CHAPTER-IV

HUMAN RIGHTS AND THE LAW OF AN ACCUSED

As has been pointed out earlier, Universal Declaration of Human Rights, 1948, has recognised certain basic human rights of an individual, including an accused. The Indian Constitution, in tune with the international endeavours, provided four basic principles to govern the criminal justice system, viz, (1) presumption of innocence, (2) prevention of ex-post facto operation of criminal law (3) protection against double jeopardy and (4) due process concept. Besides the Constitution, The Code of Criminal Procedure, 1973 and Indian Evidence Act, 1872, also deal with the protection of human rights of the accused person. In our criminal justice system, the legal ethics is quite established “let the thousand of criminals be let out, but a single innocent should not be punished”. Following this principle the judiciary requires all cases to be proved beyond reasonable doubt. In our legal system while “onus of proof” lies on the prosecution to prove the guilt of the accused, the benefit of doubt is always given to the accused. Starting from the first step of arrest till the end of trial in every stage the accused is conferred with the several rights by the Constitution of India, the Criminal Procedure Code and also according to the verdict of the higher and Apex Judiciary of the country. Before the trying court, till his guilt is proved, the accused is also considered to be innocent and even as an undertrial prisoner, any violation of his rights is considered as clear human rights violations. To protect the human rights of accused, the Supreme Court in *D. K. Basu*¹ case has held that the transparency of action and accountability are perhaps the two possible safeguards which court must insist upon. In our country, Courts are regarded as custodian of Human Rights and the common man always looks upon the trial courts as his protector. To protect the human rights of citizens, the special enactment, The Human Rights Protection Act, 1993 was brought into existence. The Act clearly specifies about the constitution of different “commissions” at the Central and State level and also
about the Constitution of Human Rights Courts. Among N.G.Os., The Amnesty International, Asia Watch, the People’s Union forDemocratic Rights (PUDR) and People’s Union for Civil Liberties (PUCL) are the leading organisations, who are vigilant against violations ofhuman rights.

4.1 Protective Laws against Indiscriminate Arrests:

It is not an unknown practice in the Police Stations that detention precedes arrest of the accused. In some cases, the person is detained and interrogated, and when the police make up its mind to register a case that he is formally arrested and put on record. It is only on this formal arrest that a person can avail of different statutory protections promised under Sections 56, 57, 436, 167 and 358 of the Code of Criminal Procedure, 1973. Besides these protections, there are Constitutional protections available under Articles 226 and 32 which entitle a person to seek judicial intervention through the writ of *habeas corpus* for his release from unlawful detention. Even judicial intervention can be sought for arrest on insufficient grounds through the writ of *mandamus* under the said Articles and also through inherent jurisdiction of the High Court under Section 482 of the Code. However, these legal protections can only be available of if someone is aware of the unlawful detention of the person concerned and the information of arrest and its ground are duly notified and passed in custody. This further calls for giving of information to some other legal aid agency where no one comes to the rescue of the detained persons. The situation is more demanding in India where half of its population is living below poverty line and over 95% of persons wrongfully confined, belong to this category. There is no gainsaying the fact that human rights relating to personal liberty and dignity of a person can only be protected if the lawful procedure stipulating arrest is faithfully and honestly followed by the police. This call for awareness of the police regarding human rights enshrined in Part III of the Constitution and supplemented and strengthened by the Higher Judiciary from time to time.
4.1.1 Protective Constitutional Provisions relating to the rights of the Accused

1. Right against conviction or enhanced punishment under an Ex-post facto Law - Article 20(1).
2. Right of protection against double jeopardy - Article 20(2).
3. Right against self-incrimination - Article 20(3).
4. Right of Privacy - Article 20(3) and Article 21.
5. Right to be informed of the grounds of arrest and right to bail - Article 22(1) and (2).
6. Right against unlawful arrest - Article 22(1) and (2).
7. Right to consult and be defended by a lawyer of his own choice - Article 22(1) and (2).
8. Right to production before a Magistrate within 24 hours - Article 22(1) and (2).
11. Right to free legal aid - Article 39-A.
12. Right to Constitutional Remedies under Articles 32 and 226.

4.1.2 Protective Procedural Provisions Vis-a-Vis Rights of the Accused:

1. Protection against arbitrary or unlawful arrest - Sections 41, 55 and 151 of Cr.P.C.
2. Protection against arbitrary or unlawful searches - Sections 93, 94, 97, 100 and 165 of the Code.
3. Protection against arbitrary or illegal detention in custody - Sections 56, 57 and 76 of the Code.
4. Right to be informed of the grounds, immediately after arrest - Sections 50, 55 and 75 of the Code.
5. Right of the arrested persons not to be subjected to unnecessary restraint—Section 49 of the Code.

6. Right to consultation of lawyer of his own choice as well as right to get legal aid at the expense of the State in certain cases—Sections 303, 304 of the Code.

7. Right to be produced before Magistrate within 24 hours of his arrest—Sections 57 and 76 of the Code.

8. Right to be released on bail if arrested –Sections 436, 437 and 439; also Sections 50 (2) and 176 of the Code.

9. Right to get copies of the documents and statements of witnesses on which the prosecution relies—Sections 173 (7), 207, 208 and 238 of the Code.

10. Right to have the benefit of the presumption of innocence till guilt is proved beyond reasonable doubt—Sections 101-104 of Indian Evidence Act, 1872.

11. Right to insist that evidence be recorded in his presence except in some special circumstances—Section 273; also 317 of the Cr.P.C.

12. Right to have a due notice of the charges—Sections 218, 228(2), 240 (2), etc. of the Code.

13. Right to test the evidence by cross-examination—Section 138 of Evidence Act.

14. Right to have an opportunity for explaining the circumstances appearing in evidence against him at the trial—Section 313 of the Cr.P.C.

15. Right to have himself medically examined for evidence to disprove the commission of offence by him or for establishing commission of offence against his body by any other person—Section 54 of the Code.

16. Right to produce the defence witnesses –Section 243 of the Code.

17. Right to be tried by an independent and impartial judge—Sections 479, 327 and 191 etc., of the Code. (The Scheme of Separation of Judiciary as envisaged in Cr.P.C.).
18. Right to fair and speedy investigation and trial – Section 309 of the Code.

19. Right to obtain a receipt when properties are seized – Sections 100 (6) and (7) of the Code.

20. Right to be heard about the sentence upon conviction – Section 235 (2) and 248 (2) of the Code.


23. Right to invoke the power of High Court under Section 482 of the Code.

24. Right to get copy of the judgement when sentenced to imprisonment – Section 363 of the Code.

### 4.2 Pre-Arrest Rights of the Accused: Law and Human Rights:

Human rights are those basic minimum guarantees which are available to every human being whether he or she is accountable or not before the law. Under all circumstances the fundamental human freedoms must be protected. No geopolitical system, no municipal legal system and no political culture can sustain its existence without its being compatible to the idea of human rights. Therefore, human rights are pre-political, pre-social and pre-legal rights and their subsequent incorporation in the scheme of regulation of human behaviour under the jury corpus of every administration of criminal justice system is of vital importance.

No justice system can function without making certain checks and balances in its disconcession regime. In the same way criminal administration of justice system in India has also contemplated certain rights of an accused wherefrom no derogation of rights whatsoever is possible. If there is any kind of let up in the availability of an accused, it is nothing but a violation of human rights of an accused and the same cannot be appreciated by the judicial establishment of the country. Thus, there are number of provisions in the Code of Criminal Procedure apart from Part
Third of the Constitution of India whereunder human rights and civil liberties during lawful detention and confinement have been judicially visited. Under this Chapter the rights of the accused are having two most important components one is pre-arrest rights of the accused and second is post-arrest rights of the accused respectively and the same has been investigated, appreciated and interpreted on a human rights premise as infra.

4.2.1 Who is an Accused?

In any dispute in which justice is to be administered, two parties are involved which are as prosecutor or complainant and the accused in criminal proceedings and the court pronounces its judgement in favour of one or the other. Administration of criminal justice is concerned with a crime, which means an act deemed by law to be harmful to society in general even though its immediate victim happens to be an individual. Those who commit such acts (crime) are prosecuted by the State so that if found guilty and convicted by the court, they may be punished according to law of the State. As in every administration of criminal justice, a trial is conducted which revolves around the accused, an important question may be asked as to who can be called as an “accused”. The word ‘accused’ has not been defined in the Code of Criminal Procedure which contains the procedure to be adopted in trial. Simultaneously, this term has not been even used in the International Covenant on Civil and Political Rights, 1966. For this, the terms ‘prisoners awaiting for trial’, ‘undertrial prisoners’, and also ‘untried prisoners’ have been used so far. The Supreme Court of India in the leading case D. K. Basu case the expression ‘arrestee’ has been used. Thus, the use of various expressions compel a person to think about the proper meaning of the word “Accused”.

As per Black Law Dictionary the term accused is defined as “the generic name of the defendant in a criminal case”. In the Law Lexicon’s Dictionary the word ‘Accused’ has been defined as “A person against whom an allegation has been made that he has committed an offence, or who is charged with an offence”.


On the basis of these two definitions, it may be said that as soon as a person is alleged formally to commit a crime, he comes in the category of accused.

According to the **Law Lexicon**, “Accused of an Offence” means where evidence whether oral or circumstantial points to the guilt of a person and he is taken in the custody and interrogated on that basis, he becomes a person accused of an offence. The mere fact that his name was not mentioned as an accused in the first Information Report will not take him out of the category of persons accused of an offence. It may be treated as a well settled principle that with the lodging of an F.I.R., a person is deemed to be an accused of an offence within the meaning of Articles 20(3) of the Constitution of India. A person against whom a formal accusation of the commission of an offence has been made can be a person accused of an offence. The word offence has been defined in Section 3(38) of General Clauses Act, as “any act or omission made punishable by any law for time being in force”.

There is no differing view that a person, who is facing a criminal trial is an accused person, but the question arises, at what stage a person becomes accused of an offence? It will be more appropriate to discuss judicial decisions on the point.

In **Maqbool Hussain v. State of Bombay**, the Supreme Court held that an accused is a person against whom an allegation is made, that he had committed an offence, and the court confined such allegations upto the FIR. In **M.P. Sharma v. Satish**, it was held that the expression “person accused of an offence” means a person against whom a FIR is lodged and who is included in the category of accused therein.

The Allahabad High Court in **Amin v. State**, held that where evidence, whether oral or circumstantial points to the guilt of the person who has been arrested on that basis and interrogated by the police, he becomes a person accused of an offence even though his name has not been mentioned in the FIR. The Bombay High Court in **State v. Devi Dosa** held that a person accused of an offence means that information is laid against him before an officer or a court
entitled to take cognizance of an offence and proceed upon the information to investigate into it.

In *Veera Ibrahim* case the Court pointed out that the phrase “accused of an offence” includes within its ambit, only a person against whom a formal accusation relating to the commission of an offence has been levelled, which in normal course may result in his prosecution. Such formal accusation may be specifically made against him is FIR or a formal complaint or any other formal document or notice served on that person.

In *Directorate of enforcement v. Deepak Mahajan*, the Supreme Court held that word “accused” in Criminal Procedure Code denotes different meanings according to the context in which it is employed; in that, sometime the said word is employed to denote a person arrested, sometimes a person against whom there is an accusation, but who is not yet put to trial and sometimes to denote a person on trial or so on.

It is clear from the above discussion that as soon as any person is alleged formally to commit an offence, i.e., afterwards an accusation is made against him for the commission of an offence, he falls in the category of accused at the same moment and he continues to be accused till he is convicted or acquitted by the court. It is immaterial whether such person has been arrested or, after arrest, has been kept in the police custody or has been recommended to judicial custody or has been released on bail. So long as the trial continues and a judgment is not pronounced, he continues to be an accused. After the pronouncement of the judgment against him, he becomes a convicted person. In case the conviction order is stayed by the appellate court and an appeal remains pending, it is debatable whether such person would remain to be an accused or not. For the purposes of the present study, the expression “accused” has been used to cover a person from the date when a formal accusation or allegation is made till he is finally convicted and punished by the highest judicial authority.
At last, it may be submitted that ‘accused’ is a person against whom an allegation has been made by way of FIR, private complaint or otherwise that he has committed an offence and such allegation in normal course may result in his prosecution.

4.2.2 Right Against Legally Unwarranted Investigations and its Remedies

As it is already discussed that ‘investigation’ is the proceeding under the Code for collection of evidence conducted by a police officer or any other person (other than a Magistrate) who is authorised by the Magistrate in this behalf. From the time of receipt of information relating to commission of a cognizable offence and until accused is arrested, is a pre-arrest stage of investigation. After a person is arrested on a criminal charge till collection of evidence by the police and ultimately filling of a charge sheet against him by the police in the court of law with a view to prosecute him, is the second stage of investigation. At both stages the accused has different kinds of rights.

Article 21 of the Constitution of India mandates that no person shall be deprived of his life or liberty except in accordance with ‘procedure’ established by law. Invocation of criminal process against a person has the effect of making serious inroad on the right to liberty and property of a person. Therefore, as observed by Mathew J. in Dayal Deorath v. The District Magistrate, Kamruo the history of the personal liberty is largely the history of insistence on observance of procedure and the observance of procedure has been the bastion against wanton assault on personal liberty over the years. So the accused has a right to insistence on procedure being followed by the police in the investigatory process.

In the investigatory process, the first stage is to get the information regarding commission of an offence which an officer in charge of a police station is competent to investigate. Such information can be given by person or police itself may have information regarding commission of such offence. An officer in charge of a police station is competent to investigate a cognizable offence without orders from a Magistrate. Therefore, on the receipt of information through a
person or when police has the information of its own, first procedural requirement is the recording of such information as FIR. At this stage the officer concerned cannot embark upon an inquiry as to whether the information laid by the informant is reliable and genuine or otherwise and cannot refuse to register a case on the ground that information is not reliable or credible. The condition which is a sine qua non for recording the FIR is that there must be information and that information must disclose cognizable offence. When these two requirements of Section 154 of the Code are fulfilled, the concerned police officer has no other option except to enter the substance thereof in the prescribed form, that is to say register a case on the basis of such information. It is not within his domain to go into the question of credibility or reasonableness of information.\textsuperscript{16}

In the investigatory process, the second stage is of taking decision by the officer in charge of a police station whether to proceed to investigate or refuse to investigate the case. Here he has circumscribed the discretion to take a decision either way. Sub-Section (1) of Section 157 of the Code imposes a statutory duty on an officer in charge to proceed in person or depute one of his subordinate officer not below such rank as the State Government may prescribe in this behalf where, from the information received or otherwise, he has reasons to suspect the commission of an offence which he is empowered under S. 156 of the Code to investigate. It is important to note that S. 157(1) of the Code requires the police officer to have ‘reason to suspect’ only with regard to the commission of an offence which he is empowered under S. 156 of the Code to investigate but not with regard to the ‘Involvement of an accused in the crime’.\textsuperscript{17} Again, the concerned police officer has no discretion to enter in investigation: (1) when information as to the commission of the offence is given against any person by name and the case is not of a serious nature; and (2) if it appears to the officer in charge concerned that there is no sufficient grounds for entering on an investigation.\textsuperscript{18} But in case of his refusal to enter into an investigation in the above two situations, he is bound to notify this fact to the informant and the reasons for not entering into investigation under clause (b) of the proviso to S.157 of the Code in addition to making a report of the reasons for not complying with the
requirement of S. 157 (1) of the Code while forwarding the report to the Magistrate competent to take cognizance.\textsuperscript{19} From the above discussion it emerges that the officer in charge of a police station must have ‘reasons to suspect’ the commission of a cognizable offence and which he is empowered to investigate under S. 156 of the Code before he can enter into an investigation. This is a jurisdictional requirement for entering into an investigation.\textsuperscript{20} The Supreme Court while explaining the meaning of the expression ‘reason to suspect the commission of a cognizable offence’ observed that it means the sagacity of rationality inferring the commission of a cognizable offence based on the specific articulate facts mentioned in the First Information Report as well as in the annexure, if any, enclosed and any attending circumstances which may not amount to proof. In other words, the meaning of the expression ‘reason to suspect’ has to be governed and dictated by the facts and circumstances of each case and at that stage the question of adequate proof of facts alleged in the FIR does not arise. But what should be the yard stick to infer existence of reasonable suspicion? In \textit{State of Gujarat v. Mohanlal J. Porwal}\textsuperscript{21}, the Supreme Court explained that the circumstances have to be viewed from the experienced eye of the officer who is well equipped to interpret the suspicious circumstances and to form a reasonable belief in the light of the said circumstances. Therefore, it is wrong to suppose that the police has an unfettered discretion to commence investigation under S. 157 of the Code. Their right of inquiry is conditioned by the existence of reasons to suspect the commission of a cognizable offence and it cannot reasonably have reason to suspect commission of an offence unless the FIR prima facie discloses the commission of such offence. Secondly, the police officer should subjectively satisfy himself as to whether there is sufficient ground for entering on an investigation even before he starts an investigation in to the facts and circumstances of the case as contemplated under clause (b) of the proviso to S. 157(1) of the Code.\textsuperscript{22} Where both these conditions are lacking, the police officer investigating the offence would be exceeding his jurisdiction giving rise to a right in favour of the accused to seek appropriate remedy in the court of law.
In a criminal investigation, the police officer investigating the case should not proceed with the pre-conceived idea of guilt of the accused person dictated with the commission of an offence and subject him to any harassment and victimisation. In order to ascertain whether there are sufficient reasons to enter in investigation he makes a preliminary inquiry. Such a preliminary inquiry, in the absence of any prohibition in the Code, express or implied, before registering an offence and making a full scale investigation into it is open to police officer to make.23

The investigation will be illegal if (1) the FIR does not disclose any offence; (2) does not disclose commission of a cognizable offence and investigation is being carried out without permission of the Magistrate; and (3) where officer investigating an offence is not competent to investigate the case. If investigation is illegal, the accused has a right to seek appropriate remedy against such investigation.

In Nandini Satapathy v. P. L. Dani24, the Court pointed out that a police officer who is not too precise, too sensitive and too constitutionally conscientious is apt to trample underfoot the guaranteed right of testimonial tacitness. Therefore, the Supreme Court in Swapan Kumar Ghua’s25 case held that there is no such thing like unfettered discretion in the realm of powers defined by Statutes and indeed, unlimited discretion in that sphere can become a ruthless destroyer of personal freedom. Their right of inquiry is conditioned by the existence of reason to suspect the commission of a cognizable offence and they cannot, reasonably, have reasons to suspect the commission of a cognizable offence unless the FIR, prima facie discloses the commission of such offence. If there is a violation of these statutory conditions, the aggrieved person can always seek a remedy by invoking the powers of the High Court under Article 226 or the Supreme Court under Article 32 of the Constitution,26 or the High Court also, in the exercise of its inherent power under Section 482 can stop and quash such an investigation.

From the study of various decisions of the Supreme Court, the position that emerges is that the High Court in the exercise of its inherent powers can quash the
FIR, firstly, if allegations, taken in their entirety, do not constitute any offence. Secondly, if the FIR does not disclose the commission of a cognizable offence, the High Court would be justified in quashing the investigation on the basis of information as laid or received. Thirdly, the High Court in the exercise of its powers under Article 226 of the Constitution, in appropriate cases can issue writ of mandamus restraining the police officer from misusing his legal powers if the petitioner could convince the Court that investigational powers have been exercised by police officer *mala fide*. Fourthly, the High Court can exercise such powers if there is any legal impediment to the institution or continuance of proceedings but the High Court cannot go into the question whether the evidence is reliable or not.27

4.2.3 Right Against Illegal Arrest and Detention and its Remedies

In India, arrests are governed by the statutory provisions contained in the Criminal Procedure Code, 1973. As already discussed, there are three stages leading to the invocation of investigatory process: (1) receipt of information regarding commission of a cognizable offence; (2) taking decision whether to enter into investigation or not; and (3) ascertainment of facts as to who is the offender and taking steps for his arrest.

After an officer in charge of a police station has decided to enter into investigation of an offence which he is empowered to investigate, he is to ascertain as to who is the probable offender and whether he should be arrested. Arrests are of two kinds: (1) accusatorial arrest (where a person is sought to be arrested for the commission of an offence punishable under the law); and (2) preventive arrest (where the arrest is meant or authorised as a preventive measure for the prevention of cognizable offences).

‘Arrest’ can be defined as putting restraint on the liberty of a person by a police officer for any act or omission which constitutes an offence and under the circumstances in which law authorises a police officer to exercise such discretion to put restraint on such person. Existence of a legally justifiable circumstances or
requirement is a *sine qua non* for a legal arrest. Such officer can arrest a person if (1) he has been concerned in any cognizable offence; or (2) against whom a ‘reasonable complaint’ has been made of his having been so concerned; or (3) a ‘credible information’ has been received; or (4) against whom ‘reasonable suspicion’ exists that he has committed a cognizable offence. Such person can also be the one who has committed any act out of India which, if committed in India, would have been punishable as an offence and for which he is, under any law relating to extradition or otherwise liable to be apprehended or detained in custody in India. Such person can also be the one for whose arrest, any requisition, whether written or oral, has been received from another police officer. In such cases requisition is required to specify the person to be arrested and the offence for which he is to be arrested, and it appears there from to the officer arresting that the person might lawfully be arrested without a warrants by the officer who issued the requisition.

The case of *Sagwan Pasi v. State of Bihar* is an instructive one on the scope of power of a police officer to arrest a person. S. 151 of the Code authorises a police officer to arrest any person designing to commit an offence which cannot be otherwise prevented. For making arrest of any person in a legal sense, therefore, a police officer is required to have a legal justification under the law and if discretion to arrest is exercised on the facts which either do not constitute an offence or do not furnish information of the circumstances justifying arrest, the arrest will be illegal.

In *Padam Dev* case, where an accused was arrested by the police on the ground that he was creating nuisance under the influence of liquor, taken to the hospital and got medically examined. Since Sec. 34 of the Police Act, authorising arrest of such a person was not in force in that area, the accused was arrested under Sec. 510 IPC which is a non-cognizable offence and for which the police did not have power to arrest the person. In these circumstances, the arrest was held to be illegal.
Article 21 of the Constitution guarantees a right against deprivation of life and liberty except in accordance with the procedure established by law. Any arrest or detention which is not sanctioned by the law would be illegal. As it has been discussed earlier, that law authorises a police officer to arrest a person on the existence of certain circumstances and his subsequent detention for a specified period is sanctioned by Sec. 167 of the Code. Therefore, it follows that if the arrest is not legal, the detention in consequence thereof cannot be legal. Secondly, even though a person may be lawfully arrested but his subsequent detention may become illegal merely because he has not been dealt with in accordance with the provisions of the law. For example, if the person arrested has been kept by the police beyond 24 hours of his arrest, though the person’s arrest will be legal yet the subsequent detention without remand may be illegal and infringe his fundamental rights under Article 20, 21, and 22 of the Constitution.33

The illegal detention can be classified into two categories: (1) *ab initio* illegal detention; and (2) suffering illegality at subsequent stage. In the first case where the person has been detained by the police without any legal justification or authority of law, the detention is *ab initio* illegal. In the second case a person may be arrested legally by the police initially but his further detention is either not authorised by law or if not dealt with in accordance with the provisions of law providing for his subsequent detention, the detention may be illegal. In *Rudul Shah v. State of Bihar*34 where the petitioner was acquitted by the Court of Session on 3.6.1968 but was released on 16.2.1982 i.e. after 14 years. Such detention was held to be illegal.

There are two remedies open to a person under illegal detention: (1) ordinary statutory remedy; (2) extraordinary Constitutional remedy. So far as the illegal detention is concerned, a person is complaining of illegal detention can invoke the jurisdiction of District Magistrate, Sub-Divisional Magistrate or the Magistrate of the First Class. Such Magistrate, if convinced that any person is so confined under the circumstances that the confinement amounts to an offence, he can issue search warrant authorising any person to search for the person so
concerned and if found, is required to be produced before such Magistrate who may make such orders as the circumstances of the case warrant.\textsuperscript{35}

The second remedy, which is more effective and efficacious, is the writ of \textit{Habeas Corpus}. Arrest and detention without any legal justification is an infringement of the fundamental right of a person under Article 21 of the Constitution. Under Article 32, the Supreme Court and under Article 226, the High Court is competent to issue writs in the nature of habeas corpus or pass any appropriate order or direction suited to the circumstances of the case. In \textit{Bhim Singh’s case}\textsuperscript{36} the petitioner was illegally arrested with the intention to prevent him from attending the Session of the Legislative Assembly and to cover up the story was booked under Sec. 153 of IPC. The Supreme Court held that the arrest as malicious and released the petitioner.

A large number of complaints pertaining to the Human Rights violations are in the area of abuse of police powers, particularly those of arrest and detention. It has, therefore, become necessary, with a view to narrowing the gap between the law and practice, to prescribe guidelines regarding arrest even while at the same time not unduly curtailing the power of the police to effectively maintain and enforce law and order and proper investigation. Some may suggest that the suspected person should be arrested after preliminary enquiry. A basic tenet of our criminal justice system is: ‘Let hundred guilty ones walk free but do not punish an innocent’. The police, which is a part of the criminal justice system, functions exactly the other way round. The Police usually arrest as many suspects as it can. The police invariably arrest the person with or without substantial evidence. After the case is registered, the police should investigate and ascertain the truth and collect evidence to identify the culprit. But in many cases, the course of action does not follow this logical sequence. The first step after registration of the case is an arrest, with or without evidence or even an investigation. The investigation invariably starts after the arrest; the collection of evidence at the later stage.

Violence and inhuman treatment to the prisoners under the police custody is nothing new in our country. There are thousands of examples where police itself
is the violator of human rights. In the past years unqualified use of qualified power of arrest by the police under Sec. 41 of Cr.P.C. and subsequent remand under Sec. 167 of the Code became a common practice. Sec. 41 which is termed as “Black Law” gives white power to the police personnels to arrest any person without any warrant or without order of the Court. On the other hand, almost every person who was under the police remand alleged that they were subjected to the worst inhuman treatment in police remand. After the tragic death of Shamim Raza Rubel in police custody, it became growing demand of people of every walk of life to scrap the law or to put some restrictions over the power of police. During the last several years a large number of people have died in the police custody. Even the President of the country in his speech delivered at the 8th National Conference on Human Rights had to say that torture and inhuman treatment meted out to a person in custody leading to custodial deaths are against humanity and civilization.  

The powers given to police under Sec.41 to a large extent are inconsistent with provisions of Part III of Constitution. Police often bluntly ignores the qualified terms mentioned in various Sections e.g. ‘Cognizable Offence’, ‘reasonable complaints’, ‘credible information’, and ‘reasonable suspicion’ etc. Application of this Section fraught more with ulterior motives than the prevention of crime and arrest of persons suspected of having committed or about to commit cognizable offence. Most of the arrests under Sec. 41 are caused on fanciful suspicion.

In Joginder Kumar v. State of U.P. the Supreme Court has laid down guidelines governing arrest of a person during the investigation. This is intended to strike a balance between the needs of police on one hand and protection of human rights of citizens from oppression and injustice at the hands of law enforcing agencies. The existence of the power of arrest is one thing; the justification for the exercise of it is other thing. Further the Court held that a person is not liable to arrest merely on the suspicion of complicity in an offence. There must be some reasonable justification in the opinion of the police officer effecting the arrest that such arrest was necessary and justified.
For the effective enforcement of Article 21 and 22(1) of the Constitution and in order to have transparency in the accused-police relations the following requirements should be complied with:

1. An arrested person being in custody is entitled, if he so requires to have one friend, relative or other person who is known to him or likely to take an interest in his welfare, told, as far as is practicable that he has been arrested and where he is being detained.
2. The police officer shall inform the arrested person when he is brought to the police station of this right.
3. An entry shall be required to be made in the diary as to who was informed of the arrest. These protections from power of arrest must be held to flow from Articles 21 and 22(1) and enforced strictly.

Taking in view the growing incidents of custodial deaths and police torture, the Supreme Court in *D.K. Basu v. State of West Bengal* has held that the precious right guaranteed by Articles 21 and 22 of the Constitution of India cannot be denied to convicts, undertrials, detenue and other prisoners in custody, except according to the procedure established by law. The Supreme Court condemned the tortuous methods adopted by the police and issued detailed guidelines to be followed in all cases of arrest and detention till legal provisions are made in that behalf as preventive measures:

1. The police personnel carrying out the arrest and handling the interrogation of the arrestee should bear accurate, visible and clear identification and name tags with their designations. The particulars of all such police personnel who handle interrogation of the arrestee must be recorded in a register.
2. That the police officer carrying out the arrest of the arrestee shall prepare a memo of arrest at the time of arrest and such memo shall be attested by at least one witness who may be either a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. It shall also be counter signed by the arrestee and shall contain the time and date of arrest.
3. A person who has been arrested or detained and is being held in custody in the police station or interrogation centre or other lock-up, shall be entitled to have one friend or relative or other person known to him or having interest in his welfare being informed, as soon as practicable, that he has been arrested and is being detained at the particular place, unless the attesting witness of the memo of arrest is himself such a friend or a relative of the arrestee.

4. The time, place of arrest and venue of custody of an arrestee must be notified by the police where the next friend or relative of the arrestee lives outside the district or town through the Legal Aid Organisation in the District and the police station of the area concerned telegraphically within a period of 8 to 12 hours after the arrest.

5. The person arrested must be made aware of this right to have someone informed of his arrest or detention as soon as he is put under arrest or is detained.

6. An entry must be made in the diary at the place of detention regarding the arrest of the person which shall also disclose the name of the next friend of the person who has been informed of the arrest and the names and particulars of the police officials in whose custody the arrestee is.

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

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

9. Copies of all the documents including the memo of arrest, referred to above, should be sent to the illaqa Magistrate for his record.
10. The arrestee may be permitted to meet his lawyer during interrogation, though
not throughout the interrogation.

11. A police control room should be provided at all Districts and State
Headquarters, where information regarding the arrest and the place of custody
of the arrestee shall be communicated by the officer causing the arrest, within
12 hours of effecting the arrest and at the police control room it should be
displayed on a conspicuous notice board.

After prescribing the above guidelines, the Supreme Court further laid down that:

(a) Failure to comply with the above requirements shall, apart from
rendering the concerned official liable for departmental action, also
render him liable to be punished contempt of court and the proceedings
for contempt may be instituted in any High Court of the country having
territorial jurisdiction over the matter.

(b) The requirements prescribed above flow from Articles 21 and 22(2) of
the Constitution and need to be strictly followed.

(c) These would apply with equal force to other Governmental agencies
also.

(d) These requirements are in addition to the Constitutional and statutory
safeguards and do not detract from various other directions given by the
courts from time to time in connection with the safeguards of the rights
and dignity of the arrestee.

The guidelines prescribed by both the above cases are required to be strictly
followed in order to safeguard the rights of an arrested person but nothing as such
is happening. The incidents of police torture and custodial deaths are still
increasing day by day.

There is a general belief at the level of the police, the people and the Courts
that the only task of the police is to arrest the suspects. Any decision regarding
their guilt or otherwise is considered to be the sole prerogative of the Courts. The
rampant use or misuse of the discretionary power to arrest has been a major source
of corruption both at the level of police stations and lawyers in the lower courts. No wonder lawyers are opposed to the amendments. People generally fear the police but not the law. The police ought to be accountable for every arrest in keeping with the fundamental right of life and liberty. The amendment will curb the arbitrary functioning of the police and hopefully make it more responsive and professional.

In 2007 about 28 lakhs arrests were made under the Indian Penal Code. In the same year about 7 lakhs persons were convicted by the courts. This shows that out of every four persons arrested in our country, three are let off as not guilty. Many of these hapless victims are actually innocent. The recent amendment in Section 41 of the Code is a welcome attempt to rectify the anomaly. It bars the police to arrest the accused persons in cases which carry a sentence of less than seven years. This would mean that in a larger number of cases the police will not be able to make arrests as a matter of routine.

The most significant changes relate to the law of arrest with the new provisions going some way towards balancing the requirements of effective law enforcement with the necessity of protecting people from injustice and police harassment. Before the amendment, Sec. 41 of the Code permitted the police officer to arrest without warrant “any person who has been concerned with any cognizable offence” even on the mere presence of “reasonable suspicion”. The new provisions stipulate that for cognizable offences punishable with a maximum imprisonment of less than seven years, arrests should be made only against the existence of “credible information” or a “reasonable complaint”. The police, moreover, are obliged to record in writing the reasons for making such arrests, which are permitted only under certain conditions, for example, to prevent the person from committing further crimes or tampering with evidence. When arrest is not justified under these conditions, the police may only issue a notice of appearance asking the presence of a person suspected of the crime to appear before it or at any other specified place.
The other safeguards against the vast discretionary power of the police are stricter procedures during the making of an arrest, the introduction of regular medical examinations of those in police custody, and the establishment of police control rooms in all districts that must display the names and addresses of those arrested. The Code of Criminal Procedure (Amendment) Bill, 2008 is based substantially on a draft prepared by the Law Commission in its 177th Report and reflects the spirit of several Supreme Court judgements on the power and procedure to make arrests.

Though the amendment in Cr.P.C. is gratifying yet the game is still not over. There is a need of further amendments in Cr.P.C. provisions e.g. Sec. 46(2) of Code of Criminal Procedure (arrest how made) reads- In making the arrest if person forcibly resists the endeavour to arrest him, or attempts to evade the arrest, such police officer or the person may use “all means” necessary to effect the arrest. It means police officer is allowed to take any action whatever he deems fit according to his personal whims and wishes. It gives high degree of arbitrary power to police. How we can forget the case of 22 year old MBA student, Ranbir Singh, who was killed in a shocking incident of an encounter in Dehradun, even without any criminal record. They fired thirty shots from close range on him and 10 bullet marks were found on his body although they could have shot fire at his leg even if the police thought that he was absconding.

Further Sec. 46 (3) says-“Nothing in this section gives a right to cause the death of a person who is accused of an offence punishable with death or with imprisonment for life”. It impliedly means that the police officer can cause the death of a person who is an “accused of an offence punishable with death or imprisonment for life”. How can police be given authority to decide the punishment for the person who is not convicted for his offence where in India death penalty is given in the “rarest of rare” cases and we think that arresting does not fall in the same category.

The hope is that the new provision will act as a check on the notorious tendency of the police to arrest. The Third Report of the National Police
Commission has suggested that nearly 60 per cent of arrest were unnecessary and unjustified. It has estimated that the abuse of the arrest law accounted for more than 43 per cent of expenditure on jails. By making this law more humane and rational, the amending Bill definitely takes an important step towards improving what the Supreme Court has once described as the hallmark of a nation’s civilisation- the method it uses to enforce the criminal law.

4.2.4 Right to Know the Power of the Arresting Authority

In addition to the recognition of the right of the accused ‘to know the grounds of arrest’, the Criminal Procedure Code, 1973, also gives an additional right to an accused vide Section 55, the right to know the power of the arresting person to arrest the accused. By this section, which is applicable when arrest is made by an officer in charge of a police station or any police officer making an investigation or any officer subordinate to him, a duty is imposed upon the superior officer to deliver an order in writing to the officer required to make the arrest specifying: (a) the person to be arrested, and (b) the offence or other cause for which the arrest is to be made. Further, the officer so directed to make the arrest is also under a statutory duty: (a) to notify to the person to be so arrested the substance of the order, and (b) if so required by such person, to show him the order. This section is, however, related to the arrest made without warrant.

In case an arrest is to be made under a warrant of arrest, Section 75 of the Code, imposes a duty upon the police officer or other person executing a warrant of arrest to notify the substance thereof to the person to be arrested and also to show such person the warrant, so that he may read it and know the grounds of arrest and power of the police officer or other person arresting him. It is to be noted that the provisions of Sec. 55 of the Code, empowering a person to be arrested to know the power of the arrester is not applicable in the case in which arrest can be made by any police officer without an order from a Magistrate and without a warrant as has been specified in Sec.41 of the Code. An additional right to an accused has been provided with regard to arrest by this section.
Investigation process is put in motion by recording the FIR. At this stage the accused has certain substantive rights in the criminal investigatory process against legally unwarranted investigations. Where FIR does not disclose a cognizable offence or discloses only non-cognizable offence or no offence, such an investigation is unwarranted by law and the person aggrieved has a right to invoke the power of High Court under Section 482 of the Code or Article 226 of the Constitution to get such investigation quashed. Similarly, an accused has a right against legally unwarranted arrest and pre-arrest illegal detention. To arrest a person, police officer must have a legal justification under the law. Arrest in violation of these requirements will be illegal. Accused can invoke the writ jurisdiction of Supreme Court and High Court to get his release.

4.3 Post-Arrest Rights of the Accused: Law and Human Rights

4.3.1 Right to Know the Grounds of Arrest and Effect of its Non-Communication

The criminal jurisprudence requires that a person accused of an offence should be informed of the grounds of his arrest so as to afford him an opportunity to advance his defence at the earliest possible. “Article 22(1) embodies a rule which has always been regarded as vital and fundamental for safeguarding personal liberty in all legal systems where the rule of law prevails…. The two requirements of Cl. (1) of Article 22 are meant to afford the earliest opportunity to the arrested person to remove any mistake, misapprehension or misunderstanding in the minds of the arresting authority and also to know exactly what is the accusation against him, so that he can exercise the second right, namely, of consulting a legal practitioner of his choice and to be defended by him”. If the policemen are allowed to hold the suspects indefinitely and question them, they will naturally try to persuade the suspects to confess the guilt. For, confession is the easiest and most satisfactory solution of a crime and also the justification of the arrest of the accused. It means the persuasion may often take the form of “third degree” method of
treatment. For this reason, the requirement for prompt furnishing of grounds of arrest and detention has been prescribed under Article 22(1) of the Constitution of India as well as by Article 9(4) of International Covenant on Civil and Political Rights, 1966, and this right is known as the most important right to know the grounds of arrest.

According to Article 22(1) of the Constitution of India, no person, who is arrested, can be detained in custody without being informed, as soon as may be, of the grounds of such arrest. The constitutional intent has been translated into legislative action by incorporating provisions in the Code requiring the officer arresting a person without warrant to forthwith communicate to him full particulars of the offence of which he is arrested or other grounds of such arrest. The newly incorporation Sec. 50-A in the Code has made it obligatory to every police officer or other person making any arrest to give information forthwith regarding such arrest and place where the arrested person is being held to any of his friends, relatives or any other nominated persons. The police officer shall inform the arrested person of his rights as soon as he is brought to police station and shall also make an entry of fact as to who has been informed of the arrest. When a subordinate officer is deputed by a senior police officer to arrest a person under Sec. 55 of the Code, such subordinate officer shall, before making the arrest, notify to the person to be arrested the substance of the written order given by the senior police officer specifying the offence or other cause for which the arrest is to be made. Non-compliance with this provision will render the arrest illegal. The right to be informed of the grounds of arrest is recognised by Sections 50, 55 and 75 of the Code where arrest is made with or without warrant by a police officer. In Shivaji case, the Court held that these provisions are mandatory and their non-compliance amounts to non-compliance with the procedure established by law and renders the arrest and detention of such person illegal. In Govind Prasad v. State of West Bengal the Court has observed that the underlying principle in requiring the officer arresting the person to furnish forthwith full particulars of the offence for which he has been arrested is to enable the person so arrested to move the court
for the enforcement of his right and secure his release. The right to be informed
of the grounds of arrest is a precious right of the arrested person. Its object is
to enable the person arrested and detained in custody to prepare his defence and
to move the court for bail or for writ of Habeas Corpus. In Ajit Kumar case the
Court pointed out that the obligation to inform of the grounds of arrest is so
strict on the police officer that if the accused alleges on affidavit that he was
not communicated with full particulars of the offence leading to his arrest, in
the face of affidavit the police diary cannot be perused to verify the police
officer’s claim of oral intimation of such particulars, even if such oral
communication was made, whether full particulars were communicated not
being known, the arrest and detention will be illegal. In Raj Kumari v. S.H.O.
Noida case, the lady petitioner complained on affidavit that she was arrested
in the night in violation of Supreme Court’s decision in Joginder Kumar and
D.K. Basu cases. She also alleged that arresting officer did not bear name
plates and no memo of arrest was prepared, but arrest at night denied by police.
The affidavit of the petitioner was the only supportive evidence on record.
There was no other corroborative material or affidavit of her relative, therefore
allegation of petitioner was not accepted. However, the Supreme Court in State
of Maharashtra v. C.C.W. Council of India passed certain directions, that
while arresting a female person, efforts should be made to keep lady constable
present but if in certain circumstances the presence of lady constable is not
possible, then arresting officer with recorded reasons may arrest a female at any
time of the day or night depending on the circumstances of the case even
without the presence of lady constable. However, the communication of
grounds of arrest need not be in writing nor it means that entire statement of
facts, documents and other material relied upon by the detaining authority for
passing the detention order should be supplied to such person which is only the
requirement of preventive detention under Art. 22 (5).

From the study of decisional material the position in regard to effect of
non-communication of grounds of arrest to accused is that it renders the
detention illegal. But courts are silent on the aspect as to what consequences
should ensure for breach of this mandatory provision. Whether the accused shall be released from custody or have no authority to authorize further detention of such person can only claim compensation for violation of this right? It is submitted that non-communication of the grounds to the person arrested is clearly the breach of his fundamental right entitling him to invoke appropriate remedy for the enforcement of his right. However, it will be a far reaching proposition of law to conclude that in such cases, the accused shall be entitled to be released from custody. Even the Magistrate can compel the police to inform the accused of grounds of arrest or may himself inform him of such grounds.

4.3.2 Right to Legal Assistance during Interrogation as well as during Proceeding before Magistrate

In United States of America, incriminatory statement made by an accused voluntarily during the interrogatory process can be proved against him. The Sixth Amendment to the American Constitution guarantees right against self-incrimination which means that any incriminatory statement obtained through compulsion, physical or psychic or atmospheric, cannot be proved against the accused. By creative interpretation of the provisions of Sixth Amendment in *Miranda v. Arizona*\(^{54}\), the U.S. Supreme Court extended the scope of this right to custodial interrogations also in which confession may be improperly obtained not because of any specific third degree practices of the police but because the entire aura and atmosphere of the police interrogation without notification of right and offer of assistance of counsel tend to subjugate the individual to the will of his examiner. Therefore, in order to provide safeguard to the accused against custodial compulsions, the law has been laid down requiring exclusion of defendant’s statement unless (i) he has been informed of his constitutional right to silence; and (ii) right to presence of an attorney retained by him or when he has not retained one, the lawyer has been provided to him at State expenses. It is also the mandatory duty of the police to inform and warn the accused of possible adverse use of such statement.
In India, the position in this regard is different, because of the statutory protections to accused against self-incrimination against proof of confessional statements made by the accused to police officer. Under the Indian Evidence Act, the confessional statement made by the accused to a police officer unless made in the immediate presence of the Magistrate is inadmissible against the accused. But this protection is narrower in nature though the scope of constitutional protection against self-incrimination is wide. The Code makes provision that State shall provide legal assistance to the accused but this right is confined only to the trial of cases and not at the investigatory stage. Judicial approach even in this regard had been apathetic when the Supreme Court construed this provision to mean that neither the police, nor the Magistrate nor the Court is under obligation to provide a counsel at State expenses and Court is only to afford necessary opportunity to accused to engage a counsel himself or to get his relatives to engage one for him. By passage of time there has been a marked improvement in the judicial approach towards the right of accused to legal assistance.

Prior to Nandini Satpathy’s case the area of right to legal counseling at interrogatory stage was obscure. It is in this case that the Supreme Court for the first time explored this right and held that the spirit and sense of Article 22(1) is that it is fundamental to the rule of law that the services of a lawyer shall be available for consultation to any accused person under circumstances of near custodial interrogation, since observance of the right against self-incrimination, is best promoted by conceding to the accused the right to consult a legal practitioner of his choice. But this right in India is not the same in amplitude as in Miranda’s case. In America securing the presence of a counsel even at State expenses before interrogation of accused commences, is mandatory. But in India, it is only recommendatory prescription to avoid serious involuntary self-incrimination secured in secrecy and by coercing the will. The only duty on the part of police recognised is to inform the accused of his right to have his counsel but the police need not wait more than a reasonable time for an advocate’s arrival. Thus the decision proved to be
recommendatory without laying down the probable consequences on denial of such right to the accused.

Judicial approach on the right of the accused to have the presence of his counsel by his side as reflected from subsequent decisions is not consistent and encouraging. As, for example, the Delhi High Court refused to allow the presence of a lawyer during interrogation even where it was asked for by the accused on the ground that Nandini Satpathi’s did not lay down any mandate but only suggested strongly that it would be prudent for the police to allow a lawyer where the accused wants to have at the time of interrogation if police wants to escape the censure that its interrogation is carried on in secrecy under physical and psychic torture. The Madras High Court took the view that there is distinction between ‘right to consult a legal adviser’ and ‘requiring a lawyer to be present while examination or interrogation of a person goes on’ and the lawyer cannot be allowed to be present since interrogation necessarily has to be secret and in fact even the identity of person interrogated or examined may have to be kept secret until a later stage.

Right to legal consultation has been the subject of consideration in a number of post-Nandini Satpathy cases. On the basis of Maneka Gandhi’s case it was observed by the Supreme Court in Hussainara Khatoon’s case that right to free legal services is clearly an essential ingredient of ‘reasonable, fair and just’ procedure for deprivation of life and liberty of a person accused of an offence and it must be held implicit in the Constitutional guarantee under Art. 21 of the Constitution. This case pertained to the right to legal assistance at pre-trial and trial stages. Even at post trial stage right to free legal assistance at State expenses has been recognised in order to enable the convict to file an appeal. In Khatri v. State of Bihar the Hon’ble Supreme Court went a step further in holding that constitutional obligation to free legal assistance not only arises at trial stage but also when the accused is produced for the first time in the court. Sheela Barse v. State of Maharashtra is another important case where Supreme Court recognised the right to legal assistance as a fundamental
right of an accused and constitutional obligation of the State to provide free legal assistance to those put in jeopardy at their lives or personal liberty. Art. 22 of the Constitution provides that no person who is ‘arrested’ shall be denied the right to consult, and be defended, by a legal practitioner of his choice. It is the ‘arrest’ of a person which gives birth to right to legal counseling. Such right accrues with the arrest and lasts till post-decisional stage. A person’s life or liberty is put in jeopardy not only when he is produced before the Magistrate or put on trial or convicted but also when he is arrested by the police in the capacity of an accused. In this situation the accused has two rights: (i) right against torture; and (ii) right against self incrimination. Why the right to legal assistance to a person arrested should then be denied? The requirement of just, fair and reasonable procedural prescription is that such person should also have right to legal assistance to vindicate his both the rights. In this regard, the approach of Madhya Pradesh High Court in Munna Singh’s case is in consonance with the constitutional philosophy of Article 21 in as much as it allowed the presence of a lawyer during interrogation when danger of physical torture and psychic torture was found imminent to answer self-incriminatory questions. This aspect has not been argued before the Court in any other case. Whatever limited be the role of a lawyer presence during custodial interrogation, at least it is a guarantee against application of third degree methods and right to presence of a lawyer, particularly when the accused wants the presence of lawyer besides him, should not be denied to the accused. It is therefore, necessary that Judicial safeguards against self-incrimination is Nandini Satpathy’s case requiring police to allow the counsel of accused to remain present should be given a statutory recognition by incorporating suitable provision in this regard in the Code.

It is now well settled law that “free legal aid to indigent and poor accused” springs from Article 21 of the Constitution. Besides, Article 39-A also provides for “equal justice and free legal aid”. After a catena of legal decisions, it is now a settled duty of the State to provide free legal aid for ensuring equal justice amongst those citizens who are unable to engage lawyers
in their litigations by reason of their economic disabilities. Section 304 of the Criminal Procedure Code, 1973, also provides that ‘where in a trial if the accused is not represented by a pleader due to insufficient means, the Court shall assign a pleader for his defence at the State expense.’ The combined and effective forces of Section 304 of the Code, Articles 21 and 39-A are quite consistent with that of Article 22(1).

A comprehensive report on legal aid was submitted by a Committee appointed by Government of India, in 1973, which comprises Mr. Justice Krishna Iyer and Mr. Justice Bhagwati, the report containing various recommendations on the basis of which the Central Government of India and the State Governments made several schemes for providing legal aid and advise to the poor. The main idea of framing the schemes for legal aid and advice to the poor was to provide legal literacy thereby to create legal awareness among the people. One of the important aims and objects of these schemes was to achieve social justice and to reduce social disparity by providing free legal aid to the weaker sections of the society and by encouraging and promoting settlement by conciliation in legal proceedings. For the effective implementation of these Schemes, the Central Government formed a ‘Committee For Implementing Legal Aid Schemes’ (CILAS) at national level, ‘State Legal Aid Boards’ at State level and ‘District Legal Aid Committees’ at the District Levels. Thereafter, a new legislation, namely, Legal Services Authorities Act, 1987 was enacted to provide the legal aid.

After the arrest of an accused, the police is bound to produce him before the Magistrate within twenty four hours. At this stage accused has a right to oppose remand either to police or to judicial custody and to enforce his right to bail. Without any legal assistance an accused, particularly when he is illiterate or unable to secure services of a lawyer due to poverty or incommunicado situation, will not be in a position to enforce his right. In this field the approach of the Supreme Court has been much encouraging. In Hussainara Khatoon’s case free legal assistance at state expenses was held to
be an essential ingredient of fair procedure. In *Sukhdas’s* case the Supreme Court went a step further in enjoining a duty on the Magistrate or the Sessions Judge before whom accused is produced, to inform the accused about his right to free legal assistance and further in *Khatri’s* case recognised the right of accused to get free legal assistance also at the stage when he is produced for the first time in the Court. A duty was also imposed on the Magistrates to make available services of a lawyer to the accused in order to enable him to oppose remand and apply for bail. However the judicial approach has considerably humanized the criminal justice system which is discernible from *Hussainara Khatoon’s* case.

Thus, the ‘right to legal aid’ to the poor and downtrodden has been accepted by the judiciary as the backbone of the ‘human right to fair trial and the approach of the Indian judiciary towards the implementation of this human right has been realistic and praiseworthy. It is now well settled that the duty of the Magistrate and Sessions Judge, before whom an accused is presented, to provide the services of a lawyer at the expense of the State is not dependent on the demand to be made by the accused and any trial would be vitiated if the accused remains unrepresented by a lawyer.

### 4.3.3 Right to be produced before the Magistrate within 24 hours of Arrest and Effect of Non-Production of the Accused

Article 22(2) of the Constitution of India provides another procedural safeguard to an accused in the form of fundamental right that: “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 to the court of Magistrate”. It is further provided by the same Article that “no such person shall be detained in custody beyond the said period without the authority of a Magistrate.” Thus, the maximum time limit for which the police can keep a person under detention is 24 hours at his own authority; even if the arrest and detention is malafide and contrary to law, the arresting officer may not be liable to be sued for damages for false imprisonment. Detention beyond 24 hours
without being produced and authorized by a Magistrate shall be illegal. In this regard the actual time of arrest is material in order to judge whether the police authorities did or did not comply with the Constitutional requirements of Article 22(2) of the Constitution. This right has been recognized with three fold objectives in mind:

(1) To prevent arrest and detention for the purpose of extracting confession or as a measure of compelling people to give information.

(2) To afford an early recourse to a judicial officer independent of the police on all questions of bail or discharge; and

(3) To prevent police stations being used as if they were prisons.

In the criminal jurisprudence law does not permit detention of any person unless there is legal sanction for it. Section 56 of the Code, requires that “a police officer making an arrest without warrant shall, without unnecessary delay and subject to the provisions herein contained as to bail, take or send the person arrested before the Magistrate having jurisdiction in the case or before the officer-in-charge of a police station”. Further, Section 57 of the Code, prohibits a police officer from detaining the arrested person for more than 24 hours, exclusive of time necessary for the journey from the place of arrest to the Magistrate’s court. Sections 56 and 57 of the Code, come into play only when a person is arrested without a warrant. In case a person is arrested under a warrant of arrest, the provisions of Section 76 of the Code are applicable which require the police officer or other person executing warrant of arrest ‘to bring the person arrested, without unnecessary delay, before the court before which he is required by law to produce such person’. It is to be noted that although no time is given in these sections, only the expression ‘without unnecessary delay’ has been used but it has been provided that such delay shall not, in any case, exceed 24 hours from the time of arrest to the Magistrate’s court.

In order to understand the scope of statutory right in conjunction with the Constitutional right, a distinction should be made between Article 22(2) of the Constitution and Sections 56 and 57 of the Code. The language used in
Sections 56 and 57 is “arrested without warrant”, while the phrase used under Article 22(2) is “arrested and detained” and is without any qualification. Secondly, the word, “every person” used in Article means all persons without any distinction. Thirdly, the word “Magistrate” used in the said Article is qualified by the word “nearest” whereas in the provision of the Code, the word “Magistrate” is generally qualified by the term jurisdiction. These differences by the Constitutional guarantee of fundamental right from the Criminal Procedure are of very great importance. Thus, the right of being produced before a Magistrate within the 24 hours from the time of arrest guaranteed by the Constitution is extendable to all arrests and detentions whether with a warrant or without a warrant.

The arrest by Magistrate and thereafter the grant of remand by him was raised in a question before the Allahabad High Court that, ‘when a Magistrate acting in executive capacity under Section 44 of Cr.P.C., 1973, arrests an individual and subsequently remands the arrestee to the custody, will the order of remand to the custody made by the arresting Magistrate be an order of the Magistrate under Article 22(2) of the Indian Constitution?’. In the case of Hariharanand v. The Jailor I/C Dist. Jail, Banaras73, the petitioners were arrested by a Magistrate acting under Section 64 of the Criminal Procedure Code, 1898, for their obstructions to the Harijans entry into Vishwanth temple which amounted to an offence under Section 6 of the U.P. Removal of Social Disabilites Act, 1947. The arresting Magistrate on the same day remanded them to the judicial custody. It was held that they were not produced before a court-within 24 hours of the arrest, thus their detention beyond 24 hours was held illegal and unconstitutional. The reason given was that the Magistrate while acting in executive capacity had no opportunity of applying his judicial mind. Further, since the same person cannot be a judge in his own cause, the Magistrate acting in executive capacity cannot be a court, as contemplated by Section 167 of the Code.
Under Art 22(2) of the Constitution, the arrested person has a right to be produced before the Magistrate within 24 hours of such arrest excluding the time necessary for journey from the place of arrest to the Court of the Magistrate. Beyond this period he cannot be detained by police without the authority of a Magistrate. Whether the arrest is without warrant or under a warrant, the arrested person must be brought before a Magistrate or Court within 24 hours.\textsuperscript{74} The philosophy behind this principle is that in a matter of life or liberty judicial authority must intervene at the earliest opportunity and the accused must be given an opportunity to make a representation against his further detention.

Sec. 57 of the Code enjoins a duty on police officers not to detain in custody a person arrested without warrant for a longer period than under all circumstances of the case is reasonable and such period shall not exceed 24 hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate’s Court. The limit of 24 hours, stated above, is the outer limit and does not create any right invariably to keep the person arrested in custody for a period of 24 hours. The production of the accused after arrest ensures immediate application of judicial mind to the legal authority of the person making the arrest and irregularity of the procedure adopted by him.\textsuperscript{75} The Supreme Court has strongly urged upon the State and its police authorities to see that this constitutional and legal requirement to produce an arrested person before a Judicial Magistrate within the 24 hours of the arrest must be scrupulously observed. This healthy provision enables the Magistrate to keep check over the police investigation and it is necessary that the Magistrate should try to enforce this requirement and where it is found disobeyed, come heavily upon the police.\textsuperscript{76}

The effect of non-production of the accused within 24 hours of his arrest before a Magistrate is that the detention becomes illegal. Where customs authorities arrested a person involved in smuggling case and kept the person in custody for 27 hours without interruption and without producing him before a
Magistrate, the detention was held to be illegal. Similar view has been taken by the Supreme Court in *Saptawna v. State of Assam* that detention of a person beyond 24 hours without production before a Magistrate renders the detention illegal. In a case, neither any information regarding commission of a cognizable offence against a person had been received nor there were reasonable suspicion of his having committed such offence, nor any case registered against such person, successive remand by the Magistrate authorising detention of such person to custody was held to be illegal. However, detention in breach of this provision will be illegal but if such person has been produced before the Magistrate, his further detention by the Magistrate becomes legalised and same cannot be attacked on the ground of the detention at earlier point of time being illegal. In *Saptawna’s case* it was argued that accused was entitled to be released on the ground that he was not produced before the Magistrate within 24 hours of his arrest. This contention was negatived and it was held that even if the petitioner had been under illegal detention earlier, his detention becomes lawful when he has been produced before the Magistrate and who remanded him to further custody.

It is only when the accused has been produced before the Magistrate that he can further authorise his detention to custody. Physical production of accused before the Magistrate, is therefore, necessary requirement of Sec. 167 of the Code. The officer arresting a person has also to transmit the case diary along with the accused. Whether the accused was produced before the Magistrate can be proved by his signatures on order authorising detention. There are two views on the point whether the Magistrate can or cannot remand the accused to custody in *absentia*. One view is that the Magistrate cannot remand the accused to custody nor can authorise his detention unless produced before him. This view has been taken by Rajasthan High Court and Allahabad High Court. The contrary view taken by Patna High Court is that mandate of law appears that the accused is to be produced before the Magistrate though it may turn out to be somewhat burdensome for the State. This on principle appears to be intended as perennial guarantee against any infraction of the
valuable right of liberty even though curtailed by criminal procedure so as to ensure that the accused has always access in person to judicial authority to make representation against his remand and for his release on bail. However, if non-production of the accused before the Magistrate is due to circumstances beyond the control of the State, further detention of the accused can be authorised in absentia, as the wholesome provisions of the Code requiring physical production has to be viewed reasonably and not to an impossible logical extreme for example when the accused may be mortally injured or grievously ill and lying in hospital, law would and cannot possibly require that he must be produced nevertheless in person before the Magistrate.

From the study of decisional materials on this aspect, the position of law emerges that though it is the statutory mandate that accused should be physically produced before the Magistrate yet in such cases where the physical production of accused is impossible due to reasons of serious ailment or transfer to another jail making his production by the State before the Magistrate impossible, remand in absentia will not be illegal. However, the non-production before the Magistrate within 24 hours will render the detention illegal and accused will be entitled to invoke the jurisdiction of High Court or the Supreme Court for restoration of his liberty, in appropriate cases, courts have awarded compensation to the person detained in custody without production before the Magistrate. At last, it may be said that the requirement of production of an accused within 24 hours is a healthy provision which enables the Magistrate to keep a check over the police investigation and its scrupulous observance by the police is vital for the protection of human dignity and human rights of the pre-trial detainees.

4.3.4 Right Against Further Detention except by the Authority of Law and in accordance with Procedural Mandate

After the accused has been produced before the Magistrate, his further detention can be authorised only by him in accordance with procedural mandate. Such further detention of accused is governed by the provisions of
Sec. 167 of the Code which contemplates two kinds of custodies viz. (i) detention of accused in police custody; and (ii) detention of accused in judicial custody. If the investigation cannot be completed within twenty four hours and police requires the custody of the accused for further period, the Magistrate is competent to authorise detention in police custody but only for a period of first fifteen days in whole. If police custody is not requested for by the police, the Magistrate can authorise the detention of accused in judicial custody for the first fifteen days and thereafter for a total period of ninety days in cases punishable with death, imprisonment for life or imprisonment for a term of not less than ten years. In other cases where offences alleged are punishable with any other imprisonment against the accused to judicial custody for a period of sixty days (inclusive of initial period of fifteen days). After expiry of this period of ninety or sixty days, if police has not filed a final report against the accused he becomes entitled to be released on bail. Procedural requirements to be observed by the Magistrate are discussed separately as under:

(i) **Remand to Police Custody:**

A Magistrate exercising jurisdiction under Sec. 167 of the Code is obliged to apply his mind to the material produced before him and hear the accused either in person or through his counsel as also the prosecution and then determine the significant question within the parameters prescribed in Sec. 167 of the Code. This, in essence, is a judicial function and in doing so Magistrate exercises his judicial mind. In *S.W. Nade v. State of Maharashtra*, the Court has held that a Magistrate before passing an order of detention or remand whether in police or judicial has to get himself satisfied regarding adequacy of grounds and for that he has to look into the extracts of case diary of investigations, since the order passed by him has the effect of taking away the liberty of a person which is a fundamental right. When the accused is produced before the Magistrate, his first detention can only be for a period of fifteen days and not beyond that. He can remand the accused to police custody if a request has been made in this regard or authorise his detention in judicial custody. But
the first and initial detention can only be for the first fifteen days inclusive of
the period of detention in police custody, if any, authorised by such Magistrate.

The period of fifteen days starts running as soon as the accused is
produced before the Magistrate. The earlier view taken by the Delhi High
Court was that once the accused is remanded to judicial custody he cannot be
sent back again to police custody in connection with or in continuation of the
same investigation even though the first period of fifteen days has not
exhausted. However, this view was not subsequently approved of by the same
High Court and it was held that the nature of custody can be altered from
judicial to police and vice versa during the period of first fifteen days
mentioned in Sec. 167(2) of the Code. After the first period of fifteen days
has elapsed, even if more serious or heinous offence is made out against the
accused during the investigation of the same offence, is no ground to authorise
his detention in police custody. Remand to police custody after expiry of
initial period of fifteen days is illegal. However, the limit of fifteen days in
whole is applicable in a single case against the accused. If he is found
concerned in another case and police custody is requested for, he can be
remanded to police custody for a period of fifteen days in whole in other case.

In Anupam J. Kulkarni’s case the Supreme Court has finally and
authoritatively settled the position in regard to remand to police custody in the
following manner: whenever any person is arrested under Sec. 57 of the Code,
he should be produced before the nearest Magistrate within 24 hours as
mentioned therein. Such Magistrate may or may not have jurisdiction to try the
case. If judicial Magistrate is not available, the police officer may transmit the
arrested accused to the nearest Executive Magistrate on whom the judicial
powers have been conferred. The Judicial Magistrate can in the first instance
authorise the detention of the accused in such custody i.e. either police or
judicial, from time to time but the total period of detention cannot exceed
fifteen days in the whole. Within this period of fifteen days, there can be more
than one order changing the nature of such custody either from police to
judicial or vice versa. If the arrested accused is produced before the Executive Magistrate, he is empowered to authorise the detention in such custody either police or judicial only for a week, in the same manner namely by one or more orders but after one week, he should transmit him to the nearest Judicial Magistrate alongwith the records. When the arrested accused is so transmitted the Judicial Magistrate, for the remaining period, that is to say excluding one week or the number of days of detention ordered by the Executive Magistrate may authorise further detention within that period of first fifteen days to such custody either police or judicial. After the expiry of the first period of fifteen days, further remand during the period of investigation can only be in judicial custody.

(ii) Remand to Judicial Custody:

Section 167 of the Code provides that the Magistrate can authorise the detention of an accused initially for the first fifteen days. Thereafter, he is required to monitor the investigation and form an opinion whether the further detention of the accused is justified and warranted by the circumstances. Thus the accused can successively be remanded to judicial custody but for a maximum period of ninety days in those cases where the offence alleged is punishable with death, imprisonment for life or imprisonment for a term not less than ten years and in other cases detention can be authorised only for sixty days.

(iii) Right to be Released on Bail after 90/60 days on Failure by Police to File Challan:

After expiry of 60/90 days of detention in custody, if the police does not file challan against the accused, he becomes entitled to be released on bail. This is indefeasible right of accused of being released on bail does not get extinguished by subsequent filing of charge-sheet. However if an accused fails to exercise his right to be released on bail for failure of the prosecution to file the charge-sheet within the maximum time limit allowed by provision to Sec. 167(2), he cannot contend that he had an indefeasible right to exercise it at
any time notwithstanding the fact that in the meantime the charge-sheet is filed. In *Om Prakash Gabbar v. State of Punjab*, it has been clarified that in offences where in the sentence upto ten years imprisonment is provided, the challan has to be filed within 60 days and in cases sentence period is not less than 10 years challan has to be filed within 90 days. Right to be released on bail after expiry of sixty or ninety days is a valuable safeguard against prolonged detention of the accused in custody. The calculation of these sixty or ninety days has been the subject of judicial pronouncements. In computing the period of sixty or ninety days, the detention of the accused in police custody under Sec. 57 of the Code has to be excluded. In calculating a day as a unit of time the day is to be taken as interval from one mid-night to another and it will be incorrect to take into consideration fraction of two days to make up one day. Thus, the day on which the custody is granted cannot be excluded. It has been clarified in *State of M.P. v. Rustum*, If 90/60 days complete on a day which is holiday, accused shall not be entitled to bail if challan is filed on the next following day. However, the Bombay High Court took a contrary view and has held that the General Clauses Act has no application to such cases and accused shall be entitled for bail if 60/90 days expire on a day which is holiday and police files challan on next day. The view taken by the Bombay High Court seems to be correct in as much as even on holidays a duty Magistrate holds court for remanding the accused produced before him and in such cases challan can be filed before the duty Magistrate on a holiday also.

In order to avail the benefit of bail under the Proviso to S. 167(2) of the Code, accused is not bound to move any formal application. All that he has to do is to intimate that he has prepared to furnish bail that may be ordered by the court. If he intimates the court orally or in writing, the court cannot refuse to pass an order directing his release on bail for want of written application. It is the duty of the magistrate to inform the accused that he has a right to be released on bail under the proviso. Bail granted under the provisions of S. 167 of the Code, for all practical purpose, has all the characteristics of a regular
bail so far as effect and consequences are concerned and cannot be cancelled except on recognised principles (Chapter XXXIII).

4.3.5 Right to Medical Examination

As discussed in the previous chapter, when a person is arrested on a charge of committing an offence of such a nature and under such circumstances that there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of an offence, under Sec. 53 of the Code police can get him medically examined by a registered medical practitioner. Similarly, accused has also the right to get himself medically examined. Under Sec. 54 of the Code, when a person who is arrested whether on the charge or otherwise, at the time when he is produced before the Magistrate or at any time during the period of his detention in custody alleges that the examination of his body will afford evidence which will either disprove the commission of any offence by him or will establish the commission of any offence by any other person against his body, the Magistrate is under a duty to direct the examination of the body of such person by a registered medical practitioner if requested by the accused unless the Magistrate is of the view that request is made for the purpose of vexation or delay or for defeating the ends of justice. The purpose of adding this provision as explained by the Joint Committee is to protect the person arrested from two excesses viz. probability of his false implication and his being subjected to physical torture. In a country like India, due to illiteracy and unawareness, the people are not aware of such right; therefore, the Hon’ble Supreme Court\textsuperscript{109} enjoined a duty on the Magistrate before whom the accused has been produced to inform him of his right of medical examination in case he has any complaint of torture or maltreatment in police custody. Such a request on the part of the accused cannot be rejected on the ground that he looks like normal man.\textsuperscript{110} This duty on the Magistrate is all the more strict when the accused is not assisted by a lawyer.\textsuperscript{111} If the accused is a female and required to be medically examined under the provisions of the Code the examination shall be made only by or
under the supervision of a female registered medical practitioner these provisions make important safeguards to save the accused from police torture.

4.3.6 Right to Speedy Investigation and Trial

Although right of an accused to ‘speedy trial’ is not specifically enumerated as a fundamental right in our Constitution, yet this right to speedy trial has been held implicit in the broad sweep and ambit of Article 21 by the Supreme Court in case of Maneka Gandhi v. Union of India. In America, speedy ‘trial’ is one of the constitutionally guaranteed rights available to the accused. The United States Congress had already passed ‘Speedy Trial Act, 1974’, which mandated time limits, ultimately reaching 100 days within which the criminal charged must either brought to trial or admonished. In India, the old saying – “Justice Delayed is Justice Denied” has now been coined into a shape after dynamic interpretation of Article 21 of the Constitution in Maneka Gandhi’s case. Thus, the recognition of the Right of an accused to speedy trial’ as a fundamental right has been granted in India by the judiciary. It may be pointed out that Sections 167, 209 and 309 of the Code have emphasized the importance of expeditious disposal of cases including investigations and trials.

The main statutory provision which exemplifies the rule of speedy trial is the Section 309 of the Code. Clause (1) of Section 309 provides that ‘in every inquiry or trial, the proceedings shall be held as expeditiously as possible and, in particular, when examination of witness has once begun, the same shall be continued from day to day until all the witnesses in attendance have been examined, unless the Court finds the adjournment of the same beyond the following day to be necessary for reasons to be recorded’. Clause (2) provides that ‘if the court after taking cognizance of an offence, or commencement of trial, finds it necessary or advisable to postpone the commencements of, or adjourn, any Inquiry or Trial, it may, from time to time, for reasons to be recorded, postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable, and may by a warrant remand the accused if in custody’. These provisions indicate that the intention of the Legislature had
been to complete the trial or inquiry expeditiously after its commencement and thus indirectly incorporate the concept of a speedy trial or inquiry or investigation.

An individual’s personal liberty is affected by an arrest. For this reason, Sections 56 and 57 of the Code, analogous to Article 22(1) and 22(2) of the Constitution provide for the production of such person before a Magistrate as soon as possible to determine whether the arrest depriving the personal liberty to the arrested person is justified or not whereas reference of Section 167 under Section 57, emphasizes the importance of expeditious disposal of cases during investigation and trials. The entire objects of Sections 56, 57 and 167 of the Code, which are mandatory and of Article 21 because *quick justice* is *sine qua non* of Article 21 of the Constitution. Therefore, it has been held by the Supreme Court in several cases that the fundamental rule of speedy trial found under Article 21 of the Constitution is not only exercisable against the actual court proceedings but also against police investigation and speedy investigation and trial are equally mandated by both in letter and in spirit by the Code.

One of the most neglected aspects of criminal justice system is the delay caused in the disposal of the cases and detention of the poor accused pending trial. Speedy trial in criminal cases is a must. There is famous saying that *justice delayed is justice denied*. Thus an Accused should not be kept in suspense for long. Charges against them should either be confirmed or cleaned. It is more so when undertrials remain in incarcerated for a long period.

Reasonably expeditious investigation of crimes is in the interest of both, the society as well as the accused. From the point of view of society, expeditious investigation of crimes increase efficacy in the criminal law process and respect for the law. From the point of accused, the constitutional guarantee of speedy investigation is essential to protect at least three basic demands of criminal justice system, as pointed out in *Richard M. Smith v. Fred M. Mooley*.
(1) to prevent undue and oppressive incarceration prior to trial;

(2) To minimize anxiety and concern accompanying public accusation;

and

(3) To limit the possibilities that long delay will impair the ability of an accused to defend himself.”

To harmonise these two competing interests, Sixth Amendment to the American Constitution guarantees to every person right to speedy trial.

Prior to the decision in Maneka Gandhi’s case the judicial approach in India had been dismal. In A.K. Gopalan v. State of Madras it was held by the Supreme Court that no person can be deprived of his life or liberty except according to the procedure established by law and by ‘procedure established by law’ it meant the procedure enacted by the legislature. Whether procedural prescription is just, reasonable and fair, was beyond the jurisdiction of the Court to decide. But Maneka Gandhi’s case added life and blood to fundamental right to life and liberty enshrined in Article 21 of the constitution by giving a hospitable interpretation to the words (procedure established by law). It was held that the procedure established by law for deprivation of life or liberty should not suffer from the vice of arbitrariness, unreasonableness, unfairness. The second epoch making landmark in this field was Hussainara Khatoon v. State of Bihar, where the Court impressed by philosophy behind the Sixth Amendment to the American Constitution and also Article 3 of the European Convention on Human Rights, gave a new shape and life to the rights guaranteed under Article 21. It was held that even under the Constitution of India, though speedy trial is not specifically enumerated as a fundamental right, it is implicit in the broad sweep and content of Article 21 as interpreted in Maneka Gandhi’s case.

The Jammu and Kashmir High Court held that the speedy trial includes within its sweep the investigatory police proceedings in a criminal prosecution. In Abdul Rehman Antulay v. R.S. Naik, the Supreme Court has finally settled the position that right to speedy trial flowing from Article 21
encompasses all the stages, namely the stage of investigation, inquiry, trial, appeal, revision and re-trial, by this decision the Supreme Court has broadened the scope of this right.

In *Madan Lal v. State of Rajasthan*\(^{125}\), the Rajasthan High Court has held that right to speedy trial is now considered a fundamental right under Article 21 and proceedings should be quashed on the infringement of this right.

Procedural prescription for securing speedy investigation is given under Sec. 173 of the Code which directs that every investigation shall be completed without unnecessary delay. Sections 157, 167, 173 should be read conjointly for speedy investigation.

In cases of investigation relating to summons cases, if the investigation is not concluded within a period of six months from the date of arrest of the accused, the Magistrate is bound to make an order stopping further proceedings in the investigation unless the investigating officer satisfies the Magistrate that for some special reasons and in the interest of justice the continuation of the investigation beyond six months is necessary. The order passed by the Magistrate is subject to review by Sessions Judge who may direct further investigation to be made into the offence subject to such directions with regard to bail and other matters as he may specify.\(^{126}\) In *Sushil Kumar v. State of West Bengal*\(^{127}\) the Calcutta High Court took the view that principle behind this provision is that the investigating agency may not harass a person for long by binding him over in less serious cases.

So far as the investigation of cases triable as warrant cases is concerned, there is no specific provision in the Code analogous to Sec. 167 (5) of the Code where the Magistrate could enforce speedy investigation. However, the Code only prescribes statutory protection against prolonged custodial detention of the accused pending investigation. Such protections are in the form of right to be released on bail after detention in custody for a specified period. If the police does not file a final report against the accused within the period of sixty or ninety days, as specified in Sec. 167, a valuable right to be released on
bail accrues to the accused. By incorporating these provisions in the Code, it seems, legislature intended that the Magistrate is required to monitor the investigation and see if the investigation is being conducted expeditiously and if not, whether to authorise further detention of the accused in custody. However, there is no provision under which a Magistrate can give specific directions to the police to speed up investigation and failing of which he may take action in the direction of stopping the investigation.

Inordinate delay by the police in the investigation of criminal cases is violative of fundamental right under Article 21 of the Constitution and gives rise to a right in favour of the accused to move the High Court under Article 226 or to the Supreme Court under Article 32 of the Constitution for the enforcement of his right. In cases of inordinate delay there are two approaches followed by the Courts. The first approach is to release the accused on personal bond or without any bond. Where an accused had been in jail for the maximum term which could have been awarded to him if found guilty for the offence he was charged with, he was ordered to be released from custody forthwith.128 In cases, where no charge sheet had been filed for three years, the accused remaining in Jail custody, they were ordered to be released on furnishing personal bonds in meager amounts.129

The second approach is somewhat radical and revolutionary. In *Krishan Bahadur v. State*130, where the accused was in jail for over 40 months without any charge sheet having been field by the police, it was held that the delay in submission of final report was not bona fide but really in pursuance of mala fide exercise of investigational powers obviously designed to keep the prisoner under detention for an indefinite period. In this case the petitioner was set free. The second approach adopted by various High Courts seems to be more effective. Inordinate delays in investigations raise presumption that either there is no evidence against the accused to put him on trial or the investigation is mala fide with a view to keep the accused in custody or harass him. In both the cases the appropriate remedy is quashing of the investigational proceedings.
In Indian criminal jurisprudence, the accused is placed in a somewhat advantageous position than under different jurisprudence of some of the countries in the world. The criminal justice administration system in India places human rights and dignity for human life at a much higher pedestal. An accused is presumed to be innocent till proved guilty. The alleged accused is entitled to fairness and true investigation and fair trial and the prosecution is expected to play balanced role in the trial of a crime. The investigation should be judicious, fair, transparent and expeditious to ensure compliance with the basic rule of law. These are the fundamental cannons of our criminal jurisprudence and they are quite in conformity with the Constitutional mandate contained in Articles 20 and 21 of the Constitution. The view of the Supreme Court has been that an investigation must be fair and effective, must proceed in proper direction in consonance with the ingredients of the offence and not in haphazard manner. In some cases besides investigation being effective the accused may have to prove miscarriage of justice but once it is shown the accused would be entitled to definite benefit in accordance with law. The investigation should be conducted in a manner so as to draw a just balance between citizen’s right under Articles 19 and 21 and expansive power of the police to make investigation. These well established principles have been stated by the Supreme Court in *Sasi Thomas v. State* and *State (Inspector of Police) v. Surya Sankaram Karri* cases.

In *Nirmal Singh Kahlon v. State of Punjab*, the Supreme Court specifically stated that a concept of fair investigation and fair trial are concomitant to preservation of the fundamental right of the accused under Article 21 of the Constitution and the right of the accused to fair defence emerges from the concept of judicious and fair investigation itself.

### 4.3.7 Right Against Search and Seizure

For the effective investigation of crimes, the Code confers vast powers on the police officers to conduct search for the purpose of collecting evidence. Such powers when exercised tend to make serious inroad on the fundamental
rights of the person. Therefore, there is a conflict between individual right to life, liberty and property and the societal interests in detection of crimes and punishment of offenders. But in a country where the rule of law prevails, every act of the executive is governed by the provisions of law and no act is lawful which neither has sanction of the law nor is in consonance with legal prescriptions.

Under Sec. 51 of the Code whenever a person is arrested by a police officer under a warrant or without warrants, unless the person is released on bail, he is required to be searched. Police officer arresting a person is to take all the articles in possession of person so arrested except necessary wearing apparels. The purpose of taking personal search of person so arrested is to keep his belonging in safe custody. Sub-section (2) of Sec. 51 provides that a female is to be searched only by another female with strict regard to decency.

A police officer has no right to search a person unless such person is first arrested. A search without person being arrest is illegal. Such search may prove useful for proper investigation. If incriminating things or stolen articles are found in such search, the police officer can seize them under S. 102 and produce them in Court. In Ramani Rai’s case, where a sub-Inspector suspecting that the accused was having in his bag some papers connected with Congress forcibly snatched the bag and when accused resisted the search was laid on Railway Platform, the action of sub-Inspector was held to be illegal. Though Sec. 51 does not provide that the search of the arrested person should be taken in the presence of witnesses, but Allahabad High Court held that such a course is advisable and also the rules made under Police Act direct that the search should be made in the presence of witnesses. The witnesses should be independent and respectable.

Section 165 of the Code confers powers on police officers to conduct a search for things necessary for investigation which can found at any place within his jurisdiction he can conduct such search. Any place includes any place in possession of an accused.
4.3.8 Right against Self-Incrimination

During the course of investigation, occasion may arise which necessitate the medical examination of accused or exposure of his body for the purpose of identification by witnesses or obtaining his signatures handwriting, thumb, palm or foot impressions, hair sample, voice sample, for the purpose of establishing identity of culprit. Whether asking an accused to undergo a medical test or give a blood sample or expose his body for identification by the witnesses or give his handwriting, thumb, palm or foot impressions, runs counter to his right against self-incrimination? In this regard, the Supreme Court has taken the view that such a course does not amount to compelling an accused to be a witness against himself within the meaning of Article 20(3) of the Constitution. It was observed that specimen handwriting or signatures or impressions of thumb, foot or fingers are only materials for comparison in order to lend assurance to the Court that its inference based on other pieces of evidence is reliable. They are neither oral nor documentary evidence but belong to the third category of ‘material evidence’ which is outside the limit of testimony.

Article 20(3) of Indian Constitution provides that “No person accused of any offence shall be compelled to be a witness against himself”. This article has been designed to protect the accused from being compelled by hope or fear to admit facts or deny them. This doctrine is based on the ‘presumption of innocence’ and so long as the presumption remains as one of the fundamental canons of criminal jurisprudence, evidence against the accused should come from the sources other than the accused.

On analysis, this provision will found to contain the following components:

1. It is a right available to a person ‘accused of an offence’;
2. It is a protection against compulsion to be witness;
3. It is a protection against such ‘compulsion’ resulting in his giving evidence ‘against’ himself. The privilege under Article 20(3) is confined only to a person accused of an offence i.e. a
person against whom a formal accusation relating to the commission of an
defense has been leveled which in the normal course may result in the
prosecution. Such formal accusation may be specifically made against him in
the FIR or a formal complaint or any other formal document or notice served
on that person, which ordinarily results in his prosecution in the court. In
Amin v. State, it has been pointed out by the Court that even his name was
not mentioned as an accused in first information report, it will not take him out
of that category if evidence whether oral or circumstantial, points to the guilt of
a person and he is taken in custody and interrogated on that basis. He becomes
a person accused of an offence.

In Nandini Satpathy v. P.L. Dani’s case, the Court said that the
expression ‘accused of an offence’ no doubt includes a person formally brought
into police diary as an accused person but it also includes suspects who are not
formally charged.

In State of Bombay v. Kathi Kalu, the Supreme Court held that the
interpretation of the phrase ‘to be a witness given in Sharma’s case was too
broad and required a qualification. Self incrimination only mean conveying
information based on the personal knowledge of the person giving the
information and cannot include merely the mechanical process of producing
documents in the court, which may throw light on any of the point in the
controversy but which do not contain any statement of the accused based on his
personal knowledge. Thus when a person gives his finger impression or
specimen writing, he is not giving any personal testimony; they are merely
materials for comparison. Hence taking of specimen writing or finger prints of
an accused would not come within the prohibition of Article 20(3).

For the application of Article 20(3) there must be a ‘compulsion to be a
witness’, compulsion here means what in law is called ‘duress’ and explained
as where a man is compelled to do an act by injury, beating or unlawful
imprisonment or by the threat of being killed. Duress also includes imprisoning
of wife, parent or child of a person.
There are some statutory safeguards against testimonial compulsion in relation to oral statements made by accused.

In India, more stringent provisions have been made in the Indian Evidence Act making confessional statement made by the accused to the police under certain circumstances inadmissible. Law forbids a police officer from offering or making or caused to be offered or made any inducement, threat or promise as is mentioned in Sec. 24 of the Indian Evidence Act. However, it is not the duty of the police officer to prevent by any caution or otherwise, any person from making any statement during the course of any investigation which such person may be disposed to make of his own free will. A confession made by an accused person cannot be proved against him in a criminal proceedings, if the making of the confession appears to the court to have been caused by any inducement, threat or promise, having reference to the charge against the accused person, proceeding from a person in authority (and a police officer is a person in authority) and sufficient, in the opinion of the Court, to give the accused person grounds, which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him. There is complete bar to the admissibility of a confessional statement made by the accused to a police officer. Even the confession made by the accused whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate, cannot be proved against him. Such a confession cannot be recorded by a police officer on whom any power of a Magistrate has been conferred under any law for the time being in force and only Metropolitan Magistrate or Judicial Magistrate can record such confession in accordance with the requirements of Sec. 164 of the Code. However, there is an exception to the above exclusionary rules that if any information has been given by an accused while in police custody and in consequence of such information some facts have been discovered, so much of such information as distinctly relates to the facts thereby discovered, whether it amounts to a confession or not, can be proved against the accused. This proviso covers
only that part of the information supplied by the accused which is the direct and immediate cause of discovery. Therefore, only three things will be relevant in the information: (i) knowledge of the accused; (ii) presence of a particular thing to his knowledge; (iii) knowledge as to place of recovery of a thing. Such a statement of accused may have potency to prove his guilt hence it may be termed a confessional statement nevertheless it will be admissible.

The immunity from self incrimination is based on the presumption of innocence and so long as the presumption remains as one of the fundamental canons of criminal jurisprudence, evidence against the accused should come from sources other than the accused. The doctrine had its origin in the 16th century in England in protest against the inquisitorial methods of the Ecclesiastical courts. This doctrine provides that the accused is a competent witness on his own behalf, he cannot be compelled to give evidence against himself and his failure to give evidence in defence cannot be commented upon. This right is recognized in India in Sections 313 and 315 of the Code and Sections 24, 25, and 26 of the Indian Evidence Act, 1872. Section 313 of the Code provides thus:

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

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

   (b) shall after the witness for the prosecution have been examined and before he is called on for his defence, question him generally on the case; provided that in any summons case, where the court has dispensed with the personal attendance of the accused if may also dispense with his examination under clause (b).

2. No oath shall be administered to the accused when he is examined under sub-section (1)
3. The accused shall not render himself liable to punishment by refusing to answer such question, or by giving false answer to them.

Section 315(1) of the Code provides that:

Any person accused of an offence before a criminal court shall be a witness for the defence and may give evidence on oath in disprove of the charges made against him or any person charged together with him at the same trial provided that he shall not be called as a witness except on his own request in writing. Similarly an accused person cannot be convicted on the basis of a coerced confession of an accused. Section 164(2) of the Code provides this right as follows:

“The Magistrate shall before recording any such confession, explain to the person making it that he is not bound to make a confession and that if he does so, it may be used as evidence against him; and the Magistrate shall not record any such confession unless, upon questioning the person making it he has reason to believe that is being made voluntarily”.

Science and law are inter-dependable. The field of law is also under the shadow of scientific advancement. Judicial system, particularly the criminal justice system, is not untouched with the advancement of science. A volcano has emerged in the age old laws of crime detection (investigation), long established laws of evidence and criminal jurisprudence with the introduction of new techniques of crime detections like Brain Mapping, Narco-Analysis, Hypnosis, P-300 and Polygraph Test (Forensic Science Techniques). These advance crime detections tools has emerged as the most powerful branch in law which are termed as Nero Law helping the Law Enforcement Agencies in the administration of criminal justice system. The application of Narco Analysis test involves the fundamental question pertaining to judicial matters and also Human Rights. The legal position of applying this technique as an investigative aid raises genuine issues like encroachment of an individual’s rights, liberties and freedom. Subjecting the accused to undergo the test, as has been done by the investigative agencies in India, is considered by many as a blatant violation
of Article 20(3) of Constitution. It also goes against the maxim *Nemo Tenetur se Ipsum Accusare* (No man, not even the accused himself can be compelled to answer any question, which may tend to prove him guilty of a crime, he has been accused of.) that is, if the confession from the accused is derived from any physical or moral compulsion (be it under hypnotic state of mind) it should stand to be rejected by the court. The main issue thus is the question of its admissibility as a scientific technique in investigations and its ultimately admissibility in courts as forensic evidence. It is well established that the Right to Silence has been granted to the accused by virtue of the pronouncement in the case of *Nandini Sathpathy v. P.L. Dani*, no one can forcibly extract statements from the accused, who has the right to keep silent during the course of interrogation (investigation). By the administration of these tests, forcible intrusion into one’s mind is being restored to, thereby nullifying the validity and legitimacy of the Right to Silence. The right against forced self-incrimination, widely known as the Right to Silence is enshrined in the Code of Criminal Procedure. Section 161(2) states that every person ‘is bound to answer truthfully all questions, put to him by a police officer, other than questions the answers to which, would have a tendency to expose that person to a criminal charge, penalty or forfeiture’.

The Narco Analysis technique involves a testimonial act. A subject is encouraged to speak in a drug-induced state. It is quite conceivable that the administration of Narco techniques could involve the infliction of ‘mental pain or suffering’ and the contents of their results could expose the subject to physical abuse. When a person undergoes a narco analysis test, he or she is in a half conscious state and subsequently does not remember the revelations made in a drug-induced state. The Narco techniques can be described as methods of interrogation which impair the test subject’s ‘capacity of decision or judgment’. Going by the language of these principles, it is clear that the compulsory administration of the Narco analysis techniques constitutes ‘cruel, inhuman or degrading treatment’ in the context of Article 21. It must be remembered that the law disapproves of involuntary testimony, irrespective of the nature and
degree of coercion, threats, fraud or inducement used to elicit the same. The popular perceptions of terms such as ‘torture’ and ‘cruel, inhuman or degrading treatment’ are associated with gory images of blood-letting and broken bones. However, a forcible intrusion into a person’s mental processes is also an affront to human dignity and liberty, often with grave and long-lasting consequences. In Smt. Selvi & Ors. v. State of Karnataka, the Supreme Court held that nobody can be compelled to undergo narco analysis, brain mapping, or lie detector tests and that any statements made during those procedures are not admissible as evidence and made it clear that forcible use of these tests is unconstitutional. The compulsory administration of the impugned techniques violates the ‘right against self-incrimination’. This is because the underlying rationale of the said right is to ensure the reliability as well as voluntariness of statements that are admitted as evidence. This Court has recognized that the protective scope of Article 20(3) extends to the investigative stage in criminal cases and when read with Section 161(2) of the Code, it protects the accused persons, suspects as well as witnesses who are examined during an investigation. The test results cannot be admitted in evidence if they have been obtained through use of compulsion. Article 20(3) protects an individual’s choice between speaking and remaining silent, irrespective of whether the subsequent testimony proves to be inculpatory or exculpatory. Article 20(3) aims to prevent the forcible ‘conveyance of personal knowledge that is relevant to the facts in issue’. The results obtained from each of the impugned tests bear a ‘testimonial’ character and they cannot be categorized as material evidence. The Court also held that 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 in the personal liberty.

The National Human Rights Commission had published ‘Guidelines for the Administration of Polygraph Test (Lie-Detector Test) on an Accused’ in 2000. These guidelines should be strictly adhered to and similar safeguards should be adopted for conducting the ‘Narco Analysis Technique’ and the
‘Brain Electrical Activation Profile’ test. The text of the guidelines has been reproduced below: 160

(1) 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.

(2) 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.

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

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

(5) 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.

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

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

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

It may be submitted that the criminal justice system is founded on a slew of jurisprudential principles that protect the rights of suspects and accused. These include the right against self-incrimination, the right to remain silent, and the right against providing information under physical or mental pressure. Despite this, invasive procedures such as Narco analysis, brain-mapping and polygraph tests have been routinely used by the police—and, shockingly, with
the approval of the courts. In holding that the forcible use of these tests is unconstitutional, the Supreme Court of India has drawn attention to the inherent violence in such investigative procedures, which constitute a gross abuse of human rights. This landmark judgment arrives at two broad legal conclusions. First, such coercive testing violates Article 20(3) of the Constitution, which stipulates “no person accused of an offence shall stand witness against himself.” Secondly, it is an infringement of the right to personal liberty as understood in the context of Article 21, in particular the right to privacy, the right to a free trial, and the right against cruel, inhuman or degrading treatment.

4.3.9 Right to be Released on Bail

The term ‘bail’ has nowhere been specifically defined in the statutes relating to criminal law. The Code of Criminal Procedure, the Oxford Dictionary and the Law Lexicon define the bail as a ‘security for appearance of prisoner on giving which the accused is released pending investigation, inquiry, trial or appeal. Webster’s Dictionary defines bail as: “The process by which a person is released from custody”. According to Section 50(2) of the Code of Criminal Procedure, 1973, in case an accused is arrested by a police officer without warrant, it is his right that he should be informed that he is entitled to be released on bail and that he may arrange for sureties on his behalf. Section 436 of the Code, enacts that a person arrested without a warrant on the allegation of having committed a bailable offence, as a matter of right, shall be released on a bail bond with or without surety either while in the custody of the officer immediately after his arrest or when such person appears or is brought before the Court at any stage of the Criminal proceedings. Section 437 of the Code, provides that to enlarge an arrestee who committed a non-bailable offence is a matter of judicial discretion; such person may or may not be released on bail. But if there are reasonable grounds to believe that such arrestee is guilty of an offence punishable with death or imprisonment for life,
the arrestee shall not be released on bail unless the arrestee is below 16 years of age or is a woman or is sick or infirm.

The Code of Criminal Procedure classifies offences into two categories for the purpose of bail viz. (A) bailable offences, and (B) non-bailable offences.161

(i) Bail in bailable cases: In bailable cases, the bail can be claimed as a matter of right. When a person is arrested by the police for a cognizable and bailable offence, police is bound to inform him that he is entitled to be released on bail and that he may arrange for sureties on this behalf.162 However, if such person is unable to furnish bail he is produced before the Magistrate within twenty four hours of his arrest as already discussed. However, occasions may arise when instead of appearing before the police, accused may appear before the Magistrate. In such eventuality when accused appears before the Magistrate, he surrenders himself to the custody of the Magistrate.163 In both the eventualities – either when the accused has been produced by the police or accused appears before the Magistrate at his own – Magistrate is bound to release such accused on bail since grant of bail in bailable cases is a matter of right.164 In bailable offences, even police officer arresting a person is under legal obligation to release him on bail. Authority to arrest is derived from the statute and no executive instructions or rules to the contrary can abridge or run counter to the statutory provisions.165 However, there may be some delay in releasing the appellant on bail on account of procedural formalities in giving effect to bail order, by jail authorities, if satisfactorily explained, may be condoned.166

(ii) Bail in non-bailable cases: Bail in non-bailable is a matter of discretion. However, such discretion is required to be exercised by the court on sound principles judicially recognized and not on whims or caprice. Principles governing the exercise of discretion in non-bailable cases are discussed below:

(iii) Principles governing discretion in grant of bail in non-bailable cases:

Justice Krishna Iyer, in G. Narasimhule v. Public Prosecutor, A.P.167 quoted as follows:
‘An appeal to a judge’s discretion is an appeal to his judicial conscience. The discretion must be exercised, not in opposition to, but in accordance with, the established principles of law’.

What is the judicial discretion in the context of bail? Justice Krishna Iyer quoted Benjamin Cardozo:\[168\]

‘The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from concreted principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition methodized by analogy, disciplined by system, and subordinated to ‘the primordial necessity of order in the social life’. Wide though in all conscience it is the field of discretion that remains’.

The principles formulated by the courts are based on two considerations firstly, the release of accused on bail may occasion fleeing of accused from justice and secondly, his release on bail may expose the society to the danger of repetition of same crime. On the other hand, there is a competing claim of liberty of a person which is always considered to be necessary for the existence of the society. Therefore, to harmonise these two competing claims the courts have formulated certain principles which have bearing on the exercise of their discretion. The relevant consideration a judge is required to take into consideration, while exercising his discretion in granting or refusing bail are:

1. Possibilities of accused fleeing from justice.
2. Likelihood of accused repeating the same offence.
3. Likelihood of accused interfering in investigation by tempering with the prosecution witnesses.
4. Likelihood of retribution against the accused.

These are some of the factors which are not, in any way, exhaustive catalogue but only relevant for the exercise of sound discretion. The
considerations which the Court has to take into account in deciding whether bail should be granted in non-bailable offence is the nature and gravity of offence. Apart from these, peculiar facts and circumstances of the case, may be found to be relevant in the exercise of discretion in each individual case.

‘Releasing a person on bail should be the normal practice and refusal to do so should be an exception’—is the general attitude of the Indian Judiciary. Besides prohibition of the deprivation of a person of his liberty unless his guilt is proved, the liberal but judicious use of the bail technique in releasing a person on bail has the side advantage of avoiding overcrowding in the jails, to some extent. Advocating for suitable reforms in the law relating to bail, the learned Justice Bhagwati in the case of Hussainara Khatoon (I) v. Home Secretary, State of Bihar,¹⁷⁰ had suggested and opined that: “It is high time that our Parliament realizes that risk of monetary loss is not the only deterrent against fleeing from justice, but there are also other factors which act as equal deterrents against fleeing. Ours is a socialist republic with social justice as the signature tune of our Constitution and Parliament would do well to consider whether it would not be in consonant with the ethos of our Constitution that instead of risk of financial loss, other relevant considerations such as family ties, roots in the community, job security, membership of stable organizations etc. should be the determinative factors in the grant of bail and the accused should in appropriate cases be released on his personal bond without monetary obligation, subject to penalty in case of breach.”

Summarising the existing law relating to bail, the learned Justices (Mr. Justice Bhagwati and Mr. Justice Koshal) formulated certain guidelines to be followed by the Courts while exercising the discretionary power of granting bail with sureties or on the personal bond of the accused. The Supreme Court had opined that till the amendment of the penal law is made by the Parliament, ‘even under the law as it stands today, the courts must abandon the antiquated concept under which pre-trial release is ordered only against bail with sureties. That concept is outdated and experience has shown that it has done more harm
than good. The new insight into the subject of pre-trial release which has been
developed in socially advanced countries and particularly the United States
should now inform the decisions of our Courts in regard to pre-trial release.’

(iv) Bail by Magistrates

Sec. 437 of the Code empowers the Magistrate to grant bail in non-
bailable offences. For the purpose of bail, offences have been classified into
two categories: (i) Offences punishable with death, imprisonment for life or
imprisonment for a term of ten years and (ii) other offences. In the offices of
first category the discretion of the Magistrate in granting bail is excluded unless
the accused is youth, sick, infirm person, or a woman. In Akhtari B. v. State
of M.P.’s case the Court viewed, that the accused is an infirm and old lady
convicted for causing death of her daughter in law, it would be appropriate to
direct her release on bail by keeping the sentence in suspension. In granting the
bail, in non-bailable offences, of course, the paramount consideration would
always be to ensure that the enlargement of persons on bail will not jeopardize
the prosecution case.

(v) Bail by High court or Court of Sessions

Sec. 437 of the Code is concerned only with the court of Magistrate. It
expressly excludes the High Court and the Court of Sessions. Unlike S. 437(1)
of the Code there is no ban imposed under Sec. 439(1) of the Code against the
grant of bail by the High Court or the Court of Sessions to grant bail to the
persons accused of an offence punishable with death, or imprisonment for life.
It is only when accused has failed to get bail before the Magistrate and after the
investigation has progressed throwing light on the evidence and circumstances
implicating the accused, that the High Court or the Court of Sessions will be
approached by the accused. This section confers special powers on the High
Court or the Court of Sessions in respect of bail. However, the High Court or
the Court of Sessions will have to exercise its judicial discretion in considering
the question of grant of bail under Sec. 439(1) of the Code and the
consideration for grant of bail in both the cases i.e. under Sec. 437(1) and
439(1) of the Code are the same as have been discussed earlier. Power under S. 439(1) of the Code can be exercised where the Magistrate has refused to grant bail in non-bailable offences.

So far as cancellation of bail in non-bailable offences is concerned, provisions have been made in the Code for such cancellation. However, no specific provision has been made for cancellation of bail in bailable cases. Bail in bailable cases can be cancelled only by the High Court in the exercise of its inherent powers. Considerations for cancellation of bail in bailable cases are the same as in case of non-bailable cases.

It is hoped that if the courts in the country keep in mind the guiding principles enunciated by the Supreme Court, while considering the applications of the accused for release on bail, the majority of the accused persons would be relieved from the hardship faced by them due to their poverty, ignorance and delayed disposal of criminal cases filed against them.

4.3.10 Custodial and Prison Rights of the Accused

Article 4 of the Universal Declaration of Human Rights, 1948 proclaims: 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'. Again Article 10 of the International Covenant on Civil and Political Rights proclaims that 'all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person'. Securing human dignity in the criminal law administration is a matter of global concern. Invocation of criminal law is attended with arrest, imprisonment and deprivation of liberty. Mere arrest and captivity does not reduce a person to sub-human or non-human. Imprisonment does not ipso facto mean that fundamental rights desert the detainee nor the human dignity which is dearer value of our Constitution can be bartered away. Maneka Gandhi's case has gone a long way in humanizing the criminal administration system by its innovative doctrine of procedural due process.
Custodial violence, either by police or jail staff, is not uncommon in India. A person under arrest and detention is in *custodia legis* and the detainer, his custodian. Physical assault or torture is not permissible under the law and its use is violative of Article 21 of the Constitution. Torture during the course of investigation of crimes is not justified.\(^{179}\) Custodial deaths\(^{180}\) and violence\(^{181}\) by police received strongest condemnation from the Supreme Court in a number of cases resulting in detailed instructions to the State Government to curb such violations of human rights. The Supreme Court expressed great concern for defect in the present criminal law due to which police atrocities and custodial crimes go unpunished and suggested amendment to Evidence Act as recommended by Law Commission.\(^{182}\) Use of violence is the greatest indignity to the prisoner and it is the duty of the Court to restore dignity whenever there is a complaint made to it.

Merely by imprisonment a person does not lose his fundamental rights. Imprisonment necessarily implies curtailment of freedom but within the circumstances of custodial detention, he has a right to enjoyment of life and liberty. In *Kharag Singh’s case*\(^ {183}\) the Supreme Court observed that by the term ‘life’ is meant something more than mere animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed. Prisoners are entitled to the amenities of ordinary inmates in the prison like games, books, newspapers, reasonably good food, and right to expression, artistic or other and normal clothing and bed. To eat together, to sleep together or work together, to live together generally speaking cannot be denied to them except on specific grounds warranting such a course.\(^ {184}\) Undertrial prisoners must be kept separate from the convicts. Similarly young inmates should be kept separate from the adults in order to save them from sex excesses and exploitative labour.\(^ {185}\)

Every prisoner is entitled to basic amenities and facilities necessary for human existence. Violation of provisions of Jail Code dealing with diet, medical treatment, supply of clothing and blankets to the prisoners was held
violative of legal right of prisoners warranting interference by the Court under Article 226 of the Constitution.\textsuperscript{186}

\subsection*{4.3.11 Right Against Hand-Cuffing}

In \textit{Prem Shankar v. Delhi Administration}\textsuperscript{187} the validity of certain clauses of Punjab police rules were challenged as violation of Articles 14, 19 and 21 of the Constitution. Krishna Iyer, J. delivering the majority judgment held that provisions in paras 22, 26 that every under-trial who was accused of a non-bailable offence punishable with more than three years jail term would be hand cuffed, were violative of Articles 14, 19 and 21 of the Constitution. Hand cuffing should be resorted only when there is \textit{clear and present danger of escape} breaking out the police control and for this, there must be a clear material, not merely an assumption. His lordship said:

\begin{quote}
\textquote{Hand-cuffing is prima facie in-human and, therefore, unreasonable, is overharsh and at the first flush arbitrary. Absent fair procedure and objective monitoring, to inflict ‘irons’ is to resort to zoological strategies repugnant to Article 21...”}.
\end{quote}

In \textit{Sunil Gupta v. State of M.P.}\textsuperscript{188}, the petitioners were educated persons and social workers, who were remanded to judicial custody, were taken to the court form jail and back to the jail from the court by the escort party hand cuffed. They had staged a ‘\textit{Dharna}’ for a public cause and voluntarily submitted themselves for arrest. They had no tendency to escape from the jail. In fact, they even refused to come out on bail but chose to continue in prison of the public cause. It was held that this act of the escort party was violative of Article 21 of the Constitution. There was no reason recorded by the escort party in writing for this inhuman act. The court directed the govt. to take appropriate action against the erring escort party for having unjustly and unreasonably hand-cuffing the petitioner.

The Supreme Court in \textit{State of Maharashtra v. Ravi Kant S. Patel,}\textsuperscript{189} upheld the judgment of Bombay High Court which held that Hand-cuffing and parading of the petitioner was unwarranted and violative of Article 21.
The above mentioned statutory, constitutional and human rights are very much important of a person’s life and liberty. They should be followed in letter and spirit by law enforcing agencies during their course of investigation.

4.3.12 Right against Ex-Post Facto Laws

It is a basic rule of natural law that no one may be punished for an act or omission which was not a crime at the time of its commission. No act can be termed as criminal retrospectively. An *ex-post facto* law is a law which imposes penalties retrospectively, i.e., on acts already done and increases the penalty for such acts. Clause (1) of Article 20 of the Indian Constitution provides 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 commission of the offence”. Thus Article 20(1) imposes a limitation on the law making power of the Legislature and prohibits the legislature to make retrospective criminal laws. However, it does not prohibit imposition of civil liability retrospectively, i.e., with effect from a past date.\(^\text{190}\) This rule was contained under Article 15 of the Covenant. The International and National provisions are identical and there does not seem to be any dispute as to these rules.

The law applies both to *ex-post* crime and *ex-post* penalty. The first part of clause (1) provides that “no person shall be convicted of any offence except for violation of ‘law in force’ at the time of the commission of the fact charged as an offence”. This means that 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.

In the case of *State of Maharashtra v. Kaliar Koil Subrahmaniam Ramaswamy*,\(^\text{191}\) the accused, an inspector at the Regional Transport Office, was convicted by the trial court under the amended Section 5 (1) (e) of the Prevention of Corruption Act, 1947. The amended Section 5 (1) (e) created a new offence-it criminalises the possession of assets disproportionately larger
than known sources of income. Prior to this amendment, no such offence existed under the Prevention of Corruption Act, 1947. The provision came into effect while the investigation was under way. On appeal, the High Court quashed the conviction on grounds of absence of witnesses supporting the prosecution case. Further, the High Court also held that the application of Section 5(1) (e) contravened Article 20(1) of the Constitution in this particular case because the offence did not exist on the date when the search was carried out at the residence of the accused. The Supreme Court upheld the decision of the High Court. Similarly, the case of Soni Devrajbhai Babubhai v. State of Gujarat, 192 involved a challenge to a dowry death conviction under Section 304-B of Indian Penal Code (IPC) where the alleged dowry death occurred before Section 304(B) was added to the IPC. Section 304-B provides that when a married woman dies an unnatural death within seven years of her marriage and it is shown that she was subjected to cruelty or harassment by her husband or his family in connection to a demand for dowry, such death is known as ‘dowry death’, and it shall be presumed that such death has been caused by her husband or his family. The Supreme Court held the respondents were protected under Article 20(1) of the Constitution and could ‘not be tried and punished for the offence provided in Section 304-B of the IPC, a new offence created subsequent to the commission of the offence.’

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 193 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. However the accused can take advantage of the beneficial provisions of the ex post facto law.
4.3.13 Right against Double Jeopardy

Article 20(2) of the Constitution of India recognises another important Human Right as a fundamental right of every citizen when it provides that: “No person shall be prosecuted and punished for the same offence more than once.” This is an important principle of administration of criminal justice. The doctrine of double jeopardy means that no person can be punished more than once for the same offence. The rule is contained in common law maxim “autrefois acquit and autrefois convict” which means that previous acquittal or previous conviction may be pleaded by the accused as a bar to subsequent trial. The doctrine is founded on English Common Law rule nemo debet proeadem causa bis vexari which means that man may not be put twice in jeopardy for the same offence. The protection against being twice put in peril for the same offence in our country is twofold. One is provided by Article 20(2) of the Indian Constitution and the other is contained in Section 300(1) of the Code of Criminal Procedure, 1973.

In America, the protection has been guaranteed by Fifth Amendment to the Constitution which provides that, “no person shall be put twice in jeopardy of life or limb”. The protection under Article 20(2) of the Indian Constitution is narrower than the protection available in England and America. In our country, the second trial is a bar when a person has not only been prosecuted but punished also for the same offence for which he is prosecuted again. Therefore, there is no bar to a second prosecution in a case where there has been no punishment in the first trial. In the case of Maqbool Hussain v. State of Bombay, the Supreme Court explained the limited scope of Article 20(2) as follows:

Article 20(2) incorporated within its scope the plea of ‘autrefois convict’ as known to the British Jurisprudence or the plea of double jeopardy as known to the American Constitution but circumscribed it by providing that there should be not only a prosecution but also a punishment in the first
instance in order to operate as a bar to a second prosecution and punishment for the same offence.

In India, this rule has been given statutory recognition by Section 26 of the General Clauses Act, 1897 and Section 300(1) of the Code of Criminal procedure, 1973. Section 26 of the General Clauses Act, 1897 provides as follows:

“Where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of these enactments, but shall not be liable to be punished twice for the same offence.”

Section 300(1) of the Code Provides:

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

It may be concluded that the Constitutional guarantee embodies only the principle _autrefois convict_ and not _autrefois acquit_, previous prosecution as well as conviction both is necessary for claiming the Constitutional plea against second trial for the same offence. But as far as the rule contained in Section 300(1) of the Code of Criminal Procedure, 1973 is concerned it embodies both _autrefois convict_ as well as _autrefois acquit_. Therefore, where there has no previous punishment or conviction, but acquittal at the end of a trial for the same offence, the person has to invoke the provisions of Section 300(1) of the Code.

4.3.14 Right to Get Copies of all relevant Documents

Sections 162, 173(4) and 207, 208 provide for the right of the accused person to obtain copies of all relevant documents so that he can come to know
the details and particulars of the case against him. But failure to furnish statements of witnesses recorded in the course of investigation may not vitiate the trial completely. Section 162, of the Cr.P.C. provides a valuable safeguard to the accused and denial thereby may be justified only in exceptional circumstances. The provision relating to the recording of the statements of the witnesses and supply of the copies to the accused so that they may be utilized at the trial for effectively defending himself, cannot normally be permitted to be whittled down and where the circumstances are such that the court may reasonably infer that prejudice has resulted to the accused from the failure to supply the statements recorded, the court can set aside the conviction. In other cases, the court may direct that the defect be rectified in such manner as the circumstances may warrant. It is only where the court is satisfied, having regard to the manner in which the case has been conducted and the attitude adopted by the accused in relation to the defect that no prejudice has resulted to the accused that the court would, notwithstanding the breach of the statutory provision, be justified in maintaining the conviction. Right of the accused to receive documents and statements submitted before the Court is an absolute right. Liberty of the accused cannot be interfered with except by “due process of law” which includes ‘fairness’ in trial. Documents submitted before the court should be disclosed giving accused fair chance of defence, particularly when non production or non-disclosure of such document would affect administration of criminal justice and defence of accused prejudicially. Accused has a statutory right to confront witnesses with statements recorded under Sec.161, he can also move an application for production of any record or witness in support of his case.

Thus, it is clear that the statutory right of the accused to be furnished with copies of all the documents on which the case of the prosecution rest and the proof of his guilt depends, is a valuable right. The denial of the same or omission to supply copies of any of these documents will certainly prejudice his case in as much as he will not be able to effectively meet all the circumstances that are sought to be brought against him. Such a procedural
lapse may prove critical to the cause of the accused. Any defect in compliance with the same is likely not only to mislead him about his case but may lead to failure in delivery justice. Such a provision having regard to the language in which it is couched and the incalculable value that is has for the accused cannot but be regarded as basic and mandatory. Even before the stage of trial, the accused has a right to have a copy of FIR from the police station.

4.3.15 Right as to Examination of Witnesses

In criminal trial, the accused is entitled to have the witnesses examined in his presence. Section 273 read with Section 245 of Cr.P.C. provides for this right. Section 273 of the Code says that all evidence in a trial should be taken in the presence of the accused, except as otherwise expressly provided for and if his personal attendance is dispensed with, in the presence of his pleader. If a departure is made and the witness cannot be brought before him for one reason or the other, whether due to the action of the accused or want of diligence on the part of the prosecution and witnesses have to be examined on commission or in any other place, it is incumbent upon the prosecution and the court that sufficient opportunity is afforded to the accused so that all evidence is led either in his presence or in his lawyer’s presence. This is essential to ensure a fair and impartial trial. The Supreme Court has rightly taken this view in Bhanji Methani\textsuperscript{198} case that the provision of Section 273 of the Code is mandatory and its violation or non compliance is such an illegality which vitiates the entire trial. Although the Court has ruled in Ram Shanker Rai v. State of Bihar,\textsuperscript{199} that evidence recorded in the presence of the accused are admissible against him, it is still an obligation on the prosecution and a matter of the right of the accused that all evidence is led in his presence in the normal conduct of the trial.
NOTES & REFERENCES:

1. AIR 1997 SC 610.
4. Supra note 1.
6. AIR 1953 SC 325
7. AIR 1954 SC 300.
8. AIR 1958 All. 293.
9. AIR 1960 Bomb. 443.
10. Supra note 5.
12. AIR 1994 SC 1775.
15. Section 156(1) of the Code.
17. Ibid
19. Section 157(2) of the Code.
20. Supra note 16.
22. Supra note 8
24. AIR 1978 SC 1025

28. Section 41(1) (a) of Cr.P.C.

29. Section 41(1) (g) of the Code.

30. Section 41(1) (i) of the Code.

31. 1978 Cri.L.J. 1062 (Pat.) See also observations in *Shyam Dattaray beturkar v. Special Executive Magistrate*, Kalyan, 1999 Cri.L.J. 2676 (Bom.H C)

32. 1989 Cri.L.J. 383 (H. P.)


34. AIR 1983 SC 1086.

35. Section 97 of the Code.

36. *Supra* note 33


40. Supra note 37.p. 309

41. *Ibid*


43. Sec. 50(1) of the Code.

44. Sec. 50-A added by the Code of Criminal Procedure (Amendment) Act, 2005.

45. *Ajit Kumar v. State of Assam*, 1976 Cr.LJ 1303 (Gou HC)

46. 1987 Cri L J 1750.

47. 1975 Cri L J 1249.


50. *Supra* note 45.
55. S. 24 Indian Evidence Act, 1872
56. S. 304 of the Code.
59. Supra note 54.
60. Ram Lalwani  v. State, 1981 Cri. L.J. 97 (Del.).
61. Anil G. Merchant v. Director of Revenue Intelligence, Madras, 1986 Cri. L.J. 1273 (Mad.).
65. AIR 1981 SC 928.
68. Supra note 58.
69. Supra note 63.
70. AIR 1986 SC 991.
71. Supra note 65.
72. Supra note 63
73. AIR 1954 All. 601 at p. 605.
74. Sections 56, 76 of the Code.


80. *Supra* note 78 second case.

81. *Supra* note 78.

82. S. 167 of the Code.

83. Explanation, Sub-section (2) of S. 167.


89. *Bhim Singh v. State of J & K*, AIR 1986 SC 494. In this case accused was not produced before the Magistrate within 24 hours of his arrest. Supreme Court awarded Rs. 50,000 as compensation to be paid by the State for wrongful detention.


91. (1994 (Cri LJ 780 (Bom.)


98. *Supra* note 92.

99. Priviso, Sub-section (2), Sec. 167 of the Code.

100. *Uday Mohan Lal v. State of Maharashtra* 2001 Cri LJ 1832 (S.C.)


104. *Ibid*

105. 1995 Supp (3) SCC 221.


110. *Mukesh Kumar v. State (Delhi Administration)* 1990 Cri. L.J. 1923 (Del.)


112. Sub-section (2) of S. 53 of the Code.

113. AIR 1978 SC 597
114. Ibid
117. (1969) 21 Law Ed 2nd 607; 393 US 374. In Bamer v. Wingo (1972) 33 Law Ed 2d 101; 407 US 514 it was held: ‘the right to speedy trial is generally different from any of the other rights enshrined in the Constitution for the protection of the accused. In addition to the general concern that all accused persons be treated according to decent and fair procedure there is a societal interest in providing a speedy trial which exist separate from and at times in opposition to, the interest of the accused.”
118. Supra note 62.
119. AIR 1950 SC 27.
120. Supra note 62.
121. Supra note 63.
122. Supra note 62.
125. 2000 Cri L.J. 3599 (Raj.)
126. Sec. 167 (5) (6) of the Code.
127. 1987 Cri. L.J. 1517 (Cal. H.C.)
128. Supra note 63.
130. 1981 Cri LJ NOC 208 Mad.
133. (2006) 7 SCC 172
134. (2009) 1 SCC 441.
136. AIR 1942 All 424.
139. Ibid.
143. AIR 1958 All 293.
144. Supra note 58.
145. Supra note 134.
147. Supra note 134.
148. Sec. 163(1) of the Code.
149. Sec. 163(2) of the Code.
150. Sec. 24 of Indian Evidence Act, 1872.
151. Sec. 25 of Indian Evidence Act, 1872.
152. Sec. 26 of Indian Evidence Act, 1872.
154. Sec. 164(1).
155. Sec. 27 Indian Evidence Act.
157. Ibid.
158. AIR 1978 SC 1025
159. AIR 2010 SC 1974
160. Ibid.
162. Sec. 50(2) of the Code.
165. *Ibid*
168. *Ibid*
170. *(1980)1 SCC 81*
172. 2001 Cri 1727 (S.C.)
174. S. 437(5) and S. 439(2) of the Code.
176. *Infra* note 183.
181. *Sheela Barse v. state of Maharashtra* AIR 1983 SC 378. This case related to custodial violence to women. In *Sunil Batra v. Delhi Administration* AIR 1980 SC 1579 a prisoner was allegedly assaulted by a warden by inserting a
stick in his anus. In Khatri v. State AIR 1981 SC 928 prisoners were blinded while in custody by putting some corrosive substance in their eyes.


185. Ibid


188. (1990) 3 SCC 119.


191. AIR 1977 SC 2091

192. AIR 1991 SC 2173

193. AIR 1953 SC 404


195. AIR 1953 SC 325


198. AIR 1971 SC 1630.

199. 1975 Cr L J 1402.