human existence. The word custody implies guardianship and protective care. Even when applied to indicate arrest or incarceration, it does not carry any sinister symptoms of violence during custody. No civilized law postulates custodial cruelty- an inhuman trial that springs out of a perverse desire to cause suffering when there is no possibility of any retaliation; a senseless exhibition of superiority and physical power over the one who is empowered or collective wrath of hypocritical thinking. The attack on human dignity can assume any form and manifest itself at any level. It is not merely the negative privilege of a crude merciless display of physical power by those who are cast in a role play of police functioning, but also a more mentally lethal abuse of position when springing from high pedestals of power in the form of uncalled for insinuation, unjustified accusations, unjust remarks, menacingly displayed potential harm, that can strike terror, humiliation and a sense of helplessness that may last much longer than a mere physical harm and which brook no opposition. The idea of human dignity is in one's sacred self and that field is quite a part and distinct from the field of considerations of rights and duties, power and privileges, liberties and freedoms or rewards and punishments wherein the law operate. If a person commits any wrong, undoubtedly he should be penalized or punished, but it is never necessary to humiliate him and maul his dignity as a human being.

Apart from multiple laws governing children, there exist many other problems at the grassroots level. Government-sponsored children’s homes are often unable to
accommodate neglected children. Children are sometimes even kept in jail. Thus, there is a problem in the execution of laws pertaining to children and the maintenance of children’s homes due to both a lack of awareness of child rights and India’s burgeoning child population.

Juvenile crimes cannot be stopped only through the proper implementation and amendments of Juvenile Justice Act. It is vital to make aware of civil society about this disease that exists in our sick society. Juveniles involved in crimes are not criminals, in fact, they are victims of society. Juvenile delinquency can be stopped at an early stage, provided special care is taken both at home and in school. Parents and teachers play a significant role in nurturing the mind of a child. Instead of labelling them as „criminals” or „delinquents“- steps need to be taken to give them a scope of rectification and it would be better if the errors in their lives (involving social and psychological) are brought to their notices. The problem of child crime like many other social evils is linked up with the imperfections and maladjustment of our society. The ideal is gradually gaining wider acceptance that juvenile delinquent needs the sympathy and understanding of our society and not the heavy hand of the law.

Every prisoner has been conferred with certain rights by the Constitution of India and various statutory laws so that his life as a prisoner is dignified and comfortable. Though, these rights are must for every convicted person to maintain and balance his mental status as a human being, the inefficiency of Indian law enforcement system prevents prisoner from enjoying these rights. But Supreme Court, National Human Rights Commission and various NGOs (Non-Government Organizations) in country are working for this cause with considerable results. If these agencies keep working this pace they will definitely be able to make a mark. But the citizens must be aware themselves so as to what rights one can enjoy if they get locked up unfortunately. Liberty is an important feature of civilized society and it should not be lightly transgressed. When authorities have to enforce the criminal law in a fair and just manner, it must never give up the basic civil liberties which were won by after a considerable time, after great sacrifices, as these are essential for the progress of nation as a whole.